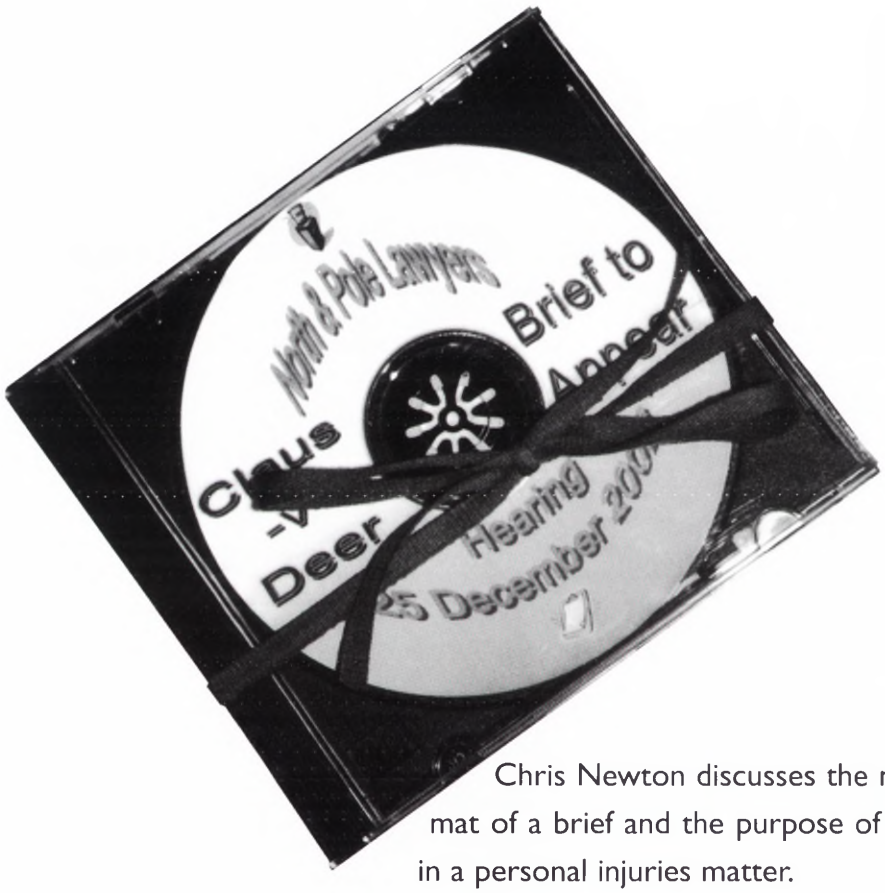
CHRIS NEWTON, QLD

Preparing a *Brief* to Counsel



Chris Newton discusses the nature, content and format of a brief and the purpose of instructions to counsel in a personal injuries matter.

Chris Newton is a Barrister at Chambers
PHONE 07 3232 2140
EMAIL cnewton@carbolic.com.au

What is a Brief?

In the age of the rapid-fire photocopier, there is a tendency to photocopy the file and send it to counsel marked "Brief". The very word "brief" should tell you that is not what is required. Its legal usage dates from 1631 as a summary of facts and points of law drawn up for counsel in charge of a case. The first and obvious comment to make about preparing any brief, and particularly a brief for trial, is that it presupposes that the person preparing the brief has applied their mind to the purpose of the brief, the stage the action has reached, and what counsel will require to adequately address the issues raised in the brief. What is or is not included in a brief depends in its inception on an understanding of the nature of the action, what is required of counsel and the purpose of the brief.

For example, in a straightforward motor vehicle collision, where the plaintiff was stationary, the defendant ran into the plaintiff from behind, and the

plaintiff was hospitalised, it is highly improbable, in the face of an admission of liability from the defendant, that counsel would require any liability documents at all. Conversely, in a rear end collision of a relatively minor nature where the plaintiff is not hospitalised, an issue which often arises is whether or not the plaintiff's complaints are likely or consistent with the nature and extent of the accident, and thus causation may well be a live issue. In that event, evidence which might well derive from liability documents about the nature and extent of the damage to the vehicle and the cost of repairs might become relevant in the action as being some evidence of a significant shunt, for example, the seat back broke.

In some actions, one gets lengthy disputes at the outset about who are the proper parties, and there may be applications joining parties and the like. Whether the pleadings and correspondence and associated documentation (which may or may not include a court application) should be incorporated into a brief being prepared for trial will depend upon a number of issues. If costs have been reserved so that counsel needs to understand the process that went on to argue that costs issue, then they are all prospectively relevant to a trial brief, albeit only for the costs argument. If costs have already been determined, then apart from including the order so that counsel knows what happened at a given point in time, there is probably no reason to incorporate into a trial brief the assorted documentation leading to that point, all of which is now superfluous.

Again, it is not hard to think of exceptions to that generality. For example, an application for leave to institute proceedings out of time inevitably contains an affidavit by the plaintiff which contains evidential statements about material facts, and it would be quite remiss not to include such an affidavit in a trial brief notwithstanding that the application had been concluded by a court order with a final costs order.

As a general rule, do not deliver a brief to counsel at all if your instructions are going to say that there is further information coming which is required before he or she can deal with the request. A common example is a brief to advise on quantum where the instructions suggest that the plaintiff is seeing a particular doctor and the report will be forwarded when available. The moment I read instructions like this, that brief goes on the back-burner, because, until the report is received, I am not about to embark on a quantum advice unless specifically instructed to do so.

In the same vein, why ask counsel to settle a complaint against, for example, a company when he or she is not briefed with a copy of the routine company search? It often has been de-registered or struck off. This is an inefficient way to commence an action which may necessitate an application prior to pleading and require the pleading itself to be further amended accordingly. If the company has been deregistered, it may be possible to sue the insurer directly under s601AG *Corporations Law* or the similar legislation where compulsory insurers exist. Those types of fundamental issues need to be addressed at the outset.

Instructions to Counsel

It is critically important to understand that you should prepare your instructions to counsel on the assumption that at some point in time they are going to hit counsel's desk when his or her mind is anywhere but on your brief. Counsel just wants to turn to the instruction sheet and quickly find out what the brief is about. In their simplest format, instructions may just be a routine request to advise on quantum in an ongoing matter in which event the instructions should say just that. For example, "Would counsel please advise on the likely quantum of recovery in this matter" and/or "so that an 'offer to settle' can be made" and/or "for the purposes of attending a settlement conference". Counsel then understands exactly what is required and assumes (rightly or wrongly) that there are no special considerations.

Having told counsel precisely why you have delivered the brief, it is critically important to then follow that with any special considerations, the most obvious of which are time limits or prearranged steps in the action which require that the brief be returned within a specified time. These types of special considerations should follow immediately upon the statement of instruction, that is, the purpose of the brief. Obviously one special instruction that should be included is to remind counsel that this is a matter that is being conducted on a speculative basis or a carry fees basis, as the case may be.

If one is preparing a trial brief where counsel has already advised on evidence, then one certainly should instruct the solicitor to respond to that advice on evidence. I am not suggesting one should respond to an advice on evidence for the sake of doing so, but it is a specific example where issues of deficiency at the time of preparing the advice are raised, and if they are not met by the trial brief being delivered there ought to be some explanation for what the problem is, or what steps are being taken to meet them.

It is of great assistance to counsel, particularly where the instructions are being prepared by the solicitor familiar with the action, if they raise perceived issues or points which will be the subject of particular interest at the trial. This may span a whole range of issues, from the fact there may be a costs issue to be addressed because of some interlocutory step, to an expectation that a particular issue will be contentious at trial. For example, whether or not a particular injury is associated with the accident as distinct from a natural degenerative condition. It is helpful to have those comments in the instructions because it flags a particular area on which to concentrate on in the brief and then specifically address in preparation for trial or in the advice itself. In addition, it puts into practical effect the old adage that two heads are better than ▶

"The most commonly used section of a personal injury brief is the medical reports section . . ."

one, ensuring that the client receives the best representation available.

Page Numbering

The purpose of having a brief in a paginated form is that it permits detailed and careful preparation by counsel so that one can flick to a particular part of the brief for a particular purpose. There is no logical reason why pagination should sequentially follow from Page 1 to whatever the last page of a brief is, and I would suggest that the updating process and the nature of briefing would be considerably simplified if you adopted a practice of paginating, for example, the pleadings section of the brief from Page 1, the medical reports section of the brief from Page 100 or again from Page 1, the statements section of the brief from Page 200, etc.

The principle is simple - if you have to update by adding further pleadings, then you do not have to renumber any pages - you merely insert the new pages at the end of the pleadings section and continue the numbering and rework the index. There is no logical reason why this is not an acceptable format for a brief, and it will simplify the updating procedure.

Order of Material

Any brief should commence with all the formal court documents, that is, the pleadings section of the brief which includes documents such as disclosure lists, interrogatories and answers thereto, and statements of loss and damage. It must certainly include any orders which have been made by the court and any offers to settle which have been made.

The most commonly used section of a personal injury brief is the medical reports section and it ought to follow immediately after the pleadings in any personal injuries action. All relevant medical reports in an action should be included, for example:

- all medico-legal reports obtained and available, irrespective of which side they were obtained by;
- all available supplementary medical information in the nature of hospital discharge summaries, x-ray reports, MRI reports and the like, even if to achieve that goal one has to extract those documents, for example, out of non-party discovered workers' compensation documents or doctors' records;
- voluminous bundles of documents one sometimes gets from non-party discovery of hospital records, army records and the like which may or may not become significant should not be included, other than to the extent they might contain specific x-rays or medical reports as such. If this is the case they should be briefed in a supplemental section further on in the brief.

What follows this? Obviously central to any brief must be the plaintiff's statements, and whether one has a plaintiff's statements section as distinct from a liability section or not will depend upon the circumstances. They may be combined or one may have a statements section followed by a liability section which may include additional documents such as police reports, engineering reports and the like. It is always difficult to generalise, but certainly there are some cases where plaintiffs have delivered lengthy letters which deal in meticulous detail with aspects of liability (or for that matter, quantum), and where it might be appropriate to include some of these letters in the statements section of the brief (perhaps rather than correspondence).

One may follow the statements and/or liability section or sections of the brief with the supplemental medical evidence, if applicable, but certainly one should then have a section where those documents disclosed by the plaintiff which have not otherwise been inevitably included in the brief should appear, and a similar section for the defendant's disclosed documents. Again, some discretion is appropriate, although one would normally expect that only relevant documents will have been obtained from the defendant.

Equally, with reference to the plaintiff's documents, in personal injuries actions one can end up with extensive bundles of assorted receipts and accounts for special damages. Counsel does not want nor expect to have included in the plaintiff's documents that myriad of piecemeal documentation which justifies what might otherwise be a quite large special damages claim. Detail at that effective accounting level is not necessary and is the province of the instructing solicitor.

Sensible discretion, however, should be exercised because, for example, either as a refund documents section in its own right or within these documents must appear critically important documents such as Health Insurance Commission refund documents and printouts, hospital claims, WorkCover letters, Department of Social Security letters, Commonwealth Rehabilitation Service letters and the like. Whether one separately sectionalises these or not obviously depends upon the size and nature of the action. Sometimes it is appropriate to do so, whereas at other times they will merely appear within these broader document categories.

Where separately sectionalised, they could immediately follow the medical reports, and this may be the preferred approach.

Usually a brief will then contain a correspondence section, but again some discretion is appropriate. Counsel does not want nor need a regurgitation of all the correspondence that has flowed between the client and his or her instructing solicitors and between instructing solicitors and the other side. Again, it is difficult to generalise but some discretion is required. There are some categories which must be included, such as:

- letters relating to admission of liability, heads of quantum and/or documents;
- any significant correspondence either with the client or the other side which raises issues that are of concern to either side. This is often the best hint counsel will get of where an opposing party is coming from in an action, and often assists in appreciating the client's needs and perceptions;
- any correspondence where there has been substantive discussion about sufficiency of pleadings, particulars, answers to interrogatories, statements of loss and damage or disclosure. Again, because it forewarns counsel of areas of concern and might highlight deficiencies in the material or the pleadings which may become an issue in the trial;
- relevant diary notes where a client has telephoned are very helpful because they give a specific date and the client is normally calling for a specific reason. The diary notes often become important in preparing detailed chronologies for the purposes of trial;
- correspondence where instructing solicitors have advised the client either on the prospects of success or in terms of likely recoverable quantum, or any other material issue.

Obviously the list might be endless, but one can equally suggest some categories of correspondence which should not be included, such as:

- lengthy correspondence passed backwards and forwards between solicitors which has been the subject of a court application that has resolved the issue;
- correspondence which has become superfluous, for example, because liability has been admitted and it relates purely to liability disputes preceding admission.

Last, but not least, a brief ought to contain a section with counsel's opinions and advices. While it might be true that somewhere in any number of bundles of documents counsel may have hard copies of advices given, or may be able to retrieve them from a computer, it is infinitely preferable to have a self-contained brief which has copies of all prior advices given, perhaps even a covering letter with the initial settlement of the pleading.

Conclusion

The options and possibilities in preparing a brief are numerous and often there is no right and wrong way to prepare a brief and to instruct counsel. You may well disagree with some of the suggestions I have made herein and have good reason for doing so. I trust these comments are appreciated for what they are intended to be - some perceptions fairly much from my personal perspective about preparing personal injury briefs which I hope will at least make you think about the process, and appreciate the importance of the process, so that your briefs are constructive and relevant and leave counsel in no doubt about what is required. I would be surprised, nevertheless, if the main points I have described are not on the shopping list of most court advocates or advisers. In general terms, the more thought and effort you put into preparing the brief, the more rewarding will be the response you receive from counsel and the performance you see from counsel in the courtroom. PL