

PERSONAL INJURY CLAIMS – INSTRUCTIONS TO SUCCEED

A paper given at a seminar held at Hunter Street Chambers by

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WHY?

The purpose of the paper is to provide a roadmap for instruction taking, evidence gathering and laying the foundation for a personal injury claim.

Simple steps you might follow and habits you might develop, to make your own professional life easier, and to assist in achieving a successful outcome.

The reason for the paper is that a claim really starts with you, the client's initial point of contact and guide through what is an increasingly complex area of practice.

The contents of a statement; the history taken by all given to a doctor; and the client's understanding and expectations, all play a significant role in the outcome of the claim. These are all matters which start with you.

As a personal injury lawyer you will deal with an array of people from varying backgrounds, ethnicity, differing levels of education, and comprehension and tolerance of the legal system.

The ABS found that in the 2009/10 financial year, 5.3% of the 12 million people employed in Australia (640,700 people) had suffered a work-related injury or illness.

As would be expected, labourers, machinery operators and trade workers made up the greater proportion of that group.

The Law and Justice Foundation of New South Wales found in its survey published in August 2012 that in all jurisdictions, stress-related illness and physical ill-health accounted for 39% of legal problems faced by those surveyed.

The same survey found that across all jurisdictions, legal advisers were sourced through the clients on personal resources or networks in 74-81% of cases.

When those surveyed were asked to identify the barriers to accessing advice, the following statistics were found:

- Legal costs. 23%
- Difficulty accessing the adviser by phone. 17%
- Time taken to respond. 14%

We know from personal experience that personal injury law grows ever more complex and with challenges arising through a reduced area of practice, focus on costs, and constant competition for clients you need to be able to streamline your practice without sacrificing customer service, and maintaining successful outcomes.

I suggest from these figures and from personal experience that effective communication with clients and achieving results, will translate to happy clients and the development of sources of referral which can only benefit you in your practice.

Jonathan Nowell from Nielsen Bookscan presented figures in January 2015, relating to the sale of books (both paperback and the books) on either side of the Atlantic.

The statistics for sales between 2004, and 2014 were as follows:

- 2004.
 - Adult non-fiction. 45%
 - Adult fiction. 32%
 - Juvenile. 23%

- 2009.
 - Adult non-fiction. 41%
 - Adult fiction. 31%
 - Juvenile. 28%

- 2014.
 - Adult non-fiction. 40%
 - Adult fiction. 37%
 - Juvenile. 23%

At first blush, you might question the relationship of this to personal injury law.

However, at the end of the day we are communicators and we tell our story to the court or tribunal in which we appear.

As with book sales, non-fiction sells better in court than fiction.

THREE STEP PLAN.

I propose a three step program for laying the foundation for a successful claim.

- 1. THE INITIAL CONFERENCE.**
- 2. THE PAPER CHASE BEGINS.**
- 3. BRINGING IT ALL TOGETHER.**

1. THE INTIAL CONFERENCE.

THE BASICS.

- Who do I act for?
- What do I want?
- Why can I have it?
- Why should I have it?

INITIAL INSTRUCTIONS.

- Plan your interview technique / Be methodical.
- Establish rapport / Explain the process.
- A proof of evidence / The chronology begins.
- Consider time limits and whether preliminary procedures such as claim forms and notification of injury have been met.
- Begin managing expectations.

Realistic appraisal of what to expect; time frames; explain issues which are able to be identified at that stage; and discuss costs.

AFTER THE CONFERENCE.

- Critique the instructions.
- Confirm instructions in writing.
- Cost agreement.
- Have client sign necessary authorities.

2. THE PAPER CHASE BEGINS.

PRE-LITIGATION EVIDENCE GATHERING.

- Clinical notes from treatment providers.
 - Produced pursuant to the client's written authority.
- Demands on the insurer, authorised by statute.
 - ss.73 and 126 Workplace Injury Management and Workers Compensation Act 1998.
 - Reg.46 Workers Compensation Regulation 2010.
 - Chp.5.3 of the MAA Claims Handling Guidelines requires that the insurer provide a copy of the police report with the s.81 Notice, or within 20 days if it is obtained after the Notice is issued.
 - Chp.10.2 of the MAA Claims Handling Guidelines requires that the insurer provide a claimant's solicitor with copies of treatment providers' reports within 20 days of their receipt.
- Informal requests on the insurer(s).
 - In many cases, there may be a valid reason why the insurer will be willing to share information.

This could include where it will assist in a recovery to the insurer, e.g., a claim against a third party which will ultimately result in a recovery of compensation paid.

- Requests to the potential defendant for inspection or information.
 - Claim forms.
 - Witness statements.
 - Photographs / Video.
 - Claim or incident histories.
- Request files relating to previous claims.
- HIC Notice of Past Benefits.
- PBS Claims History.
- ATO.

Income tax returns, notices of assessment and payment summaries will be released by the ATO upon receipt of the client's written authority.

Such documents provide not only material for assessing preinjury and probable earnings, but usually provide an accurate history of periods of employment and the correct identity of employers.

- Write to employers for employment and wage information.

- Witnesses.
 - Identify.
 - Locate.
 - Interview.
- Preliminary discovery.
 - Part 5, of the UCPR.
 - Part 21 of the UCPR.
 - Part 23.8(5) of the UCPR, extends provisions for inspection of property, to a claim for preliminary discovery.

3. BRINGING IT ALL TOGETHER.

STATEMENT.

- Once the objective and other background evidence is to hand, prepare a statement of evidence.

The statement of evidence will in many cases, provide the factual basis for other evidence such as the assumptions for medical and expert evidence.

Although it may be used in jurisdictions where there is no automatic right to cross examination, it should be prepared on the basis that the client will be cross examined against it.

- Statements should:
 - Use headings.
 - Be sequential.
 - Provide evidence, not submissions or conclusions.
 - Contain relevant evidence only and address what is necessary.
 - Provide sufficient facts and evidence to support any expert opinions relied upon in the case.
 - Rules of evidence may not apply in the particular jurisdiction however, they should be followed.
 - Ensure that the statement is read and confirmed by the client before it is signed.
- Jurisdictions such as the Workers Compensation Commission and CARS provide that evidence is by way of statement.

It presents a unique opportunity to ensure that all the necessary evidence to establish the claim.

If prepared accurately and correctly, the opportunity for successful cross examination should not arise.

- In some instances the statement may be admissible in jurisdictions bound by rules of evidence by way of:

- A prior inconsistent statement. (s.43 of the Evidence Act)
- A previous representation in the course of cross examination. (s.44 of the Evidence Act)
- As an exception to the hearsay rule. (s.64 of the Evidence Act)

MEDICAL ASSESSMENTS / EXPERT EVIDENCE.

Medicolegal assessment.

- Provide the doctor with an accurate history and assumptions.
- Ensure that the doctor is aware of and agrees to be bound by the expert code of conduct.

The code of conduct applies by virtue of Reg. 31.23 and Schedule 7 of the UCPR.

- Reports should comply with the principles set out in *Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305.*
- In jurisdictions which aren't bound by the rules of evidence, *Makita* does not apply strictly however,
 - Rule 14.3(3) of the Workers Compensation Commission Rules 2011, provides that expert evidence which does not comply with any Practice Direction is not admissible unless the commission otherwise orders.

Practice Direction 3 provides for expert evidence and provides a similar outline to the Expert Code of Conduct.

- While the rules of evidence do not apply at CARS, should the matter proceed to court following a CARS General Assessment, the evidence will need to be admissible in court.
- The history recorded by a doctor does not have to correspond with complete precision with the facts.

It must however provide a fair climate for the acceptance of the opinion offered. (See, *Paric v John Holland Constructions Pty Ltd* [1985] HCA 58)

- The expert must still identify the “facts and reasoning process which he or she asserts justify the opinion”. (See, *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152)
 - There must be sufficient reasoning disclosed to enable the tribunal of fact to evaluate the opinions expressed. (See, *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11)
 - A bare *ipse dixit* of an expert, no matter how eminent, will carry little weight. (Per, Heydon J, in *Makita* at [59] – [82])
- Be aware of Reg. 31.22 of the UCPR.
 - Obligation to disclose where the expert’s fees are contingent upon the outcome of the proceedings. (Reg. 31.22(1)(a))
 - Obligation to disclose where the expert’s fees are deferred. (Reg. 31.22(1)(b))

Panel assessment.

- Question whether the matter is ready to be referred for assessment.
 - Should a dispute be referred for assessment in circumstances where it may result in an adverse causation finding which affects other valuable heads of damage?
 - Have sufficient investigations been undertaken to date?
- Annexe a copy of the client's statement to the application.
- Ensure that all appropriate investigations, clinical notes and other source material are annexed as well.

PLEADINGS.

- Concise.
- One allegation at a time.
- Allegations of fact which establish the cause of action, not the evidence or particulars which support it.
- Plead the necessary matters, e.g., a disease claim must allege disease, a consequential loss claim should plead consequential loss.

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