

# Preparing the plaintiff for trial

This is the first of a regular feature on trial preparation and advocacy by Gerard Mullins, an experienced Brisbane barrister and one of the presenters of APLA's popular Trial School workshop.



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**E**very genuine plaintiff injured by the fault of another should be compensated. But it doesn't always work out that way. A plaintiff with a complicated history and a bad memory has defence lawyers firing up the barbeque to slowly roast them in cross-examination.

Meanwhile, the plaintiff's lawyers spend their time stamping out bushfires created by inconsistent statements.

In the end, many cases are won and lost on how the plaintiff shapes up in the witness box. If the plaintiff has credibility, a judge or jury can forgive occasional inconsistencies in the evidence.



But if the explanations for the inconsistencies are less than convincing, the entire case on liability and quantum can be undermined.

Each lawyer has their own method of preparing a plaintiff for the witness box, settlement conference or mediation. But it's not something we're taught at law school. So, here are some thoughts of mine.

Most trials involve factual disputes. Only rarely are legal issues the focus of a trial. The factual dispute involves a difference in perception and belief (often genuine on both sides) of the truth of a series of events. The plaintiff alleges a certain factual scenario, while the defendant alleges another.

A jury or trial judge generally resolve the dispute after hearing oral testimony, seeing the witnesses and balancing the objective forensic evidence. Their determination is coloured by their own commonsense and experience, some of which is common to all of us and some particular to them.

## THE JUSTICE OF THE CASE

For the defendant to be successful at trial, they must prove that the 'justice of the case' demands they should win.

What is the 'justice of the case'? Put simply, it means the person who is right should win. This is not 'right' as defined by academic jurisprudence, but right as opposed to wrong on a common sense level.

**"There are few plaintiffs who cannot be rescued by good preparation."**

Psychologists and jury experts tell us that these decisions are largely subconscious. Whether they are conscious or subconscious, or whether the tribunal is a judge or a jury is not important. They want to discharge their duty to the community and do what is right. To ask them to find for a party who is not, to their mind, genuinely entitled to succeed on the justice of the case will always be a difficult exercise.

In the average case of personal injury or death, the defence needs to

persuade the trial judge that the plaintiff is not deserving of any compensation, or at least not to the level demanded by the plaintiff's lawyers.

## DEFENCE EVIDENCE - WHAT IS AVAILABLE?

Aside from demonstrating that a plaintiff's version of events is inherently incredible, the defendant has only three physical methods to prove the plaintiff is not telling the truth:

- Video or audio evidence of previous acts by the plaintiff.
- Previous written records of statements.
- Evidence of lay witnesses.

All of these methods require some contribution from the plaintiff. The plaintiff must have made a statement to form the basis of an inconsistent statement. They must have performed an activity to provide evidence for a video recording. The circumstances giving rise to the creation of the evidence must be within the plaintiff's knowledge. ▶

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“Lawyers should tell their plaintiff clients not to overstate the extent of their complaints.”

To successfully counter any attack on a plaintiff's credibility, the plaintiff must be well prepared. The plaintiff's lawyer must keep three broad issues in mind to ensure they effectively counter the defence's case.

## I. THE PLAINTIFF'S LAWYER MUST KNOW THE PLAINTIFF'S CASE

The plaintiff needs to be persuaded from the time instructions are first taken that they must disclose everything in their history that may be in any way relevant to the claim. This includes details of:

- medical history
- criminal history
- workers' compensation history
- other accidents
- psychological or psychiatric history.

Securing the plaintiff's trust is the fundamental starting point to complete and open disclosure. Some plaintiffs are frightened or embarrassed about dis-

closing details of their personal history. Others may think an issue is not relevant or that disclosure of a material fact may adversely affect their claim. The failure to disclose may be intentional or unintentional.

Plaintiffs must be persuaded that a genuine entitlement to damages may be completely undermined by concealing the true facts on an unimportant subsidiary issue.

Any details that can be confirmed by an independent source should be confirmed. All available documentary evidence should be obtained, including the plaintiff's full medical history. Evidence from people close to the plaintiff who are in a position to observe the plaintiff on a regular basis should be obtained so the plaintiff's complaints can be verified.

Pay careful attention to the plaintiff's symptoms. In many cases, you may be the only person in a position to bring some objective assessment to their com-



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plaints. Part of our work is to ensure that all medical problems and symptoms are brought to light. This requires regular and careful examination of the plaintiff.

Conversely, it is important to reality test the plaintiff. A complaint of being unable to sit for fifteen minutes may be inconsistent with going to a football game each weekend. A fear of driving may be inconsistent with regular trips to the beach to surf. Overstatement of symptoms may set the scene for investigations to prove the recorded symptoms are simply an exaggeration. At worst, they may be proved to be a deliberate exaggeration.



Although it is obviously important to elicit all relevant symptoms, lawyers should also emphasise that plaintiffs must not overstate the extent of their complaints. This caution should extend to interviews with defence medical personnel.

## 2. THE PLAINTIFF MUST KNOW THE PLAINTIFF'S CASE

The plaintiff must be briefed on any inconsistencies in their evidence. Carefully test their responses. Cross-examine them in the same way defence counsel will challenge them. Ensure they understand the issues and their responses.

Often, the plaintiff's first response to an allegation of inconsistency in their account is to blurt out a denial or the most obvious exculpatory explanation. That's natural and understandable. But the plaintiff's lawyer must delve beyond this to find the truth.

Having established the truth, the plaintiff must understand the issue. They must also understand what their response will be when questioned or challenged about the issue. It is one matter to take instructions, but another to ensure the plaintiff understands.

## 3. THE PLAINTIFF MUST BE ADEQUATELY PREPARED FOR CROSS-EXAMINATION

Surviving cross-examination will be the plaintiff's ultimate test. If, at the conclusion of cross-examination, a jury is satisfied that the plaintiff is telling the truth, the case will be largely determined.

You must prepare the plaintiff for cross-examination. Don't terrify or confuse them. Explain what they should expect. But keep the explanation as simple as possible.

Explain the physical aspects of the courtroom, the people they can expect to see there and the roles of the various parties. Tell them how long their evidence is likely to take and what breaks they will be

given.

Help the plaintiff with the basics of cross-examination. Here are some simple examples:

- If you can't remember, don't guess. Say you don't remember.
- Don't argue or ask questions back – stay calm.
- Answer the question.

For a plaintiff, giving evidence is a traumatic experience. Prepare them for each step. Above all, keep the instructions simple.

## ONE MORE THING

If you can, get the bad stuff out before cross-examination. If you're certain it is going to be raised, frame the issues in a series of questions that your client can answer and that will explain the problem. Don't leave it for the defence to spring on your client. They will be much less gentle.

There are few plaintiffs who cannot be rescued by good preparation. Thorough investigation and candid evidence will often neutralise defence attempts to undermine the plaintiff. In particular, recognising the weakness in a plaintiff's case will negate a case based on a plaintiff's lack of credibility. **PL**

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