

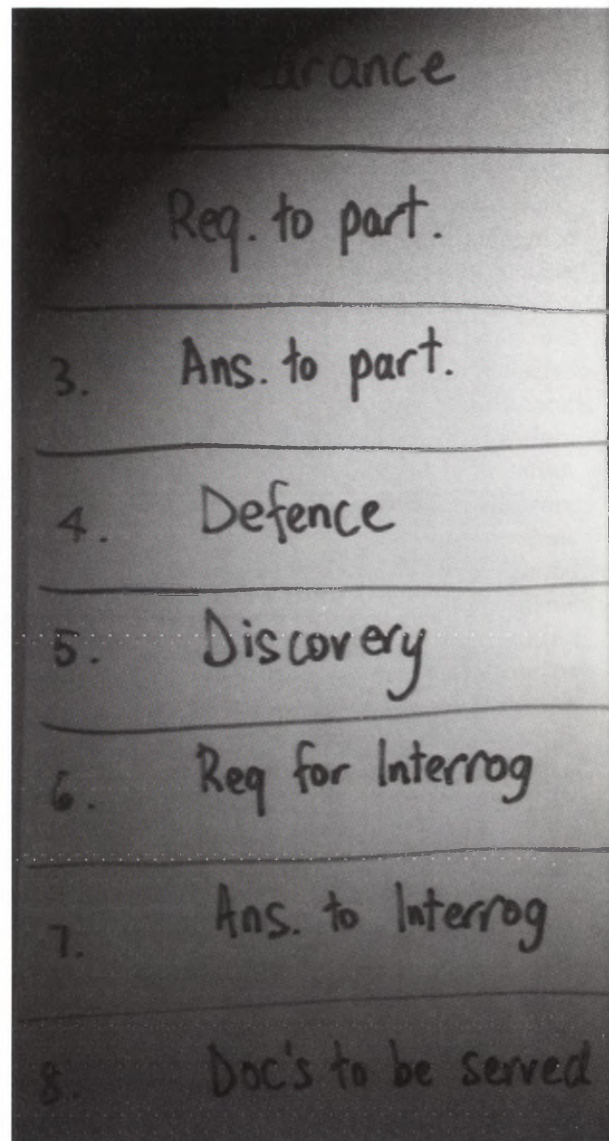
Preparation for *trial* in a personal injury action

An important element in enhancing the reputation of your firm, and of yourself as a solicitor, is to ensure that you prepare properly for trial. In this article, David Reid provides a handy checklist of everything you should address when preparing for trial.

Prior to Obtaining a Date for Hearing

It is of course stating the obvious to say that preparation for trial commences well prior to the institution of proceedings, indeed from the time you obtain instructions, and continues throughout the course of the claim. Nevertheless, it is something that is often overlooked in the daily accumulation and exchange of correspondence and documents. From the time of obtaining instructions, a solicitor must prepare the matter with a view to its determination, either at a conference, mediation, appraisal, or in a declining number of cases, at trial. However the matter finally comes to be resolved, it is important to keep in mind that the matter may ultimately end up being determined at a trial and to prepare accordingly, ensuring that at all stages the file is properly progressed so that it can be dealt with efficiently at any stage of the litigation process.

David Reid is a Consultant at MurphySchmidt Solicitors and at Eardley Motteram Solicitors **PHONE** 07 3303 9830
EMAIL dreid@murphyschmidt.com.au



Obtain full statements from all relevant witnesses

I found through my experience practising in litigation for over 20 years that one of the most basic but frequently overlooked requirements in effectively preparing an action is to ensure full statements are obtained from all relevant witnesses. This should be done at the earliest opportunity. Too often the proofing of witnesses is left until late in the litigation process. It is important that corroboration of your client's or witness's statements be obtained, if possible.

Prepare a chronology

A particular matter which I have found of enormous help both in my time as a barrister and more recently as a solicitor, and which I have tried to encourage solicitors in the firms where I have worked to prepare as a matter of course, is a chronology, cross-referenced to relevant source documents. The preparation of this document should be commenced from the time instructions are obtained. It is a particularly useful document to allow a proper understanding of the case in a short time. This is particularly of importance in large

23/11/01	9
18/1/02	25
5/4/02	12
3/5/02	3/
7/6/02	7/4
2/7/02	

firms where, inevitably, solicitors handling a matter change over the years. If an accurate, up to date and cross-referenced chronology is on file, it enables a new solicitor taking over a file to have a ready understanding of the matter, and, from a barristers point of view, is enormously helpful for cross-examination if the matter proceeds to trial.

“... I urge you to give the use of chronologies a try.”

As each new piece of information comes to hand, the chronology must be added to. For example, when tax returns are obtained include details of the dates of employment, earnings, periods of unemployment, periods when the plaintiff was in receipt of social security, etc. Medical reports can be used to identify dates on which operations

were performed, or to identify dates when the plaintiff returned to work. The chronology highlights the strengths and weaknesses of the case and by cross-referencing it to, for example, answers to interrogatories, it can be used to ensure that answers do not conflict with known facts. If the chronology is kept up to date throughout the life of the file it is not a burdensome task, and is useful both for solicitors and barristers since it enables an easy comprehension of the facts of the case and is most useful in court.

In order to be effective, the cross-referencing must include not only a reference to the particular source document but to the section of a particular page in the document. For example, a reference “Dr Harrison, 6.3.01 p 3.20” indicates the fact referred to is at page 3 of the report of Dr Harrison of 6 March 2001, 20 per cent of the way down the page. If readers of this article gain nothing else from it, I urge you to give the use of chronologies a try. They are enormously useful and, with practice, can be used to develop a relatively short summary of a case to assist with an understanding of the matter, and with the presentation of the matter at trial.

Consider the implications of all matters under consideration

It is important for a solicitor at all stages of an action to turn his or her mind to the implications of all matters coming to his or her attention. For example, there is little use in taking a statement concerning a plaintiff's past medical history in a personal injuries case without following up any relevant past history by way of discovery of doctor's records. Similarly, a full employment history should be obtained by way of discovery from former employers, tax returns, etc. It is important to not just “go through the steps” of obtaining a statement, medical reports and other documents. Solicitors must always apply their professional expertise to matters under consideration. Every medical report, witness statement, police or traffic report, loss assessors report etc, when they come to hand, must be fully read and consideration given as to whether they call for any further areas of investigation. You must train yourself to analyse documents and see what further can be done to advance your client's case. I was often surprised, when briefed in matters, that

a bundle of tax records had been provided but no attempt apparently made to analyse a plaintiff's work history to ascertain whether there were, in the past, significant periods of

COMPLETE DOMESTIC CARE

Need help qualifying your client's Domestic Assistance claim?

At Complete Domestic Care, we provide reliable current and historical market rates for all forms of care including:

- ✦ Nursing rates (live-in / live-out etc). Our rates are the most reliable because we provide an average of several established Nursing Agencies' rates.
- ✦ Handyman/gardening assistance
- ✦ Cleaning ✦ Nannies, Chauffeurs & other miscellaneous needs

Our experienced nurses, occupational therapists and physiotherapists are also available to assess Domestic Assistance needs in conjunction with the treating specialists.

TEL: (02) 9988 4195 FAX: (02) 9402 7395
27 BOBBIN HEAD ROAD, PYMBLE NSW 2073

cdclisandrews@bigpond.com

unemployment, periods when the plaintiff was in receipt of social security, or other relevant information which is contained in the tax returns themselves.

Make an assessment of liability and quantum

It is important to make a realistic assessment of liability and quantum as early as possible. Early settlements are likely to be advantageous to both sides and reduce costs. In the firms where I have worked I have encouraged solicitors to prepare a short written opinion on liability so that as new solicitors come across the matter they can understand the strength of the claim and to maintain the original solicitor's focus on the strength of its case. A proper understanding of this issue can affect one's attitude to settlement, and one's keenness to allow the matter to proceed to trial.

Obtain counsel's advice

Prior to obtaining a date for hearing, it is important to obtain counsel's advice on evidence. If you are to conduct the case yourself, prepare your own list of evidentiary matters to be attended to.

Update matters prior to obtaining a hearing date

Arrange for updated medical reports to be obtained. Ascertain whether any witnesses are unavailable at any time

during the time when the trial is likely to be listed for trial. Check counsel's availability. All of these matters should be done prior to obtaining a hearing date. After a date is obtained, it may be too late, and if, as sometimes now happens, there is not a great deal of time after obtaining a trial date and before a trial you may find that important evidentiary matters cannot then be gathered.

After Obtaining a Date for Hearing

After a date has been obtained for hearing the following matters will need attention.

- Diarise the trial date.
- Notify your client and witnesses of the trial date and make times for expert witnesses to give evidence.
- Arrange with the other side suitable times for experts to attend to avoid a conflict. Attendance times can be rearranged at this stage without significant inconvenience. Check with the other side its attitude to phone evidence if this is desired. Although the court has an unfettered discretion to receive such evidence, the consent of the other side is a relevant consideration.
- Ask the other side to advise whether they are prepared to admit:
 - Expert's reports;
 - Special damages;
 - Any particular issues, for example liability, particular documents, rates for care, award rates of pay, etc so as to limit the expense and duration of the trial.
- Advise any experts whose reports are admitted that they will not be required.
- Subpoena any witnesses necessary to be subpoenaed.
- Ensure you have all necessary documents dealing with statutory and other refunds, award rates of pay, cost of domestic assistance, etc. Take care to ensure you have an appropriate Health Insurance Commission statement to avoid delay in payment or receipt of damages.
- Prepare a schedule of special damages clearly indicating whether each particular item is admitted or in dispute. If the item is in dispute, cross-reference the schedule to a page in the brief supporting the expenditure, such as receipts or invoices. The schedule should indicate if and when the item of special damages was paid to assist with calculating interest.
- Amend the chronology by cross-referencing the pages of the brief to enable easy reference.
- Arrange for conferences between counsel and appropriate witnesses.
- Identify documents which are to be tendered and have them readily available at trial for tendering in sequential

PROFESSIONAL MEDICAL NEGLIGENCE REPORTS

Susan Welling & Associates



acting as independent intermediary between specialist doctors and solicitors.

We have a wide range of specialists available to provide expert medical negligence reports.

- | | |
|---------------------------------|--|
| • Anaesthetist | • Hand, Plastic & Reconstructive Surgeon |
| • Cardiologist | • Neurologist |
| • Chiropractor & Osteopath | • Neurosurgeon |
| • Dentist | • Oncologist |
| • Dermatologist | • Ophthalmologist |
| • Ear, Nose & Throat Specialist | • Orthopaedic Surgeon |
| • General Practitioner | • Pharmacologist |
| • General Surgeon | • Physician |
| • Gynaecologist/Obstetrician | • Psychiatrist |
| | • Radiologist |
| | • Urologist |

PO Box 1353, Neutral Bay, NSW 2089

DX 21727, Neutral Bay

Tel: 02 9929 2921 Fax: 02 9929 9218 Email: susanw@smartchat.net.au

... it is important to keep in mind that the matter may ultimately end up being determined at a trial."

order, as arranged with counsel. This should be done at a conference with counsel. If counsel has prepared an appropriate trial plan it should be possible to know well in advance the sequence in which documents will be tendered as exhibits. No doubt, at any trial, there are surprises but preparation at this stage ensures an orderly and efficient disposition of business before the court.

- Ensure the statement of loss and damage is up to date.
- If photos, plans, or similar documents are to be used, ensure copies are made for counsel on both sides and for tendering. Again, this allows the efficient disposition of the court's business. More recently, some cases have involved the presentation of evidence using electronic media. Again, ensure that all parties can readily access documents being referred to, and so obviate the need for the trial to be held up while, for example, photos or other documents are passed from party to party so that everybody has an understanding of the matters being considered. If the action is commenced in Queensland, ensure you comply with rule 393 of the *Uniform Civil Procedure Rules 1999* if you intend to rely on a plan, photograph, video or audio recording or a model. Each state probably has its own, similar rules.
- Where a particular witness has provided a number of statements over a period of time, have them reduced into one compendious statement to assist with leading the witness in evidence.

Briefing Counsel

There is an article by Chris Newton elsewhere in this issue of *Plaintiff* on briefing counsel. However, I'd like to add the following brief points that should be considered when briefing counsel.

Choose documents carefully

A difficulty sometimes associated with briefing a barrister is that the person preparing the brief does not adequately understand what should be included. Not all documents should be briefed to the barrister. It is, however, a sin to leave out important documentation so decisions as to what should or should not be included is a matter that requires some

expertise and an understanding of the issues in the case. If liability has been admitted, do not include superfluous documents dealing with the issue.

Ensure the brief is organised

Ensure the brief is paginated and indexed, and organised under appropriate sections.

Ensure the brief is prepared in such a way that further documents could be easily added to the appropriate section of the brief and the brief can be repaginated by adding a further letter to the pagination. For example, new

documents to be inserted after page 111 would become 111A and so on. A further index should be prepared and supplied to counsel as further documents are added. If senior counsel is engaged, ensure identical briefs are prepared.

Clearly identify the issue

Observations to counsel must clearly identify the issues in dispute. If liability is admitted or particular reports or heads of damage are admitted be sure this is clearly stated in the observations. If solicitors have conducted any research, or discovered relevant cases, be sure counsel has the benefit of your research. Advise counsel of times when witnesses have been arranged. ▶

Engineering and Ergonomics Expert

Mark is a professional engineer, a qualified ergonomist and has been an APLA member for several years. His consulting group has advised about 2000 enterprises since 1977 in safety, engineering and ergonomics. He also assists many Australian law firms in their personal injuries matters, and has prepared over 5000 reports on public and workplace accidents. Mark appears regularly in court in several States, giving independent expert opinion, most commonly on **back and upper limb strains; machinery incidents; slips and falls; RSI; and vehicle accidents.** Fee options for plaintiffs include deferred payment, with special arrangements for regular clients. Details, a brief CV and a searchable list of cases can be found at www.ergonomics.com.au/expert.

Mark Dohrmann
AM FIEAust BE (Mech) CPEng Cert Erg MESA



Mark Dohrmann and Partners Pty Ltd
PO Box 27
Parkville VIC 3052

(03) 9376 1844
mark@ergonomics.com.au

Search Mark's cases by keyword at:
www.ergonomics.com.au

Witnesses

The following steps should be taken to ensure both you and your witnesses are prepared for trial.

- Arrange times for conferences and for giving evidence.
- If their attendance becomes unnecessary, advise them as soon as possible.
- Arrange a view of the scene of the plaintiff's injury prior to the conference with counsel if this is necessary. Generally it is unnecessary for counsel to attend, but discuss this with counsel in each case. Be sure you have a camera and tape-measure to assist witnesses with distances. Ensure witnesses do not attend together to avoid the possibility of an allegation of collusion. Consider whether a scale plan is necessary to assist the witness giving evidence.
- A video of the plaintiff in cases of severe injury to demonstrate to the judge the difficulties the plaintiff has with life that should be considered.
- Give consideration to whether or not colour photographs of the plaintiff's injuries are required, particularly in cases of scarring.

Trial

Attention to the following matters at trial will help things proceed more smoothly.

- A chronology adapted from that I have earlier referred to can be prepared in consultation with counsel for tendering. It must refer only to documents which are to be put in evidence or to oral evidence given.
- Have a schedule of medical reports with attached copies for the judge to work with, in addition to the copies to be tendered. The judge cannot write on exhibits.
- Keep a list of exhibits in a folder with copies of all exhibits. Counsel may wish to use copies from his or her own brief which may have appropriate observations written on them. Exhibits in the folder should be clearly numbered.
- Keep notes of evidence, especially during the examination by your own counsel who will be busy asking questions and hence cannot easily take notes. Be aware of the issues and remind counsel if it seems to you a question has been overlooked.
- If you or your client wish to communicate with counsel, write down the observation so as not to interrupt counsel until convenient or necessary.
- Ensure witnesses are available as required so the trial is not adjourned due to the unavailability of witnesses. When expert witnesses arrive, advise counsel so that they could be interposed if possible. Ascertain whether witnesses are to be sworn or are to give an affirmation. If they are to be sworn, but not on a bible, make appropriate arrangements.
- Ensure witnesses are advised of the progress of the trial and of any changes as to when they may be required.
- If evidence is to be given by phone or video ensure arrangements with the court are made to allow this to occur without difficulty.
- Ensure the witnesses have a bible available if they are to swear. When you attend court ensure you have a library photocopy card, stationary supplies, a mobile phone or charge for a public phone.
- If required, obtain the transcript of the evidence and arrange for it to be collected, either by counsel or by instructing solicitors for delivery to counsel.

Conclusion

Experience has taught me that perhaps the single most important quality that all leading lawyers have is a sense of relevance. They have developed an innate ability to continue to think clearly about a case amid the turmoil and pressure of everyday work. Early in my career, a barrister, now a leading QC, expressed it by saying that he thought lawyers suffered by not spending enough time looking out of their office window. It is easy to become immersed in the everyday details of your work, or to believe that interlocutory applications relating to particulars or interrogatories are of primary importance. Seldom is this so. What is of primary importance is to develop a clear sightedness and capacity to cut through details so as to ensure that, in combination with quality preparation, you achieve good outcomes for your client. **PL**



**Forensic Safety,
Engineering &
Ergonomics
Experts**

InterSafe
International safety, ergonomics and forensic engineering

Our Experience:

- over 9,000 reports
- more than 60 years collective experience
- objective & scientific analysis

For:

- national client base of over 300 legal firms
- international consulting base

In such areas as:

- workplace injury & disease
- occupier/public liability
- pedestrian & vehicle accidents
- product liability
- slips, trips & falls

Our collective expertise, experience and resources guarantee timely work of the **HIGHEST QUALITY**

Talk with us regarding

- No obligation case appraisal
- Payment options

For Services Australia-wide
Phone: 1800 8111 01
www.intersafe.com.au
Our Offices - Sydney & Brisbane