Farhad Shekib | Partner
4950 Yonge St.
Suite 2200
Toronto, ON
M2N 6K1
T: 647-270-6513
F: 416-901-9978
E: fashekib@pintoshekib.ca

September 18, 2024

Ontario Bar Association, Litigating an Employment File

Lessons Learned From My Trial Experiences

Farhad Shekib, Pinto Shekib LLP[1]

[1] Farhad Shekib is a Partner at Pinto Shekib LLP, where his practice focuses on employment law and general civil litigation (including real estate disputes, estate disputes and commercial disputes).

Overview

In this paper, I would like to share with you some of the lessons that I have learned from my trial experiences over the years.

1. Be Credible

Your job as an advocate is to persuade the decision maker that your case should win. To be persuasive, you must be credible – otherwise, how can the decision maker trust what you are saying?

How do you build credibility? There is no simple answer, but you may want to consider the following:

- **Know your facts and the law:** If you make a mistake, don't hide it – own it and correct it. Do not misstate the evidence or the law.
- **Be careful in cross examination:**
    - Cross examination is both an art and a science. You need to be careful in how and when you decide to cross examine.
    - Aggressive cross examination (e.g. calling the witness a thief or a liar) may hurt you. The judge or jury may become sympathetic to a witness (particularly, a lay witness) who may be seen as being unfairly attacked.
- **Be yourself**: Speak using your own style – you will be most comfortable, and hopefully most convincing, when you are being your true self.
- **Be respectful:** Treat opposing counsel, witnesses and the Court (which includes Court staff) with respect.

2. Be Prepared

- **Review your pleadings before trial:**
    - Ensure that all parties are properly named and joined.
    - Consider whether amendments are required (e.g. to plead a defence or a cause of action). Amending mid-trial is possible, but not a guarantee (and may require additional discovery time).
- **Review discovery transcripts before trial:**
    - Ensure undertakings have been answered.
    - Determine whether corrections are needed to discovery evidence.
    - Prepare you discovery "read ins" for trial.

- **Prepare and serve relevant documents/notices, including:**
    - Request to admit certain facts – other side must be given 20 days to respond.
    - Request to admit authenticity of documents – other side must be given 20 days to respond.
    - Rule 49 Offers – must be served at least 7 days before the start of trial.
    - Serve appropriate Evidence Act notices – at least 7 (business records) or 10 days (medical records) before the start of trial depending on the notice.
- **Non-Expert Witnesses:**
    - Interview witnesses and determine availability for trial.
        - What evidence will they give?
        - What documents will be introduced into evidence via the witness?
        - Prepare their chief and mock cross examination.

- Explain to them:
    - What to wear.
    - Who will be present.
    - The Courtroom layout – if possible, show key witnesses the Courtroom before trial and explain layout (the stand, where the judge sits, etc.).
- Prepare and serve summons on all witnesses.

- **Expert Witnesses:**
    - Pick them carefully – at trial, you are stuck with them. Research your expert – have they testified before? What have judges said about your expert? Can they withstand aggressive cross examination? Are they well prepared? See R v Hanson, 2024 ONCA 369 as an example of how choosing an ill-prepared expert can destroy your case.
    - Review your report well before the pre-trial and address any issues.
    - Ensure you serve reports in accordance with timeline in the Rules – 90 days (original report) /60 days (responding report) before pre-trial. Judges are becoming less forgiving of late service of expert reports.

3. Be Helpful

At trial, you likely have lived with your case for years – you should know it well. The trial judge, however, does not: they have most likely only reviewed the pleadings. It is important, therefore, to make sure that you don't "lose" the judge during your trial.

Accordingly, you may want to consider the following:

- Watch the judge – are they taking notes? If so, consider slowing down your submissions or examination.

- Have they stopped writing? If so, perhaps you can move on from your point. Or you may have lost the Judge, and you need to back up.
- Make sure all your documents are tabbed, hyperlinked etc., such that the judge can easily move from document to document.
- Prepare helpful chronologies and compendia of relevant documents.

4. Be Mindful of Evidentiary Issues

What facts are you relying on to support your case? How will those facts be admitted into evidence? Consider creating a list of material facts in issue and how you will prove them:

Cause of Action	Material Fact	Evidence Relied on	Evidentiary source (document discovery, examination for discovery, witness statements etc)
Breach of contract	Parties to the contract	Mr. X, CFO	Tab 1 – Contract
	Material terms of the contract	Mr. X, CFO	
	Alleged breach	Mr. X, CFO	
	Damages	Ms. Y, Valuator, Expert	Tab 32 – Expert report, Charts 1-3

Also be mindful of Browne v Dunn: When you intend to impeach a witness called by the opposite party, you must give that witness the chance to respond to contradictory evidence while that witness is on the stand. It is a rule rooted in trial fairness: the witness, whose credibility is attacked, must be given an opportunity to respond while on the stand.

For example, if your position as Defence counsel is that the Plaintiff was terminated for cause because she engaged in time theft (and you will adduce this evidence via your own witness), you must put this proposition to the Plaintiff during your cross examination. The

Plaintiff must be given a chance to respond. A breach of this rule can be problematic: the witness may be recalled, the evidence may be excluded and the judge may become upset with you.

5. Be willing to bet on yourself

This is the most important lesson that I have learned in life: if you don't believe in yourself, your case and your position, no one else will. I'll share with you an example:

I conducted a two-week personal injury jury trial in the summer of 2023. We had a very tough case:

- it was a minor injury (a bump to the elbow);
- the theory was loss of earning capacity, instead of a traditional income loss claim (because the Plaintiff was fired from his job well before the accident and therefore had no employment income on the date of the accident); and,
- an aggressive insurance company was the Defendant.

At trial, I put our expert witness, an economist, on the stand to speak to the loss of earning capacity claim. We went through his report, where I focused most of my time on the "higher end" of the damages (e.g. $400K +).

When the jury retired for the day, I was told (privately by a lawyer) that I should have focused on the "lower end" of the damages claim – $50K or so – as no jury was going to award what I was asking, and that I would lose credibility by asking for such a high amount.

The goal, after all, was to get *something* in damages, so we can ask for our costs (Defence had offered $0.00; we had a R.49 offer of $50K plus costs).

Well, the jury awarded $365,000 in income loss and we secured a total of $596,479.42 for the Plaintiff, inclusive of PJI and costs. Had I focused my examination on the "lower end" of the damages, I am not sure the Jury would have awarded my client $365K. Trust yourself.