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Commentaries

Personal Injury

New South Wales

A full commentary on the law and practice relevant to conducting personal injury matters.

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Overview and limitation periods

Overview

This Personal Injury Guide concentrates upon injury claims caused by negligence, the questions and considerations that should be taken into account and the steps necessary to get the claim underway.

However, it is also important to note that clients may be entitled to claim damages arising from intentional torts such as trespass, assault and battery, sexual or indecent assault, invasion of privacy, false imprisonment and defamation. Damages in such claims are not affected by the legislative restrictions which apply to injuries occurring as a result of negligence, such as within the Civil Liability Act (see below). Exemplary and aggravated damages may also be available in appropriate circumstances. The usual limitation period for defamation proceedings is within 1 year of publication, but is 6 years for other intentional torts.

Conduct of a personal injury claim in New South Wales requires some familiarity with the common law, as well as with relevant legislation, which has significantly altered applicable principles and procedures.

Consideration of most claims for personal injury or loss arising from civil liability must commence with the Civil Liability Act.

The act was introduced in NSW in an effort to deal with what was seen by the government to be a crisis in affordability of public liability insurance. The Act codifies and restricts what had been, until 2002, the applicable common law relating to civil liability claims.

Before advising a client, it is important to understand the nature and extent of the restrictions upon claims and damages, and the defences created by this legislation.

For personal injuries sustained in a motor vehicle accident, please refer to the Motor Vehicle Accidents Guide.

For personal injuries sustained in a work-related accident, please refer to the Workers Compensation Guide.

Limitation periods

Part 2 Division 6 of the Limitation Act 1969 applies to personal injury claims based upon any cause of action other than claims made under the Motor Accidents Compensation Act 1999.

The relevant time period within which a claim can be commenced is determined by application of the provisions set out within s 50C and s 50D.

There are two periods to take into account:

- A period of three years running from the date upon which the claimant knew or ought to have known that an injury had occurred which had been caused by the fault of another person and which was sufficiently serious to justify bringing an action (the '3 year post discoverability limitation period'); and

- A period of 12 years running from the date of the event claimed to have caused the injury or, in the case of a compensation to relatives claim, running from the date of death (the '12 year long-stop limitation period').

The limitation date for commencement of proceedings is the earlier of the two respective end dates for the 3 year post discoverability period and the 12 year long-stop limitation period.

A court may, upon application, extend the 12 year long-stop limitation period, but not beyond the 3 year post discoverability period: s 62A(2). The matters which a court may consider in determining whether to exercise its discretion are set out within s 62B.

NB: Great care should be taken to commence proceedings in time whenever possible because the NSW Court of Appeal has, in recent times, adopted a very restrictive approach to applications for leave to proceed out of time.

The limitation periods do not run while a person is a minor without a capable parent or guardian, or is incapacitated in management of their affairs and does not have a manager or guardian appointed under protective legislation: s 50F. Further, time limitations upon claims for child sexual abuse in NSW no longer apply - see s 6A(2) of the Limitation Act 1969, with retrospective effect.

LawCover: Schedule of Limitation Periods in Civil Matters.

Getting the matter underway

A client will either come in to see you specifically because they want to receive advice about an injury that they or a family member have suffered in an accident, or they will be consulting you about an entirely different matter and happen to mention difficulties that they are having due to an injury that has been suffered in an accident.

In either of the above situations, it is important to obtain all relevant information and to be able to either provide prompt and accurate advice about the client's rights, the procedure involved, and relevant time limits; or refer the client to obtain suitable advice.

The legislative provisions relating to liability and damages, and any limitations issues, should be kept in mind at the time of obtaining initial instructions, so that all relevant information is obtained and considered during preparation and when later advising the client on the merits of their claim and the range of damages that they can reasonably expect to receive.

It is recommended that a comprehensive statement be obtained from the client and from any other witnesses. The following details should be considered:

- Age and domestic situation;
- Schooling and training;
- General antecedents;
- Work history and experience;
- Future intentions as to work or training but for the injuries;
- Previous health;
- Previous claims or injuries;
- Chronology of events and activities leading up to the injury, including prior familiarity with the incident scene or the person or activity causing injury;
- Any consumption of alcohol or drugs before incident;
- Date, time and a precise description of the place of the incident leading to injury;

- Description in detail of how the incident occurred;
- Identified and unidentified witnesses;
- Relevant conversations before or after the incident;
- Available photographs, plans, or other records relating to the place or incident or injuries sustained;
- History of treatment received;
- Description of all injuries received;
- Details of persons who attended in response to the incident – for example, police, ambulance, security, neighbours;
- Details of treating doctors;
- Current symptoms and restrictions;
- Employer name and address as at date of incident, time spent off work, changes required to duties due to injuries, changes to past or future earnings caused by injuries;
- Details of any government, Centrelink or insurance benefits received since the date of the accident, including amounts and claim or reference numbers;
- Medicare number;
- Medical fund membership details.

The Retainer Instructions in this guide also address the above matters.

Also within this guide are Authority forms to obtain hospital records, medical records and reports, taxation returns and financial records, Centrelink information and payment details from health insurance providers and Medicare.

Components of a successful claim

Basically, a claimant must demonstrate harm that has been caused by another party's negligent breach of a duty of care or breach of a statutory duty owed to the claimant.

This means that the important threshold questions must be satisfactorily addressed:

- What is the nature and extent of the duty of care owed to the claimant?
- Has there been a breach of that duty?
- Has the breach caused harm?
- Was such harm reasonably foreseeable?

As a starting point, s 5 of the Act provides the following definitions:

'harm' means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

'negligence' means failure to exercise reasonable care and skill.

'personal injury' includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

The duty of care

General principles

Section 5B of the Act provides that a person is not negligent, and therefore not liable to another person, unless the risk of harm being suffered by that other person was:

- reasonably foreseeable, and
- not insignificant.

The Act requires a court to consider the above factors, and also to undertake a type of 'cost/benefit' analysis of the subject activity claimed to have caused the harm: see s 5B(2):

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.

Other principles that a court must observe in determining what precautions should reasonably have been taken by a defendant in order to avoid or minimise injury are set out within s 5C:

> In proceedings relating to liability for negligence:
>
> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
>
> (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Specific provisions relevant to the duty of care and recovery of damages

Intoxication: s 49(1)

- There is no duty of care owed to a person merely because that person is intoxicated; and
- A person's incapacity to take reasonable care for their own safety which is caused by intoxication cannot be taken into account in determining the duty of care owed to them.

Illegal acts: s 54(1)

- Damages cannot be awarded for harm caused to a person by their engagement in conduct which probably constitutes a serious offence.

Self-defence: s 52(1)

A person is not liable for damages for reasonable conduct which they believe necessary to:

- respond to a perceived threat to their own personal safety;
- prevent the taking or destruction of property;
- prevent or terminate unlawful deprivation of liberty of themselves or another person; or
- prevent or terminate criminal trespass to property.

Good Samaritans: ss 56, 57 & 58

A person who acts in good faith and without expectation of reward in an emergency, in coming to the assistance of someone who is apparently injured or at risk of injury (a 'good Samaritan'), is not liable for any harm caused by their acts.

This protection does not apply if:

- the good Samaritan originally caused the injury or risk of injury to which he then responds;
- there was a failure by the good Samaritan to exercise due care and skill that arose from significant impairment caused by legal or illegal consumption of a drug or alcohol;
- the good Samaritan impersonates a health care or emergency services officer, or police officer; or
- the good Samaritan falsely represents possession of expert emergency skills.

Voluntary community workers: ss 60–66

A volunteer is not liable for the consequences of any community work undertaken, except for:

- defamation;
- conduct that constitutes an offence;
- failure to exercise reasonable care caused by voluntary consumption of alcohol or drugs, legal or illegal;
- conduct that was known, or should reasonably have been known, to be outside the authorised scope of the community organisation's activities;
- liability that is required by statute to be insured against; or
- liability covered under the Motor Accidents Compensation Act 1999.

Recreational activities involving risk of harm: ss 5L, 5M

- Under the Act, a 'dangerous recreational activity' is one that involves a significant risk of physical harm.
- A recreational activity includes:

  (a) any sport – whether organised or not;

  (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

- There is no liability for harm suffered from an obvious risk of dangerous recreational activities, whether or not the plaintiff was aware of that risk: s 5L.

- The provider of a recreational activity does not owe a duty of care to a participant in respect of a risk associated with that activity if the risk was the subject of a risk warning to the participant: s 5M.

A 'risk warning' is an oral or written warning given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The provider does not have to establish that the participant received or understood the warning or was capable of receiving or understanding the warning.

Obvious risks

An obvious risk is one that would be obvious to a reasonable person even if it has a low probability of occurring or is otherwise inconspicuous: s 5F.

- A person is presumed to be aware of an obvious risk unless proven otherwise on the balance of probabilities: s 5G.

- In addition to the provisions above relating to recreational activities, there is, pursuant to s 5H, no duty of care to warn another person of an obvious risk, unless:

(a) that person has requested advice or information about the risk from the defendant, or

(b) there is a statutory requirement to warn the person of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the person from the provision of a professional service by the defendant.

Inherent risks: s 5I

- A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

- An 'inherent risk' is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

Mental harm

- There is no duty of care owed by a defendant to take steps to prevent mental harm to another person unless it is shown that the defendant should have known that a normal person might suffer psychological injury if reasonable care was not taken: s 32.

Public authorities

Section 41 of the Act defines the public and other authorities that benefit from the protections given by sections 42 to 46:

- Consideration of the duty of care owed by a public authority must take into account its overall functions and duties, financial resources and its compliance with general standards and procedures: s 42.

- An act or omission by an authority does not constitute a breach of statutory duty unless in the circumstances it was so unreasonable that no authority could properly consider the act or omission to be a reasonable exercise of its functions: s 43.

- A roads authority is not liable for harm arising from a failure to carry out road work unless, at the time of the alleged failure, the authority had actual knowledge of the particular risk, the materialisation of which resulted in the harm: s 45. Additionally, this section does not operate to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or to affect any standard of care that would otherwise be applicable in respect of a risk.

Professionals

- The Civil Liability Act establishes the importance of commonly held standards accepted within various professions in determining the nature and extent of the relevant due standard of care owed to a person to whom professional services are provided.

- Section 5O provides that:

  (1) A person practising a profession ('a professional') does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

  (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

  (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

  (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

  It is important to also bear in mind the requirement set by rule 31.36 UCPR that an expert's report containing mandatory information must be filed and served with the Statement of Claim commencing a professional negligence claim.

Apologies

- An apology is defined by the Act as an 'an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter': s 68.

- An apology made in connection with an incident does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and it is not relevant to the determination of fault or liability in connection with that matter: s 69.

Causation

The Act changes the principles of causation applying to negligence claims previously set within the common law.

Section 5D(1) requires two essential elements to be established in order to establish causation of harm:

- a finding that the negligence necessarily caused or contributed to the particular harm; and

- a finding that the defendant ought to be held liable to pay damages for that harm.

It can be observed that the second test above requires consideration of the type of defendant and the type of harm involved; this may be seen to potentially increase the liability of defendants operating commercial enterprises for harm suffered by customers, as compared with the liability of defendants such as homeowners or voluntary community organisations for harm suffered by visitors or service users.

Further relevant requirements to be observed in determining causation are set out within s 5D:

> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
>
> > (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
> >
> > (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation: s 5E.

Garzo v Liverpool/Campbelltown Christian School [2012] NSWCA 151 highlights the importance of carefully considering causation in s 5D of the Act, and taking into account other factors that may have contributed to a slip and fall - especially where other explanations for the fall may be equally available. The absence of previous accidents, whilst not determinative of breach of duty, is one factor, sometimes significant, to which regard should be had.

Contributory negligence

The common law relating to contributory negligence is largely unaffected by the Act:

5R Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence-claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the Compensation to Relatives Act 1897, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the Law Reform (Miscellaneous Provisions) Act 1965 does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the Compensation to Relatives Act 1897.

Damages

The Civil Liability Act 2002 sets out certain thresholds and limits that apply to damages payable for harm suffered by a claimant.

Economic loss: s 12

This section applies to an award of damages:

(a) for past economic loss; or

(b) for future economic loss; or

(c) for the loss of expectation of financial support.

For any such award, the court will disregard the amount by which the claimant's gross weekly earnings would have exceeded three times the average weekly wage applicable as at the date of the award of damages. The 'average weekly earnings at the date of an award' is defined to be the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award of damages.

Future economic loss: s 13

In determining an award of damages for future economic loss, the court must first be sure that the assumption about future earning capacity agrees with the claimant's most likely future circumstances but for the injury.

This amount is then adjusted by reference to the percentage possibility that the events might have occurred but for the injury.

Section 14 provides that, if any component of the award is assessed as a lump sum, then the value of the future economic loss is determined by adopting the prescribed discount rate, which is either 5% or such other rate as is prescribed by the regulations.

Gratuitous attendant care services: s 15

Damages for gratuitous attendant care services are for services of a domestic nature, services relating to nursing, and services that aim to alleviate the consequences of an injury. These services are provided by another person to the claimant, for which the claimant is not liable to pay.

These services must have been, or continue to be, provided for at least six hours per week, for a period of six consecutive months.

The court must be satisfied that:

(a) there is (or was) a reasonable need for the services to be provided, and

(b) the need has arisen (or arose) solely because of the injury to which the damages relate, and

(c) the services would not be (or would not have been) provided to the claimant but for the injury.

Loss of capacity to provide domestic services: s 15B

Damages may be awarded for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied that:

(a) The claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose; and

(b) The claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity; and

(c) There is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:

  (i) For at least six hours per week, and

  (ii) For a period of at least six consecutive months, and

(d) There will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

Loss of superannuation entitlements: s 15C

The maximum amount of damages payable for loss of superannuation entitlements is the 'relevant percentage' payable in respect of the gross amount of lost earnings or loss of earning capacity upon which the claimant's economic loss has been assessed.

The 'relevant percentage' is the percentage amount required by law to be paid as guaranteed employer superannuation contributions; this amount is presently 9% of gross earnings.

Non-economic loss

No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case: s 16(1).

The maximum amount of damages that may be awarded for non-economic loss is indexed each year on 1 October in accordance with s 17. The indexed yearly amounts can be found in clause 3 of the Civil Liability (Non-economic Loss) Order 2010.

The maximum amount is to be awarded only in a most extreme case.

If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, then damages are determined in accordance with the following table, found in s 16:

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6%

26%	6.5%
27%	7%
28%	7.5%
29%	8%
30%	23%
31%	26%
32%	30%
33%	33%
34-100%	34-100% respectively

Section 17A provides that, in determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings.

Exemplary, punitive and aggravated damages

In claims to which the Civil Liability Act applies, a court cannot award exemplary, aggravated or punitive damages: s 21.

Interest: s 18

Interest may be ordered as payable at the prescribed rate upon past damages other than damages for non-economic loss, gratuitous services, or inability to provide gratuitous domestic services.

Other heads of damage

The Act does not specifically refer to other heads of damage to which a successful claimant is entitled under the common law. These include:

- Past and future amounts reasonably paid or likely to be payable for products and services which include, but are not limited to, medical treatment, medication, physiotherapy, massage, rehabilitation, retraining, domestic or personal assistance, travel for treatment and similar outgoings.

- Reimbursement of the amount of taxation paid in respect of any weekly workers compensation benefits received by the claimant during any past period of incapacity for work: *Fox v Wood* (1981) 148 CLR 438.

Legislation, jurisdiction and obligations

Legislation

The Civil Liability Act applies to civil liability whether arising in tort, contract, or under statute: see ss 5A(1), 28 and 40.

The types of claims that are specifically excluded by s 3B from operation of the provisions of the Act are:

- workers compensation claims
- motor accident claims
- dust diseases claims
- claims arising from intentionally caused death or personal injury, or sexual assault (this is a partial exclusion: see s 3B(1)(a))
- claims relating to smoking or the use of tobacco products.

The Court of Appeal has also determined that a claim for damages for deprivation of liberty and loss of dignity arising from false imprisonment is not a claim for damages that relate to the death or injury to a person, and is therefore not governed by the provisions of the Act: see State of New South Wales v Williamson [2011] NSWCA 183.

Jurisdiction and court procedures

The District Court has a jurisdictional limit up to $750,000 for personal injury claims other than for motor accident injury claims; claims that are likely to exceed this limit should be brought in the Supreme Court.

If a claim is remitted from the Supreme Court back to the District Court, the jurisdictional limit above does not apply: s 149 Civil Procedure Act.

The District Guide and the Supreme Court Guide provide advice on the structure of the courts and their procedures and will give you the information you need to comply with the

processes of the court. Those guides also include a library of precedents, including correspondence, pleadings, interlocutory process and other documents.

The manner in which a claim will proceed, and other applicable rules and forms, can be found within the Civil Procedure Act 2005, Civil Procedure Regulation 2017, and the Uniform Civil Procedure Rules 2005.

Solicitor's obligation

A solicitor must have reasonable grounds to believe that a claim has reasonable prospects of success before commencing court proceedings.

Specifically, clause 4(2), Schedule 2 Legal Profession Uniform Law Application Act 2014 provides:

(2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

A solicitor who commences proceedings in breach of the above provision may be guilty of unprofessional conduct or even professional misconduct, and also faces the risk of the court ordering that the solicitor personally bear the costs of the unmeritorious proceedings.

Gathering information

Gathering factual evidence

It is usually very important to gain a firm understanding of what the factual evidence relevant to liability and consequent loss is likely to be before:

- providing initial advice to a client about the likely success of any claim; or
- retaining an expert to advise, based upon certain factual assumptions; or
- committing either yourself or your client to further work or expenditure on disbursements; or
- commencing proceedings (see the commentary above as to solicitor's obligations).

The steps that need to be taken will vary from case to case, but will often include the following:

- Witnesses need to be identified and interviewed, with a view to a statement being obtained either at the time or at a later time. Often, it is far better to ask your client to speak to potential witnesses first to find out whether they are prepared to initially speak to you informally about the areas of interest. An appointment can then be made for a statement to be taken or it may be more convenient and efficient to utilise a good private investigator to visit and obtain a statement.
- If using an investigator to obtain statements, it is important to ensure that all relevant areas of interest are carefully considered and then set out in the letter of engagement. This will ensure that the statement meets your needs at a later stage in that you will not be met by the witness providing evidence at a later time which is adverse to your client's case and which was not dealt with at the time of the statement being obtained.
- Photographs, measurements, film footage and diagrams of relevant places should be obtained.
- Before proceedings are commenced, requests can be made of the prospective defendant and any other party to produce any documents that may be relevant to the question of whether or not proceedings should be commenced. If it appears that

documents will not be voluntarily produced, an application can be made to the court for pre-trial discovery: see regulation 5.3 Uniform Civil Procedure Rules (UCPR).

- The authorities obtained from the client at the initial conference should be used to obtain medical reports or records from treating doctors or hospitals. It is often the case that copies of previous reports or clinical records are all that is required, and this is often easier for a busy doctor to provide as well as usually being less expensive for you or the client.

- Unless you are confident that a treating doctor will satisfactorily address your questions about such things as the claimant's present disabilities or restrictions, need for domestic assistance, future surgical or other treatment needs, or general prognosis, it is usually more appropriate to engage a suitably qualified medical expert for this purpose.

- Particulars of the claim being made will usually be sought by the defendant and are in any event required by part 15.12 of the UCPR to be filed and served by the claimant and also to be accompanied by supporting documents. At an early stage after obtaining instructions, if not provided by the client, the client's signed authorities should be used to obtain financial material such as medical and other out of pocket receipts and accounts, tax returns and/or payslips.

- The client's authorities should be used to obtain statements from Centrelink, health funds or Medicare as to amounts repayable in the event of the claim succeeding.

- If workers compensation has been paid, a request should be made for provision of an itemised statement of all expenses, weekly benefits and lump sums paid pursuant to the claim, as well as copies of any Report of Injury Form or medical report held by the insurer. The amount repayable to the workers compensation insurer, pursuant to s 151Z of the Workers Compensation Act 1987, should be confirmed prior to settlement discussions or hearing.

- There are often records relevant to liability, prior employment or medical history, or current health or treatment that can only be obtained by issue of a subpoena.

Injury examples and possible future complications

Soft tissue

- Repetitive strain injury

- Pain, tenderness, swelling, paraesthesia (a sensation of tingling, pricking or numbness)

Joints

- Laxity – where the joint becomes unstable and weak
- Stiffness
- Osteoarthritis

Broken bones

- Osteoarthritis
- Joint stiffness
- Limb shortening
- Growth plates in children

Spinal cord

- Paralysis
- Complications associated with paralysis such as muscle wasting, bed sores

Scarring

- Unsightly
- Painful
- Irritable and itchy

Scarring considerations:

- Age, gender and pre-accident appearance;
- Surgical improvement possibilities
- Functional problems – lack of elasticity

- Keloid reactions - keloid scars are defined as an abnormal scar that grows beyond the boundary of the original site of a skin injury. It is a raised and ill-defined growth of skin in the area of damaged skin.
- Embarrassment and indignity
- Loss of self-esteem and self confidence
- Whether the scar can be hidden by clothing, makeup, etc.

Colour photographs should be taken (not by you or the client) from a similar distance as to say that of a casual observer.

Head injury

- Intellectual impairment
- Dependency on others
- Emotional disturbance
- Paralysis

Particularly difficult as the victim may:

- lack awareness of his loss or damage
- have behavioural problems
- be emotionally unstable, irrational
- be incapable of giving instructions – would require a tutor

Brain damage

- Concussion
- Intellectual problems including memory difficulties, concentration problems, visual problems.
- Physical problems including dizziness, impairment of sense of smell or taste, fatigue and lethargy.

- Emotional problems including depression, behavioural changes and aggression

For mild damage question the victim and their family to ascertain changes to the victim's attitudes, behaviours, memory, emotions, intellect, personality, and their sense of smell and taste.

For severe damage the complications may be coma and extensive hospitalisation.

Psychiatric

- Anxiety
- Depression
- Nervousness

Use of counsel

Obtaining advice from counsel experienced within this particular field is usually appropriate; this not only assists in adequate preparation and presentation of the claim, but also gives the client a reliable second opinion about the prospects of success of the claim and the likely extent of recovery of damages.

Counsel may often draft or settle the pleadings to be filed in court, which will usually minimise any need to amend at a later stage prior to the hearing, and will tend to assist proper presentation of the claim at mediation or hearing if the same counsel is retained to appear.

Care should be taken in preparing briefs to counsel to ensure that only documents that are intended to assist presentation of the claim are included, that any particular problems or concerns are raised for response, and that the extent of the retainer is confirmed.

A suggested form of brief is set out within this guide.

Obtaining expert opinion

An expert may be needed to provide an opinion as to liability. Care should be taken to ensure that:

- the letter seeking the report sets out assumptions of fact that are relevant to the opinion being sought, and that can be proven;

- the expert is asked to confirm within his report that he has been provided with, has read, and agrees to abide by the Expert witness code of conduct: see schedule 7 UCPR for a copy of the code; and

- the expert is asked to provide an opinion as to all relevant aspects of liability, together with supporting reasons and a summary of the facts or assumptions upon which the opinion is based.

There will often also be a need to obtain expert reports from medical specialists, accountants, rehabilitation advisers, vocational capacity assessors and other experts. Some examples of instructing letters are provided with this guide; generally, the same procedure should be followed as set out above in relation to use of the code of conduct, supply of relevant material, expression of opinion, and furnishing of cogent reasons for any opinion expressed.

Settling it early

Settling a case

Most claims will be the subject of informal settlement discussions and will also be required to be the subject of mediation before being allocated a hearing date.

It is imperative that instructions are obtained from the client about resolution of the claim that are validly based and informed; to achieve this, adequate advice must have been given to the client about:

- the likelihood of the claim succeeding, and the risks and costs associated with the claim proceeding to a hearing;
- the range of damages likely to be obtained if the claim succeeds;
- the amounts that will need to be deducted for legal costs and disbursements, unpaid treatment expenses, Medicare refund, health fund repayments, repayment of Centrelink benefits or workers compensation repayment;
- the extent to which any settlement or judgment sum will prevent future receipt of workers compensation or Centrelink benefits.

During settlement discussions it is crucial to have all of these figures to hand, including your total costs and disbursements, so that the client can consider any offers on a “nett” basis. See precedent for Instructions to Settle.

An offer has been made

When an offer has been made a client’s instructions to either make or reject a settlement offer should:

- be confirmed in writing,
- record a summary of the advice given in relation to the above matters, and
- be signed by the client as an acknowledgement of receipt of the advice and satisfaction of any outstanding questions or concerns which the client may have.

Settlement is reached

When a settlement is reached, get written instructions from the client to accept the amount offered and acknowledging the nett amount the client will get in the hand.

You will need the client to sign an Authority to Receive/Direction to Pay – see precedent to be sent to the other side's solicitors, which authorises them to pay the settlement money into your trust account (so you can disburse it as required) rather than to the client.

Legal costs

Prior to seeking authority from the client to have your costs and disbursements paid, it is essential that the client is provided with a Tax Invoice and advised of their right to have the costs and disbursements independently assessed if they so wish.

It is usually appropriate to have the client sign an Authority/Direction to you confirming the client's instructions to pay the costs and disbursements as set out within your Tax Invoice out of the settlement proceeds and at the same time directing you how to pay the client's money to them.

Disbursing Settlement Monies

Settlement funds will usually be paid into your trust account. It is not uncommon for a client to ask you to make multiple payments from the settlement monies, to credit cards, home loans, relatives and the like and these directions need to be in writing and signed by the client.

You may also need to consider allowing for the cost of multiple payments within your Tax Invoice.

Structured settlements

A structured settlement is an agreement that provides for the payment of an award of damages in the form of periodic payments funded by an annuity or other agreed means: s 22 Civil Liability Act.

The Act states that, contrary to what appears to be current common practice, plaintiffs negotiating the settlement of a claim for personal injury damages must seek the written advice of an Australian legal practitioner about the availability of structured settlements, and the desirability of obtaining independent financial advice about structured settlements and lump sum settlements of the claim: s 25.

Lump sum damages and social security entitlements

Legislation relevant to social security entitlements and lump sum compensation and damages provides that, if a person has been compensated for loss of income, they should use that money to live off rather than receive a taxpayer-funded payment. Lump sum compensation payments are treated on the basis that people who cannot work because of a compensable injury should **not** receive income support for the same period from both the:

- social security system; and
- compensation systems.

This reflects the view of successive Australian governments that primary responsibility for the support of people who are incapacitated because of a compensable illness or injury rests with the relevant state or territory compensation schemes, and not with taxpayer-funded social security programs. Section 17(3) of the Social Security Act.

Deductions and preclusions

Before seeking instructions to settle or to proceed to an assessment of the claim, it is very important to obtain a full and detailed summary of all amounts which are likely to be deducted from any sum payable to the claimant. This may include:

1. payments for treatment made by Medicare;
2. payments for treatment made by a private health fund;
3. payments of workers compensation benefits made to the client;
4. unpaid treatment accounts;
5. other insurance policy benefits paid by any insurer to or on behalf of the client which are related to the subject claim and which may be defined as recoverable within the relevant policy; and
6. benefits paid by Centrelink.

It is also essential to be aware of any preclusions which might apply in respect of future Centrelink benefits otherwise payable to the claimant. A request should usually be made to Centrelink by use of their standard form for formal advice relevant to the client as to the

applicable preclusion period within which any past benefit payments must be repaid and any future payments will not be made.

No instructions can be sought and no settlement offer can be accepted without the above information. If, for example, the client agrees to settle for $100,000 in the expectation that their Centrelink benefits will continue unchanged, but in fact the settlement means the client is precluded from receiving Centrelink benefits for 12 months, which might be worth say $15,000, then the settlement is actually only worth $85,000 to the client and they may not have accepted it if they had understood the true position.

Obtaining this information will require careful checking with the claimant, any health fund used for treatment expenses, treatment providers such as hospitals and doctors, Centrelink, the CTP insurer and any workers compensation or other insurer which may have paid benefits.

Medicare Notice of Charge

In addition to the above, it is necessary to have a current Medicare Notice of Charge in order to facilitate payment of the full amount of the settlement or award, failing which the insurer will retain 10% of that amount until the Notice of Charge has issued.

To obtain a Notice of Charge, the following steps occur:

1. Obtain an Authority from the client to communicate with Medicare on their behalf (this form should be obtained at, or shortly after, the first conference);

2. The form Request for Notice of Past Benefits must be completed and sent to Medicare with the Authority;

3. The Notice of Past Benefits should be checked with the client and those services which relate to the claim ticked, then the form returned to Medicare;

4. Medicare will then issue a Notice of Charge which is then valid to be relied upon for the ensuing 6 months.

This process can take some time (weeks!) so make sure if possible that a current Notice of Charge is maintained at all time so as to avoid any delay in settlement or payment of the client's claim.

Properly informed instructions can only be obtained from the client when the extent of likely deductions and preclusions have been disclosed and discussed beforehand. Written instructions should be obtained which confirm the decision made by a client to settle a claim

or to instead proceed to assessment and which acknowledge that this decision has been made after any outstanding questions or concerns have been answered; these written instructions should contain details of the anticipated deductions/preclusions and also set out the claimant's understanding of the minimum sum to be received in the event of settlement.

As discussed above, deductions may be payable from a settlement or an award of damages as follows:

1. Costs and disbursements not recoverable from the insurer, however, see above under Costs regarding restrictions;

2. Repayment of workers compensation benefits paid to the claimant; see s 151Z of the Workers Compensation Act;

3. Payment of outstanding treatment, pharmacy, hospital or other expenses which have not been previously presented or paid;

4. Repayment to a health fund of benefits paid for treatment of accident-related injuries

5. Repayment to Medicare of any payments made by it for medical expenses, as set out within a current Notice of Charge;

6. Repayment of any advances paid by the insurer to the client or treatment expenses already paid by the insurer;

7. Repayment of any benefits paid to the client by any other insurer in relation to the client's injuries or inability to work caused by the accident (e.g. loss of income benefits paid to a client under a superannuation policy); any such benefits may or may not be repayable depending upon the terms of the policy. It is therefore recommended that this be clarified before the claim is finalised;

8. Repayment to Centrelink of benefits paid to the claimant during what is determined by Centrelink to be the "preclusion period".

Centrelink Preclusion Periods

Information about repayments to Centrelink and about Centrelink preclusion periods can be found on the Centrelink Website.

A preclusion from obtaining certain Centrelink benefits for a certain period will usually apply to a claimant receiving payment for an injury claim, regardless of whether the claimant was receiving benefits at the time of injury or not.

The Centrelink preclusion period is determined by:

1. taking the total amount of any past and future loss of earnings within any awarded sum, or half of the amount of any settlement sum (because half of any settlement sum is legislatively deemed to be economic loss); and then

2. dividing this amount by the prescribed statutory figure – by way of example, the divisor figure as at 9 June 2017 is $970.38.

The resulting figure is then taken to be the number of weeks of the applicable preclusion period.

The preclusion period usually starts from the date of accident or from the date when loss of earning capacity commences and finishes after the determined number of weeks have expired.

Most types of income benefits received during the preclusion period by the claimant or the claimant's partner are repayable to the Commonwealth from any lump sum.

In addition, the claimant is prevented from receiving future Centrelink benefits for the duration of the preclusion period.

Calculation of the preclusion period and any amount repayable from a proposed settlement or award amount can be obtained from Centrelink by submission of the form Estimate of Centrelink Charge/Preclusion which can be found on the Centrelink website. This site provides a very useful "Compensation Estimator" which should be used.

If the claimant is a member of a health fund, the rules of that fund may also sometimes preclude payment of future benefits for treatment expenses relating to the subject injuries for a specified period of time, if the claimant has successfully concluded a claim which included future treatment expenses.

Effect on income protection policies

Many income protection policies contain offset provisions. This may mean that any settlement or award of damages will be offset against the client's income protection policy – in many cases reducing the income protection benefit to nil.

Obtain a copy of the client's policy and carefully consider whether the settlement sum or damages fall within the offset provision. If there is doubt, consider getting counsel's advice on the proper interpretation of the policy.

In some policies, only the part of the settlement or award of damages referable to income will be offset. In that case, consider making express provision in the deed of settlement specifying which part is referrable to economic loss and which part is referrable to pain and suffering. Otherwise, the insurer may try to offset the entire amount.

Going to court

Statement of claim and particulars

Uniform Civil Procedure Rules – Pt 4, Pt 14, Pt 15

File the Statement of Claim, and the number of copies necessary to serve each defendant plus one copy to be retained on your file, in the registry of the court with the correct filing fee.

UCPR rule 15.12 also requires a statement to be served upon a defendant at the time of serving the Statement of Claim, setting out full details of injuries and disabilities, any claims made for loss of income or domestic assistance, future loss of income or loss of earning capacity, and this statement must attach all available documents supporting such claims.

Once you have sealed copies arrange for service of the Statement of Claim and the timetable on the defendant/s. See discussion of service below.

UCPR Pt 4 sets out the formal requirements for documents filed in the court.

Where proceedings are commenced using the wrong process, they are nevertheless taken to be duly commenced: rr 6.5, 6.6.

The formal requirements for pleadings are contained in UCPR Part 14 Pleadings and UCPR Pt 15 Particulars.

Remember with professional negligence claims you must serve an expert report with the Statement of Claim: UCPR 31.36.

Interest

A claim for interest is not available, and should not be claimed, within the Statement of Claim.

Interest however may be paid as a penalty on the defendant if they failed to make a reasonable offer of settlement. This is claimed at the trial after the verdict.

District Court

Practice Note DC (Civil) No. 1 - Case Management in the General List is a practice note issued to 'facilitate the just, quick and cheap resolution of the real issues in all proceedings before the Court'.

The following is a brief summary of this practice note and the issues it covers. Practitioners should read the practice note in full and be sure they understand its requirements before embarking on any case in the District Court.

Time standard

Once a matter has commenced, the court aims to have it completed within 12 months.

Commencing proceedings

Proceedings should only be commenced when they are fully ready to proceed.

Be sure the relevant impairment threshold for damages for non-economic loss has been reached.

The plaintiff must file and serve particulars, and serve the supporting documentation on the defendant.

On receiving the Statement of Claim, the defendant must start preparing for trial based on the matters alleged.

Before commencing proceedings or filing a defence, legal practitioners must give their clients notice in writing of the requirements of this practice note and of the court's insistence on compliance with its orders.

Proposed consent orders

The plaintiff must serve proposed consent orders for the preparation of the case on the defendant with the Statement of Claim.

If the defendant doesn't agree with the proposed orders or wants to add additional steps, then they must serve amended consent orders on the plaintiff's solicitor at least seven days before the pre-trial conference.

Representation

If a party is legally represented, a legal practitioner with adequate knowledge of the case must represent that party whenever the case is listed before the court.

Pre-trial conference

The court will allocate a pre-trial conference date when the Statement of Claim is filed. The plaintiff must notify the defendant of the date and time when the Statement of Claim is served.

The pre-trial conference is held two months after commencement of proceedings.

At the pre-trial conference, the court will examine the orders proposed and make all appropriate directions and orders to ensure that the case is ready to be listed for hearing at the status conference. Disputes between the parties will be resolved or a hearing date fixed for a motion.

The court will give directions for the service of expert reports under rule 31.19 UCPR at the pre-trial conference. The parties must be able to tell the court the precise nature of any expert evidence to be relied on and the names of all experts so that appropriate directions can be made. All reports must be served at least 28 days before the status conference.

In cases under the Motor Accidents Compensation Act 1999 or Part 2A of the Civil Liability Act 2002, the defendant should tell the plaintiff whether or not it agrees that the relevant threshold has been reached at or before the pre-trial conference.

Subpoenas, motions and summonses

Subpoenas

Parties must issue subpoenas as early as possible so that documents can be produced and inspected and are available for the proper preparation of the case, including submission to

experts. For more information about subpoenas please see our 101 Subpoenas Answers Guide.

Parties should inspect all documents produced under subpoena and serve any documents on which they rely before the status conference. Parties must ensure that they follow up any non-production of documents and file any necessary notices of motion before the status conference.

Motions and summonses

Interlocutory disputes between the parties should generally be resolved by filing a notice of motion.

A motion will be allocated a hearing date in the general motions list on the first available Friday, and the parties should be ready to argue the motion on the first return date.

Status conference

Within its standard practice note, it is stated that the District Court aims to have all cases completed within 12 months of commencement. Most cases will therefore be required to take a hearing date within a period between 8 and 11 months from commencement.

Matters allocated a hearing date will generally be referred to mediation unless the parties can satisfy the court that mediation is not appropriate.

When parties attend a status conference they must have instructions about mediation, details of the availability of their client, witnesses and counsel, together with an estimate of the length of the case to allow a hearing or arbitration date to be fixed.

Note that availability of counsel is generally not an acceptable reason not to be able to take a hearing date within the available range offered by the Court.

Long trial dates

In cases estimated to take five days or more, the court will allocate long trial dates at the status conference or any subsequent directions hearing.

Cases with an estimated trial time of two weeks or more will be listed before the court for case management directions. Each party should be represented on that date by counsel briefed on the trial or the solicitor with conduct of the case to enable all proper directions to be made.

Alternative dispute resolution – District Court

The court will refer all appropriate cases for alternative dispute resolution under part 4 of the Civil Procedure Act. The parties must have instructions about suitability for mediation, arbitration or other alternative dispute resolution when they ask for a hearing date.

Directions hearings and show cause hearings

At any stage, the court may refer a case to a directions hearing before the civil list judge or the judicial registrar. If a case is not ready for hearing at the status conference it will be referred for directions. Any order to provide statements or file affidavits must be strictly complied with. Generally, the court will not accept statements, affidavits or submissions that have not been provided in accordance with an order.

Where there has been non-compliance with court orders, the court may list a case for:

(a) The plaintiff to show cause why the case should not be dismissed for want of prosecution;

(b) The defendant to show cause why the defence should not be struck out and/or any cross claim dismissed for want of prosecution.

Adjournments

The court will only grant adjournment applications where there are very good reasons. The failure to comply with orders will normally not be a reason for adjournment. Parties who breach orders may be restricted in the evidence that they can rely on at the hearing.

An application for adjournment of a trial or arbitration is made by notice of motion and supporting affidavit and must be made at the earliest possible opportunity.

Settled matters

Until terms of settlement, consent orders or a notice of discontinuance are filed, the parties must attend when the case is listed before the court.

Supreme Court

For cases of professional or medical negligence, refer to Practice Note No. SC CL 7 - Supreme Court Common Law Division - Professional Negligence List.

For other claims refer to Practice Note No. SC CL 5 - Supreme Court Common Law Division - General Case Management List.

The following is a summary of the general case management list practice note and the issues it covers. Practitioners should read the practice note in full and be sure they understand its requirements before embarking on any case in the Supreme Court.

Commencement

Plaintiff

A plaintiff must file an originating process as well as a General Case Management (GCM) document. The GCM sets out a statement justifying the commencement of the proceedings in the Supreme Court and why the claim is for that amount.

Also filed with the Statement of Claim, or shortly thereafter, is a Statement of Particulars.

Plaintiff's General Case Management document must contain:

1. A concise narrative of the facts the plaintiff intends to prove on the issue of liability, so drafted as to expose the specific matters of fact, but not law, upon which liability is likely to depend;

2. A statement clearly identifying any previous proceedings;

3. A statement about any other proceedings the plaintiff has brought in any court for damages for personal injuries which may be relevant to the assessment of damages in the proceedings in which the GCM document is filed;

4. Full particulars of any accident or injury the plaintiff has suffered which is not the subject of a claim in the proceedings in which the GCM document is to be filed and which may be relevant to the assessment of damages.

Annexed to the GCM document should be any reports about the accident/injury that have not yet been served on the defendant. If the reports have been served then a Schedule of Reports should be annexed, detailing what reports have been served and the date they were served.

Defendant's General Case Management document must contain:

A concise narrative of the facts the defendant intends to prove on the issue of liability, including contributory negligence.

Annex a copy of any claim form or written report of the injury or accident the defendant or their insurer has received from the plaintiff.

More about the General Case Management document

Each party files the GCM document in order to provide the court with information that will ensure that the Directions Hearings are efficient and effective.

A GCM document is not a pleading. It may be amended at any time without leave, but any amendment may be taken into consideration upon the question of costs.

If a report or other document that is annexed to a party's GCM document has already been served on another party, a further copy of that report or document need not be annexed to the copy of the GCM document which is to be served on that party. That copy of the GCM document must however include a schedule listing the reports and documents which have been served and the date of service.

Directions Hearings

Proceedings in the list will generally be managed by way of Directions Hearings.

The first Directions Hearing will be appointed for approximately three months after proceedings are entered in the list. The date of the first Directions Hearing will be given by the registry in a notice issued at the time of filing the Statement of Claim to be served by the filing party.

Upon a defence or a statement of cross-claim being filed in default proceedings, the registry will give notice to all parties with an address for service in the proceedings of the date of the first Directions Hearing.

Action prior to first directions hearing

The originating process and pleadings should be as brief and precise as the nature of the case allows.

It is expected that the parties' legal representatives will have discussed the case before the first Directions Hearing and will have:

- Narrowed issues and identified any matters of agreement;
- Agreed on suitable interlocutory orders, directions or arrangements;
- Prepared a draft timetable for the future management of the proceedings;
- Prepared draft short minutes of any orders or directions to be sought at the Directions Hearing; and
- Discussed the possibility of settling the dispute by alternative dispute resolution (ADR).

Representation

Each party not appearing in person must be represented at the Directions Hearing by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made. Any failure to comply with previous directions should be addressed by an affidavit of the defaulting solicitor explaining the reasons and the steps now being taken to remedy the non-compliance.

Actions at a directions hearing

The purpose of a Directions Hearing is to ensure the just, quick and cheap disposition of proceedings in accordance with the overriding purpose set out in s 56 of the CPA. Each party is obliged to notify the court and the other parties if they are aware of any substantial default that cannot be cured by the making of consent variations to directions or timetables.

The tasks at a Directions Hearing include, but are not limited to:

- Considering whether the proceedings would more appropriately be heard in the District Court and making a consent order accordingly;

- Defining the matters in issue, including liability. If no defence (or defence to cross-claim) has been filed, the Registrar may direct that there be judgment as to liability on that claim;

- Considering whether there should be a separate trial of the liability issue held before the trial of issues as to quantum, especially in the case of a child plaintiff where the assessment of damages may take some time before being able to be determined;

- Directing that a party or all parties serve or file and serve witness statements - the purpose of such a direction being to facilitate clarification of issues and realistic negotiations for settlement;

- Considering whether ADR is suitable;

- Establishing whether any party requires a trial by jury (bearing in mind the provisions of UCPR 29.2);

- Making consent orders for the completion at the earliest possible time of interlocutory steps such as discovery, interrogatories, views, medical examinations and expert reports;

- Directing that a party or all parties serve or file a statement of damages – the purpose of such a direction being to facilitate what heads of damage are genuinely in dispute and to provide a basis for realistic negotiations for settlement.

Expert witnesses in personal injury actions

The court is concerned about the number of experts often expected to give evidence in personal injury cases. The practice of having a large number of experts - medical and otherwise - whose opinions may be overlapping and whose reports either are not used or are of little assistance to the court when tendered, is costly, time consuming and productive of delay. The attention of practitioners dealing with cases in which a claim is made for personal injury or disability is drawn to Practice Note No. SC Gen 10, which deals with 'Single Expert Witnesses'.

Concurrent and single expert evidence

All expert evidence will be given concurrently unless there is a single expert appointed or the court grants leave for expert evidence to be given in an alternative manner.

At the first Directions Hearing the parties are to produce a schedule of the issues in respect of which expert evidence may be adduced, and identify whether those issues potentially should be dealt with by a single expert witness appointed by the parties or by expert witnesses retained by each party who will give evidence concurrently.

Alternative dispute resolution – Supreme Court

If the matter appears to the court to be appropriate for resolution by mediation or arbitration, the court will refer the proceedings for mediation or arbitration.

Variation of directions and timetable

Case management directions given at a Directions Hearing and times set for compliance with any direction may be varied:

(a) by consent of all parties, so long as such variation does not extend the time for compliance with any direction beyond the day specified by the court for compliance with the last direction made; or

(b) by the court.

Where a party seeks a variation of the directions and timetable that is not consented to by the other parties, any party may apply to have a further Directions Hearing listed.

Listing for hearing

When ready for trial, for proceedings in which a claim is made for damages for personal injury or disability, standard directions are deemed to have been made, unless the court otherwise orders.

For further information about conducting a matter in either the District Court or Supreme Court, please refer to the relevant guide.

Finalisation

When the case is over

The case is not over and the file is not dead the very second that the judge leaves the bench after each side has made submissions! Do not give in to the temptation to chuck all your notes and documents in a box and wave goodbye to the client as if you will never have to see them again. The file, which has inevitably been torn apart in Court in response to counsel's urgent whispered demands for various documents, should be reconstructed and reinstated in your office. The client should be communicated with and made to feel that he or she is still important, supported and represented.

Most judges will reserve their decision and you may expect to wait weeks, even months for a judgement. You should warn your client of this fact before the case – clients do not know this and often expect a decision on the spot at the end of the evidence. This period of waiting can be extremely stressful for a client, who unlike you doesn't have other cases to which they must turn their attention, so keep the client's welfare in mind and stay in touch.

Remember that the case can still settle even after the trial is over, before judgement is delivered. No one knows for sure what a judge will do and once all the evidence and argument has been heard it may be appropriate to make another offer. Advise your client of this possibility. Do not be surprised to receive an offer in that period and be ready to react quickly to it, as it will obviously only be held open until the judgement is delivered. Similarly, consider whether your client wants to make any such offer.

When the judgement is finally delivered, you will either have won or lost.

Unfavourable verdict

If you lose you will need to consider and advise your client about whether to institute an appeal. This will require careful consideration of the evidence, the verdict and the transcripts of the case. You will need to confer with the trial counsel and/or perhaps brief a new counsel or senior counsel. Even if there is to be no appeal, you will need to advise your client about any adverse costs orders and negotiate party/party costs with the other side.

Favourable verdict

If you receive a verdict in your client's favour, there is still plenty of work to do. Before a defendant will give you any money you need to provide them with a Notice of Charge from

Medicare (see above) and Centrelink (if applicable), as well as a Authority to Receive/Direction to Pay (see precedent under Settlements). You may need to calculate interest payable on the judgment amount. You will also need to negotiate party/party costs with the other side. You should get your client's written instructions to do this (see precedent) and their Authority to disburse the settlement funds (see precedent under Settlements).

Closing the file

When all of that is done, appeal rights exhausted or expired, verdict money received and disbursed, costs agreed and paid, THEN you should terminate your retainer in writing and close your file.

Further information

OTHER TRUSTED AND USEFUL RESOURCES

District Courts of NSW

Personal Injuries legal framework – Judicial Commission of New South Wales Civil Trials bench book

Court Mentions List 2017 – A list of lawyers available for mentions in all NSW courts

RELATED BY LAWYERS PUBLICATIONS

Papers, articles and case law

District Court Litigation Guide

Supreme Court Litigation Guide