PRACTICAL TRAINING FOR TRIAL OF CIVIL CASES

by A. L. Stein, Q.C.*

> "It is said that a case is won or lost in a lawyer's office, not in a court room. To the extent that thorough preparation is more important than brilliant court room forensics, this is a correct statement."[1]

Few "fourth-year" law students of our local universities approach the practice of their chosen profession with anything like a realistic picture of their first few years of daily activity. Yet it is in these uncertain, difficult, and formative years, that a newly-graduated lawyer frequently determines his future career. In this period, mistakes, disappointments, frustrations and, finally, economic necessity, often may terminate what otherwise might have been an interesting and successful practice. And nowhere is this more evident than amongst those young lawyers who, with pre-conceived images of clever exchanges with other brilliant barristers, "and/or" stirring addresses to judges and juries aspire to a speedy (and prosperous) eminence at the Bar. But, as the student, after graduation and left to his own resources, slowly discovers for himself, this lofty aspiration may never be realized by the existing system, literally speaking, of "trial and error".

To nearly all students, indentured with an established office during their last year of legal education, this year is their first one of practical training. Most of these indentured students seem prepared — in fact, almost too much so — to assist a senior member of the firm to which they have become attached, in the drafting of legal arguments, briefs, and legal research. Unfortunately, however, at this point in their respective careers, this is where their services are least required. Nor is this the case only during a student's first year of practical experience in a law office but, also, in many instances, during the first several years of his practice in the profession.

On the other hand, however, to most of the legal firms which have sought, and obtained, the services of fourth-year law students, or of recently-graduated lawyers, of average, better-than-average, and even top-grade ability, their experience has shown that generally these students, or lawyers, are inadequately, if not entirely, untrained in the preparation of a civil case for trial. Yet it is in this area of work that the services of students and young lawyers are most sought after by senior members of the Bar.

In a foreword to Professor Robert E. Keeton's book entitled *Trial Tactics and Methods*, Dean Robert G. Storey, of the Southern Methodist University Law School, points out —

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[1]Biskind, Elliott L., in preface of *How to Prepare a Case for Trial* (1954) pp. vii, viii.

> "A recurring controversy in the legal profession in recent years centers around the question of whether the law schools are adequately preparing students for the practice of law. The charge is made that law school graduates enter the profession without the practical knowledge necessary to represent clients. To this the law schools reply that while they provide some practical training, they cannot turn out finished lawyers and that this practical experience must, for the most part, be gained by the young graduates after they enter the law office. While I am aware that a number of law schools are doing more in this field than seems to be generally appreciated by the Bar, I feel that most schools could do more than they have done or are now doing in this respect. At the same time I have come to the conclusion that the ultimate solution probably lies in a period of internship of applied legal training to bridge the gap between law school and the practice."[2]

Obviously, it was to supply this "period of internship of applied legal training" that the "fourth-year" indentureship with a law office was established in this locality. Yet the practical instruction which is required, cannot, save in very rare cases, be obtained during this last year of legal training and indentureship with a law office. Firstly, one must realize that the "fourth-year" student must acquire this training and experience on a part-time daily basis in a period of approximately six months, from about September to the following January; since immediately thereafter, the student must devote himself entirely to the task of preparation and study for the Bar examinations in June. Moreover, the student still follows a number of lectures during his fourth year, usually in the afternoon, and must maintain his scholastic standing in the faculty. In addition, the student must also learn the rudiments of an unfamiliar law office routine; the many intricacies of court procedure; how to obtain and file legal proceedings, both ordinary and extraordinary; and acquire a working acquaintanceship with courthouse officials and their deputies, and learn their functions in relation to the lawyers' work. If, added to the foregoing, the student is permitted also to argue a few minor motions or other proceedings in the Practice Court, or in some of the other lower Courts, which he may enter, "then, and in such event", — in the terms of a well-worn legal phrase, — the student has realized as much, as could be hoped for in the way of practical training and experience during the indentureship.

Desirable as this experience gained by the student may be, there remains, nonetheless, an area of practical legal training which could prepare the student and the novice lawyer for the every-day type of civil case which he will encounter most frequently during his first years. This essential part of the student's practical training has been either underestimated, or entirely overlooked. For to know — with some experience and confidence — how to prepare a civil case from its beginnings until the day of trial — is a prerequisite for the lawyer embarking on his career. Without such knowledge and the proper preparation, on that nervous, exciting morning when he enters into legal combat with a learned and usually much more experienced adversary, there is little hope for judgment in his client's favour in the unequal contest called a trial. Often at this point, the die is already cast and neither brilliant examination of witnesses,

[2]Keeton, Robert E., *Trial Tactics and Methods*, Foreword at p. vii.

nor learned argument of the attorney, will save the position of the client and his case.

But there is more to this unfavourable picture. Not only has the new practitioner the disadvantage of an experienced adversary, but further handicaps resulting from the fact that this opponent may have been assisted by specialists in the investigation of the facts and examination of witnesses preparatory to trial. This is especially true where the litigation concerns a negligence or accident case, and when the defendant is represented by an insurance company or in cases where the defendant is a large corporation. In such instances, an experienced and highly specialized staff of trained investigators immediately set out to verify all facts relating to the accident, interview the witnesses, obtain photographs and other evidence, and finally, submit a written report to assist the defendant's attorney in the preparation of the defence. Often, too, these experts have interviewed, and even obtained a written statement from the client of the less experienced attorney. In such circumstances, is the graduate student trained to enter into his profession as a barrister?

Consequently, it is to remedy this apparent "lacuna" in legal training that the writer would focus special attention. To this end, a course of instruction or series of lectures could be given to the student during his last year or two, which would deal with the practical preparation of a civil case for trial. Such a course or series of lectures could be given by one or more experienced and practicing trial lawyers — who would deal with a number of topics conforming more or less to the several steps or stages of development of a routine trial case from its inception (or first contact with the client) to the day of trial on the merits of the case. This practical course of lectures and instruction could comprise the following list of subjects, suitably developed and expanded by appropriate examples in actual or hypothetical cases, as follows:

1. THE PROBLEMS OF PREPARATION
   priority of "facts" or "law" investigation in early preparation — review in relation to later development of case — changes in jurisprudence during pendency of case.
2. MEETING AND INTERVIEWING THE CLIENT
   where and how — written mandate — when advisable — obtaining the client's story — critical examination.
3. METHOD FOR INVESTIGATION OF FACTS
   use of your client — special investigators — or services of lawyer.
4. EXAMINATION OF WITNESSES AND DETERMINATION OF THE FACTS
   dealing with witnesses — critical examination — obtaining written statements.
5. TYPES OF DEMONSTRATIVE EVIDENCE
   documents, physical evidence — identity of actors and objects — physical surroundings of scene — physical condition of client and personal injuries.
6. VIEWING THE SCENE OR LOCALE TO WHICH FACTS ARE RELATED
   photographs of scene and objects involved — when advisable and how to be used at trial — engaging expert assistance when necessary and how to be used.
7. ENGAGING MEDICAL EXPERTS
   arranging examinations — reports when necessary — and how to be used.

8. EVALUATION OF DAMAGES
direct and remote — exaggerated claims — bias of client — malingering — incapacity, temporary and permanent — partial and total — medical expertise in relation to damages — future treatments and operations — damages in case of decease.

9. DEALING WITH REPRESENTATIVES OF OPPOSITE PARTY
interviews with adjusters — medical, and other representatives of adverse party — negotiations and *pourparlers* of settlement — how conducted without prejudicing client's interests — disclosure of material facts or information.

10. DRAFTING OF PLEADINGS IN RELATION TO FACTS
style — and precision — procedural rules — use of forms.

11. PRE-TRIAL EXAMINATION OF PARTIES, WITNESSES AND DOCUMENTS FOR COURT RECORD
when resorted to and how best used — advantages and disadvantages — opening the door to proof for the opposite party.

12. JOINING ISSUE IN PLEADING
unnecessary delays in bringing case to trial — avoidable side issues, motions and incidental proceedings.

13. REVIEW OF FACTS AND INVESTIGATION
re-examination of witnesses still available — examination of witnesses out of jurisdiction — use of rogatory commission.

14. PREPARATION OF CASE BEFORE TRIAL
personal preparation for conduct of trial — efficient method of preparation for examination and cross-examination of witnesses and parties — re-examination of client and witnesses before trial — review of facts and issues with client.

15. PREPARATION OF AUTHORITIES ON PROBABLE ISSUES TO BE RAISED IN COURSE OF TRIAL AND IN ARGUMENT ON MERITS.

As an illustration of how this course of lectures might prove to be of value in the training of a new lawyer, let us explore the topic entitled — "Meeting and Interviewing The Client". At first glance this might appear to be a simple matter of application of common sense rules of conduct. Yet a closer and more detailed examination of this subject reveals a number of problems deserving of more careful consideration and study by both student and lawyer alike.

A practicing lawyer soon appreciates that a client who calls for his services usually is, or believes himself to be, "in trouble". Such a person must be treated with something akin to special patience by the lawyer whose advice is being sought. Often, too, this is the first personal contact between the client and his prospective lawyer, and as such, might well determine the course of their future relationship, if any. It is especially important, therefore, for a "new" lawyer to be forewarned of certain pitfalls at this time.

Frequently, a client will try to induce his lawyer to interview him at the client's office or home; and usually at his own convenience or in the evening, or outside of regular working hours. This practice should be discouraged as much as possible and avoided except in the unusual circumstances, where a client is confined to bed at home or hospital, and where an immediate interview is desirable. In such cases particularly the lawyer should prepare a letter of mandate engaging his services, to be signed by the prospective client before he has spent too much time or effort in relation to the case. For nothing is more frustrating or disappointing to the young lawyer than to spend several hours of an evening or weekend, listening to a prospective client and giving advice

in relation to a proposed claim or action, and then to find several days later that the matter has been placed in the hands of another attorney, unaware of the earlier interview. Too frequently such discourtesy and lack of consideration is dismissed lightly by the prospective client in terms such as, "Well, I just wanted his opinion. I didn't engage him or 'give him my case'". The written mandate might have proved otherwise. Apart from self-protection, the young lawyer should be alerted also to prevent himself from being made a party to such abuse; by a careful inquiry as to any previous consultations by the prospective client with any other lawyers concerning the proposed case.

In addition to clarifying or establishing his own position to act on behalf of his client, the lawyer should also discuss a retainer fee and other financial arrangements with his client as soon as possible after his first interview. Here, again, are some mistakes which can be avoided easily. Attempts by a client to engage his lawyer on a *quota litis*, percentage-sharing or profit-sharing basis must, of course, be refused by the latter with the appropriate explanation that such an arrangement would constitute a violation of the Bar Act. In cases where prior investigation, particularly of the facts, is necessary, to determine whether the claim is well founded, arrangements should be made for such disbursements as might be expended in the course of investigation. An estimate should be given to the client as to the total expenditure, including lawyer's fees for such work, despite the possibility that the ultimate result might prove the claim is unfounded or for other reasons not worth pursuing. Even where the claim appears to be clear on grounds of liability, the client should still be informed as to the approximate cost of the litigation involved, with appropriate consideration for such expenditures in relation to the net amount which might ultimately be realized.

In all these preliminary matters, tact is essential, yet firmness and frankness are even more important, if real confidence is to be established between the prospective client and his attorney.

Thus far we have touched but briefly on some of the problems arising out of the solicitor-client relationship itself. But let us now give some further thought to the interviews with the client dealing with the case itself. In this area, too, there is much instruction which can be given to the student, and newly-initiated lawyer, which would prove of benefit to him.

Firstly, his client's version of the facts should be obtained without prompting and with keen attention on the part of the attorney. Only too often a client wittingly, or unwittingly, represents the facts of his case to his lawyer in a manner which he calculates would serve his interests best. It is for the lawyer to determine from the long story which will be related to him how much of the "real" truth has been told by his client. For — as he will soon learn, "In ordinary affairs of life, truth is an elusive thing."[3]

[3]Biskind, p. vii.

Has his client been biased in his version and has he a knowledge of the real facts himself? In this desire to present what he thinks to be the most important matters relating to his case, the client often omits important details; an omission which could be fatal to his claim.

Lawyers must be prepared to be critical in the examination of their client's version, even if the client should be somewhat embarrassed by this type of inquiry. Often such careful examination of the client's story will uncover additional valuable information, forgotten or overlooked in the recital of the facts. In another sense, this might also prepare the client for cross-examination by opposing counsel at a later stage.

All this brings us to the conclusion that some basic rules of conduct can be formulated which would greatly assist the young lawyer with his prospective client. A more experienced approach to the problem discussed will surely instill confidence in the lawyer on the part of his client — a most important result from the viewpoint of the lawyer at this stage of his career.

Thus might be avoided an incident such as occurred in the experience of a well-known trial lawyer, which was reported to this writer, as follows:

> An old client who sought the services of this trial lawyer's firm in connection with a rather routine damage action, was requested on arrival to step into the adjoining office of the "junior" and to report to him all the facts concerning the claim. The client was told that thereafter the report and the details thereof would be discussed or reviewed with the senior member of the firm. After what seemed like an unusually long interview (and a very thorough recording of the facts — as the senior trial lawyer hoped) the client returned to his office, obviously dissatisfied and considerably distressed. "Surely", he said, "you are not going to rely on the report that your young assistant is going to give you?" "And why not?" the senior trial lawyer replied, "didn't you tell him all the facts?" "Of course", was the rejoinder by the client, "but your 'junior' merely took down everything I told him, and hardly asked me a question about the case itself!"

This skeptical attitude of a client whose version was accepted too readily, is not unusual and merits careful consideration — particularly by the novice in the profession. For what had caused this obvious lack of confidence — entirely unjustified, in this writer's opinion — was merely the lack of "practical" training in the preparation of a case for trial.

In conclusion, it should be pointed out that it has not escaped attention that some of the material suggested for discussion might be termed as either subjective, or mere common sense, or both. It also might be argued by some that part of the instruction proposed to be given to students could be acquired by their own experience over a period of years under the "trial and error" system of our courtrooms. Yet it is this writer's conviction that since much of our law is basically founded on common sense — then teaching it in the suggested manner with regard to trial cases, is both sound training and profitable education for the student in the practice of law.