

The Importance of Legal Research – and the Lack Thereof

by Barry Weintraub, Partner, Rueters LLP, Toronto, September 27, 2016

I started researching legal cases as a summer student in 1986. Dinosaurs were already extinct for many years, but computers were not widespread and there was no internet, no google, no instant updating of cases, and not even any YouTube video advertising by other lawyers that you could watch to learn discrete areas of law. For precedential legal research, there was an encyclopedia of law called the Canadian Abridgement which we used extensively, supplemented by textbooks on law and law reports, some of them organized by subject matter. Of necessity, we focused on the facts of a case.

Thirty years later, I maintain that a focus on the facts of a case remains the best approach to take.

Nevertheless, the fact that you are reading this paper drives home the point, which many people believe and others take for granted, that legal research is important in handling a legal case. Having good legal research conducted matters if one wants to present a legal case well, both for resolution of the case without a trial and in preparing for a trial.

Legal research properly understood is about analyzing the facts of a case in light of the outcomes and reasoning applied in other similar cases in the past. The facts of the case before the court must be and must remain the central focus of legal research and not the other way around.

Critical Research at the Beginning of a Case

By far the most important juncture for legal research is at the beginning of a case. In order for clients to understand their chances of succeeding and the issues that will determine whether they will win or lose, and for their legal advisors to assist them in this endeavor, it is important to thoroughly explore both the facts of a case and the legal doctrines and precedents that may apply. This will inform the strategy of presentation of the case, as well as a client's strategy for resolution.

Good legal research of necessity involves more than just what is commonly thought of as legal research and finding cases and authorities to support a proposition of law. Rather, it is more important to focus on the application to a case of whatever legal authorities might be relevant. In practice, by far the most important part of any research a legal professional (or anyone else handling a case) does is a detailed examination of the available facts of a case which might be proved if it is thought important to do so. This means learning all aspects of what happened in a case. It also involves being able to synthesize the facts and legal precedents which may apply to come up with a coherent and compelling theory of why one side of a case should win and why the other(s) should not. It means deciding what facts are important and focusing attention on them, and identifying which facts are against you and making them seem less bad and less important.

It is useful to remember that legal cases are decided by judges or tribunal members, most if not all of whom are human beings, trying to do the right thing and trying to reach the right result. As such, they bring to bear on a case such normal human attributes as they may possess. In a common law system, while the existence of precedents is useful in assisting a court by demonstrating how similar cases have been handled in the past, the reality is that every single case is unique in many ways. One should not slavishly follow precedents, dooming society to repeat all the mistakes of the past, but rather we should strive to do justice in every particular case. A lawyer in presenting cases – and a judge or tribunal

member in deciding them -- has to have the courage of his or her own convictions as to what is right and what is wrong, and be willing to depart from precedents where necessary to do justice.

In doing research in preparation for a case, focus on the facts that make a client's cause more worthy of human judicial approval, and try to emphasize their importance and improve their appearance. Note also the facts of a case that make a client's cause less appealing, and strive to minimize their importance and make them appear less damning. Similarly, focus on the facts of the opponent's case, and do the same exercise in reverse.

In reading cases you come across, pay attention to the facts of the precedent cases, to see whether the context is the same. Often, precedents are only explainable in light of the facts of the case in which they arose.

A healthy dose of common sense and reasonableness are far more persuasive and compelling than arcane recitation of legal learning, no matter how esoterically impressive the latter may be. The reality is that the presentation of the facts of a case determine probably 90 per cent of the outcome. The case law that applies is useful in giving an adjudicator confidence that his or her judgment of a situation is consistent with the way reasonable adjudicators in other similar cases have adjudged a case, and they provide a language for expressing a determination of a case in a way that will speak to future generations, but never forget that what is being decided in most cases is not the law as it will be for all time going forward, but rather the winner and loser in the case at bar.

So, five simple rules:

1. Take the facts as you find them, and make them better.
2. If your case is a bad one, settle it on the best basis you can.
3. If the facts are in your favour, focus on the facts.
4. If the facts are not in your favour, focus on the law.
5. If neither the facts nor the law are in your favour, distract the adjudicator from the facts and the law, through such techniques as making noise about the conduct of your opponent.¹

The art with which a case is presented will have an impact on the outcome. Good people win, so strive to make your client appear to be a reasonable person, no matter how difficult that may be.

Research for Pleadings

Following are some considerations that apply in the preparation of a claim that necessitate legal research, but the examples below are by no means comprehensive of all the possible issues to be researched.

Rules of pleading require the allegation of all material facts relevant to a dispute. This means for a plaintiff that if some material facts necessary for the cause of action to be established are missing, the claim cannot succeed. As a result, the plaintiff needs to know the necessary elements of the cause of action being asserted, and must be sure to plead facts which if found to be true will establish all of the

¹ I hasten to add that the enunciation of this rule is not intended to be prescriptive. Unfortunately, there appears to be considerable empirical evidence that this is in fact a rule adopted by many counsel, some of them able and some of them successful. My general practice is to only raise the conduct of others where it is serious and important to a case.

necessary elements of the case. That requires legal research in most cases to identify the elements of a cause of action and the sorts of facts and fact patterns that have been found persuasive to other judges in other cases.

In addition, in determining the cause of action to be alleged, it may be the case that multiple causes of action could apply. For example, in a case of negligent performance of a contract that caused injury, there could be a contractual claim as well as a negligence claim, and there may very well be statutory claims as well. With each cause of action, different considerations arise and different issues are relevant. So, legal research must be conducted to ensure no applicable causes of action are missed.

Remedies may also be different depending upon the cause of action asserted, and these should be researched.

Consideration also needs to be given to who the appropriate parties are, which requires attention being paid to the possibility that there may be more than one plaintiff (such as family members in a personal injury claims, who have many claims available to them under the Family Law Act) and to the issue of who the appropriate defendants are, and whether they have standing and capacity to be sued.

A preparer of claims also needs to anticipate the defences that may be asserted, and present the case in such a way as to weave into the story of the case the answers to those defences. This includes consideration of limitation period defences that may apply – preferably before an action is commenced.

Finally, it is important for those drafting claims to consider which court(s) or tribunal(s) has (have) jurisdiction to hear the case, and if there are more than one, which venue would be the most appropriate and in the interests of the plaintiff.

The art of putting together an effective claim involves weighing the above noted various considerations against the facts of the case, using professional judgment as to the best manner of presentation of the case so as to maximize the party's chances of a positive outcome.

Research During the Course of a Proceeding

During the course of litigation, new facts are often discovered or manufactured, so it is important for legal professionals to turn their minds to the impact these new facts have on the case. It is also important to stay abreast of new developments in the law, so as to be cognizant of legal trends and to keep in mind the facts that are often found persuasive in similar cases.

Research in Preparation for a Hearing or Trial

The work done in preparation for a hearing invariably leads to a careful reconsideration of the facts and law applicable to the case. One's understanding of a case, and what is important, will change from the beginning of a proceeding. Interview witnesses, review documents, check public sources of information and up-date the case law.

In addition, it is important to anticipate and prepare for any evidentiary issues that may arise in the course of a trial, so as to be prepared to argue any objections as they arise, and to better present evidence so as to be consistent with the case law.

Use of the Law at Trial

It is often good practice to present the trial judge or tribunal member at the outset of a trial with a short brief of legal principles that you anticipate will apply, with authorities. It demonstrates to the court or tribunal that you are prepared, knowledgeable and that you think the law is in your favour. Besides, judges often find it useful to be reminded of the key issues to look for in a case. While Judges and adjudicators are often very knowledgeable about the law that applies, it never hurts to give them a handy reminder that they can use in coming to a determination of the outcome of a case. However, make sure your brief is not so simplistic as to be insulting to the adjudicator. Also, don't try to cover too many issues, and be careful to avoid going out on a limb in anticipating how the evidence will actually come out at trial.

Arguing the Law

Many counsel adopt the practice of separating their submissions on facts from their submissions of law. Consider instead weaving principles and authorities of law in with factual submissions in argument. It is less boring than going through case after case consecutively. It also serves to emphasize the application of the law to the facts of the case. Again, if the facts are the strength of your case, you want to do everything you can to focus on the facts and how they are consistent with previous precedent decisions in your favour.

Address case law that you anticipate the other parties will seek to rely on. If you can use the cases in your favour, that is best. If not, address adverse authorities head on by seeking to establish why they shouldn't be applied. Distinguishing the facts of the case at bar from the facts of the case represented in the legal authorities is an important practice. The ostrich approach of ignoring cases that you don't like is rarely successful.

Keep in mind as well that neither judges nor opposing parties are stupid. If there are authorities that are not consistent with the result you wish to obtain, they will eventually be found and argued, and if you choose not to address them you miss the opportunity to interpret (or spin) a case in as favourable a light as possible. Note also that if you don't address case law that doesn't help your cause, even if opposing counsel at first instance don't draw it to the court's attention, eventually someone will bring it forward on appeal. In my experience it is better to tackle unhelpful authorities head on.

In presenting cases to the Court, remember that quality is more important than quantity. "Quality" in this context includes numerous considerations of persuasiveness, including the level of the Court deciding a case (the higher the court is in the judicial hierarchy, the more persuasive it is), which judge decided the case (highly regarded judges' decisions being more persuasive than less highly regarded judges' decisions), how old the case is (newer decisions being more persuasive since they have the benefit of experience resulting from prior decisions) and the quality of the reasons in a report. Be sure to highlight the paragraphs or passages of particular importance in an authority, especially if a case is long. Finally, make sure you read all authorities carefully before relying on them.

Engage the judge or tribunal member in a discussion of the law wherever possible. This necessitates developing an instinct, through observation of the decision-maker(s), for when they are receptive to legal arguments and when they are not. Court time is a precious commodity, and is within the judge or tribunal's control. If they don't want extended reviews of case law, do your best to truncate your submissions, especially if you feel you are winning. If you feel you are losing, make all the points you feel are necessary for your client's case to be heard, within the time permitted to you. If that time is

insufficient, ask for more time. It may not be granted, but at least it may possibly afford a ground for appeal (albeit not one that is likely to succeed in most cases). Still, if a judge or tribunal does not want to hear the law, don't belabour it.

After all, as important as legal research and the law may be, it is not the determinative factor in most cases, and it is important to keep this in proper perspective. Legal research is an important element of understanding justice, but it is not synonymous with justice. Justice is about getting the right answer for the particular case.