



PRACTICE NOTE SC CL 7

Supreme Court Common Law Division - Professional Negligence List

Commencement

1. This Practice Note was issued on 26 May 2020 and commences on 1 June 2020.

Application

2. This Practice Note applies to proceedings in, or to be entered in, the Professional Negligence List.

Definitions

3. In this Practice Note:

CPA means *Civil Procedure Act 2005*

Expert witness means a person engaged by a party or the parties jointly, or appointed by the court to give expert evidence in proceedings

List means the (Supreme Court) Professional Negligence List

List Judge means the Judge appointed by the Chief Justice to be the List Judge for the Professional Negligence List in the Common Law Division

PNL means the (Supreme Court) Professional Negligence List

Tender bundle means a bundle of documents that a party intends to rely on at the hearing

UCPR means the *Uniform Civil Procedure Rules 2005*

Introduction

4. The purpose of this Practice Note is to explain the operation of the List.
5. It is intended that proceedings in the Common Law Division that include a claim for medical or legal professional negligence, and other proceedings that the court considers suitable, will be entered in the List.

Removal from the List

6. Upon an order being made removing proceedings from the List, this Practice Note shall, subject to paragraph 7 below, not apply to the proceedings from the making of the order.

7. The Court may direct that this Practice Note shall continue to apply to the proceedings to the extent stated in the direction.
8. The making of an order removing proceedings from the List shall not affect any orders made or directions given prior to such removal.

Appointing Directions Hearing

9. Proceedings in the List will be managed by way of Directions Hearings, the first of which will be appointed for approximately 3 months after proceedings are entered in the List.
10. All proceedings in the List will be case managed by the List Judge or another judge assigned to case manage a matter.
11. Where proceedings are entered in the List pursuant to UCPR 45.1(1), the date of the first Directions Hearing will be given by the Registry in a notice issued at the time of filing to be served by the filing party. Where entered pursuant to an order, parties with an address for service will be advised of the date by the Registry.
12. At a Directions Hearing, proceedings may be listed at a specified future date for a further Directions Hearing.
13. Directions Hearings in relation to the List are held on the first Friday of every month before the List Judge.
14. Directions Hearings may be conducted by telephone. Parties wishing to avail themselves of this facility must advise the Sydney Registry at least three days prior to the date of the scheduled Directions Hearing. This written advice is to be forwarded to the "Common Law List Clerk" and must indicate a telephone number that the party or relevant legal representative wants to be called at for the Directions hearing. Such advice is to be sent by email to the Listings (Civil) email address set out on the contact us page on the Supreme Court website. Parties seeking a telephone Directions Hearing must ensure that the telephone number nominated is available from 10 minutes before the confirmed time of the Directions Hearing. A telephone Directions Hearing may not be available if the case involves multiple defendants that are separately represented and it is thought impractical to use the facility.

Action prior to first Directions Hearing

15. A statement of claim should be served promptly so as to allow ample time for Directions Hearing preparation. The requirements of UCPR 31.36 should be observed.
16. In proceedings being a claim for damages in respect of personal injuries, the provisions of UCPR Pt 15 Div 2 apply and must be complied with except to the extent varied by orders made by the court.
17. It is expected that the parties' solicitors will have discussed the case before the initial Directions Hearing and will have:
 - agreed on suitable interlocutory orders, directions or arrangements;
 - prepared a draft timetable for the future management of the proceedings; and
 - prepared draft short minutes of any orders or directions to be sought at the Directions Hearing.

18. It should be noted that indemnity costs may be awarded in respect of work necessitated by an unreasonable failure to provide access to or copies of medical or hospital records before or after commencement of proceedings.

Action at Directions Hearings

19. At a Directions Hearing the Court may give directions or make orders as it considers appropriate with a view to the just, quick and cheap disposal of the proceedings. The orders or directions may relate to:
- the provision of any further information;
 - the filing of other pleadings;
 - the provision of any essential particulars;
 - the making of admissions;
 - the filing of lists of documents;
 - the provision of copies of documents, including medical, hospital or legal records;
 - the administration and answering of interrogatories;
 - the service of statements of evidence as to matters of fact;
 - an early separate trial on liability;
 - proceedings to preserve evidence; and
 - the consent transfer of proceedings to the District Court;
20. Orders or directions relating to the provision of particulars, the filing of lists of documents and the administration of interrogatories will be made only upon demonstrated need being established in respect to particular matters.

Representation

21. Each party not appearing in person must be represented at any 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.

Mediation

22. At any Directions Hearing:
- the court may consider whether the proceedings are suitable for mediation and may direct the parties to confer upon this question;
 - if the matter appears to the court to be appropriate for resolution by mediation, the court will endeavour to secure the consent of the parties to a referral of the proceedings for mediation; and
 - if the parties consent to the referral, and agree as to who is to be the mediator, the court may give directions to enable the parties to be prepared for the mediation.
23. Proceedings may be referred to mediation by the court with or without the consent of the parties if it considers the circumstances appropriate.

Variation of directions and timetable

24. 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.
25. Where a party seeks a variation of the directions and timetable which is not consented to by all other parties or, where a party is in default in timely compliance with any direction, any party may apply to have a further Directions Hearing listed.

Applications

26. Applications may be made to the List Judge:
 - orally at a Directions Hearing;
 - on notice returnable at a Directions Hearing; or
 - by letter to the List Judge requesting that the proceedings be given a Directions Hearing and stipulating the reason, a copy of which is to be served in the same way as notice of a motion, and will not be included in the general applications list for the Division.
27. Applications may be made to the List Judge by way of notice of motion supported by affidavit(s).
28. Unless the Court otherwise directs, any such motion is to be made returnable on the first Friday of the month next following the filing of the motion before the List Judge.
29. Urgent applications, and applications by consent, may be made at any time by arrangement with the List Judge.
30. All applications for expedition should ordinarily be made to the List Judge by way of notice of motion to be returnable at a Directions Hearing, or by arrangement with the List Judge.

Expert witnesses

31. 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 qualified, both medical and otherwise, whose opinions may be overlapping and whose reports either are not used or are of little assistance to the court is costly, time-consuming and productive of delay.
32. Where it is considered that an unnecessary expert has been qualified or is sought to be called to give evidence, the court may:
 - reject the tender of the expert's report;
 - refuse to allow the expert to be called; and
 - disallow any costs incurred in qualifying, in having the expert's report prepared or in calling the expert to give evidence.
33. The Court recognises that the liability aspects of medical negligence claims often involve complex issues as to breach and causation. This may require more than one expert from a

party to give evidence on a particular issue or issues. However, where there is more than one expert to give evidence on an issue, the evidence will be given concurrently unless directed by the Court. Particular directions in relation to those issues will be given at an appropriate point in the Directions Hearing.

34. In respect of the quantification of damages for death or personal injury, the following indications may be given:
- (a) As a guide, the number of expert witnesses giving evidence on behalf of a party shall be limited to:
 - (i) one medical expert in any speciality, unless there is a substantial issue as to ongoing disability, in which case the number shall be limited to two in any relevant speciality concerning that disability; and
 - (ii) two experts of any other kind.
 - (b) Actuarial reports will as a rule be considered unnecessary except in special circumstances where they are shown to be of assistance in the assessment of damages, for example in proceedings under the *Compensation to Relatives Act 1897* or where a claim is made for the costs of future fund management.
 - (c) 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 alternate manner.
 - (d) 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.
 - (e) In the case of concurrent experts, within 14 days of all expert witness statements/reports being filed and served, the parties are to agree on questions to be asked of the expert witnesses. If the parties cannot reach agreement within 14 days, they are to arrange for the proceedings to be re-listed before the court for directions as to the questions to be answered by the expert witnesses.
 - (f) In the case of concurrent experts, the experts in each area of expertise are to confer and produce a report on matters agreed and matters not agreed within 35 days of the first Directions Hearing or such other time as the Court may order.
 - (g) A single expert direction as to damages will be taken to have been made at the first Directions Hearing unless otherwise ordered.
 - (h) A single expert direction means that the following directions are to be taken as having been made, with such variations as may be specified at that time or subsequently:
 - Any expert evidence is confined to that of a single expert witness in relation to any one head of damages, including but not limited to the nature, extent and cost of required nursing care or domestic care (including claims under *Griffiths v Kerkemeyer*), physiotherapy, speech therapy, home modification, motor vehicle or aids and equipment, being evidence of the kind customarily given (by way of example) by rehabilitation consultants, occupational therapists, nursing and domestic care providers, architects, builders, motor vehicle consultants, and by aids and equipment suppliers.
 - Evidence may be provided by the same single expert in relation to more than one head of damages provided the expert is appropriately qualified. It is contemplated, however, that there may be a number of single expert witnesses retained or appointed in the one proceedings.

- In relation to any head of damages as to which any party wishes expert evidence to be adduced, the parties are to agree on a single expert to be retained and are to obtain the consent of the expert together with an estimate of the time required by the expert to complete the report within 14 days from a date specified in the order as the commencement date of the direction, otherwise within 14 days from the making of the direction.
- If the parties are unable to agree on a single expert or obtain the consent of the expert within the 14 day period referred to in the previous paragraph, the parties are to notify the court within a further 3 days and the court will pursuant to Part 31 of the UCPR appoint a court expert to be the single expert.
- Within 14 days from the selection or appointment of a single expert witness the parties are to brief the expert in such manner as the parties may agree with material sufficient to enable the expert to prepare a report. If the parties do not agree as to the manner of briefing the expert or as to the material to be provided to the expert or as to the questions to be put to the expert, the parties are to notify the court within 3 days for the purpose of having the matter re-listed for further directions as to briefing the single expert.
- If the parties agree or the single expert witness so requests, the plaintiff in the proceedings is to submit to clinical examination by the single expert witness.
- Within 21 days from the date on which a single expert witness is so briefed or within the time estimate provided by the single expert witness, the expert is to send his or her report to each of the parties to the proceedings, through their legal representatives.
- A single expert witness may be requested to provide a supplementary report taking into account any new or omitted factual material. The provisions of this part of the practice note apply to such a supplementary report *mutatis mutandis*.
- Any party may, within 14 days from receipt of the report, put a maximum of 10 written questions to the expert, but for the purpose only of clarifying matters in the report unless the court otherwise grants leave. The expert is to answer the questions within 14 days.
- The report of a single expert witness and any question put to the expert and the expert's answer thereto may be tendered by any party at the trial subject to all just exceptions.
- A single expert witness may be cross-examined at the trial by any party.
- A single expert witness's fee for preparation of the report and any supplementary report and for attending court, if required to do so, is to be paid by the parties equally, subject to other agreement or direction and subject to any later order concerning the costs of the proceedings. A single expert witness's fee for answering questions put by a party is to be paid by the party, subject to the same qualification.
- A single expert witness may apply to the Court for directions.

Listing for hearing of trial

35. Upon the service of lay witness statements the List Judge will determine if it is appropriate to list a matter for hearing and allocate to a judge for pre-trial case management.
36. When a hearing date is allocated it is to be anticipated that the List Judge will make such of the orders set out in Schedule 1 hereto as have not previously been made in the proceedings.

Registrar

37. The List Judge may arrange for the Registrar to carry out various functions in respect of the List.



T F Bathurst AC

Chief Justice of New South Wales

26 May 2020

Related information

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes

Practice Note SC Gen 6 Supreme Court – Mediation

Practice Note SC Gen 10 Supreme Court – Single Expert Witnesses

Practice Note SC Gen 11 Supreme Court – Joint Conferences of Expert Witnesses

Supreme Court Rules 1970

Uniform Civil Procedures Rules 2005

Amendment History

26 May 2020: This Practice Note replaces former Practice Note SC CL 7 which was issued on 17 March 2008.

17 March 2008: This Practice Note which commenced on 31 March 2008 replaced the previous version of Practice Note SC CL 7 issued on 1 March 2006.

1 March 2006: This Practice Note replaced the previous version of Practice Note SC CL 7 issued on 17 August 2005.

17 August 2005: This Practice Note replaced the former Practice Note No. 104 on 17 August 2005.

SCHEDULE 1

FINAL ORDERS

It is contemplated that, unless made earlier in the proceedings, these orders will be made at the time a hearing date is allocated by the List Judge.

By this date it is expected that:

1. Pleadings are closed.
2. Expert reports on liability and damages have been served.
3. Instructing letters, statements of assumptions or documents provided to the expert have been served with the expert's report.
4. Any expert conference has taken place and any joint expert report has been filed.
5. A Part 15 Statement of Loss and Damage has been filed and served.
6. Interrogatories have been answered.
7. Any notices to admit facts or authenticity of documents have been served and responded to.
8. Any orders for trial of a separate issue have been obtained and any limited question for the trial judge has been agreed upon or ordered.

These draft orders contemplate the following practical realities:

1. The hearing date for the trial will be allocated by the Registrar at the last directions hearing.
2. The time between the allocation of the trial date and the trial date will be long (4 to 8 months).
3. Counsel may not be briefed until after the trial date is allocated.
4. A considerable amount of trial preparation takes place in the last two months before trial.
5. Supplementary experts' reports are often obtained after a trial date has been allocated.
6. Pleadings are often amended after the trial date has been allocated.

These draft orders are intended to:

1. Recognise the practical realities of trial preparation.
2. Focus the parties on the strengths and weaknesses of their case.
3. Permit a more informed appraisal of the case to facilitate earlier settlement discussions.
4. Provide an orderly division of labour between the parties in their trial preparation.
5. Assist the trial judge by having a uniform set of materials.

FINAL PNL ORDERS AND EXPLANATORY NOTES

1. Evidence Act Notices

Any notices under the *Evidence Act* that require "reasonable notice" should be given not less than 2 months before the trial.

2. Audio-Visual Link Applications

If any party intends to call evidence by Audio-Visual Link s/he should inform the other party. If the other party consents, the relevant form should be completed not less than 2 months before the trial. If the other party does not consent, an application should be made to the List Judge no less than 2 months before the trial.

3. Witness Statements

The evidence of the parties and all witnesses of fact (but not expert witnesses) should be by statement. The evidence of the plaintiff's witnesses should be served no less than two months

before the trial date. The evidence of the defendant's witnesses should be served no less than six weeks before the trial date.

4. Witness List

Each party should serve a list of proposed lay and expert witnesses to be called, the anticipated duration of their evidence and the order in which the witnesses are expected to give their evidence. This list should be served not less than 1 month before trial.

5. Supplementary Expert Reports

Any supplementary expert reports (ie, from experts whose reports have already been served) should be served not less than 1 month before the trial date. This accommodates issues of fact that may arise from the witness statements.

6. Expert Literature

Where an expert intends to rely on literature to support his/her opinion, the party calling that expert should, if so requested by another party, provide copies of any such literature (if available) or a list of any such literature (if it is not available) no later than 1 month before the trial date.

The literature should be limited to 5 relevant articles per expert. Literature does not replace expert opinion; it supports that opinion. The trial should not be used as a forum to examine the world literature on a topic; hence the recommendation to limit the number of articles which can be relied upon by one expert. Experts should be expected to be cross-examined on the literature relied upon.

7. Schedules of Loss and Damage

The plaintiff should provide a summary of the heads of damage. The defendant should respond to this document, noting agreement or disagreement on the heads of damage or the amount claimed. Where there is disagreement, the defendant should indicate the basis of the disagreement and state what amount, if any, it considers appropriate and why. Note that it is expected that the Part 15 statement will contain details of the plaintiff's claim. This Schedule is a summary only. The plaintiff's summary should be served no less than 2 months before the trial. The defendant's summary should be served no less than 1 month before the trial.

8. Plaintiff's Chronology

The plaintiff should prepare a chronology of material facts. There should be 3 columns:

- 1) DATE
- 2) DESCRIPTION
- 3) AGREED/DISPUTED

The third column should be left blank. The plaintiff's chronology should be served no less than 2 months before the trial.

9. Agreed Chronology

The defendant should complete the plaintiff's chronology noting in the 3rd column whether a fact is agreed to or is in dispute. The defendant may also include in the chronology additional material facts, to be indicated by underlining, and should serve the completed document no less than one month before trial. Where the defendant does include additional facts, the plaintiff should indicate in the third column whether such additional facts are agreed or disputed and should then re-serve the document no less than one week before trial.

10. Defendant's Statement of Facts and Issues in Dispute

The defendant should list the matters of fact and issues in dispute from the defendant's perspective. This should be served no less than 1 month before trial.

11. Plaintiff's List of Questions for the Trial Judge

The plaintiff should prepare a list of questions for the trial judge. This should include questions directed to any disputed issues of fact (derived from the defendant's chronology) and any other issues in dispute (derived from the defendant's statement of facts and issues in dispute).

The list of questions should include disputed issues of breach of duty, causation and damages.

The list of questions should be served no less than 2 weeks before trial.

The defendant may serve a response no less than one week before trial, including additional questions not expressed in the plaintiff's list and comment on the plaintiff's list of questions.

12. Glossary of Technical Terms

The defendant should prepare a glossary of technical terms to be served no less than 2 weeks before the hearing.

13. Amendments to Pleadings

Any amendments to the pleadings should be made not less than 2 weeks before the hearing. It is anticipated that with all witness statements and expert reports served any amendments would be to regularise the pleadings to accord with the evidence rather than to raise new allegations and defences.

14. Tender Bundles

The parties should agree on a list of documents to be included in their respective tender bundles. The objective is to not duplicate documents. All tender bundles should be paginated.

Agreed Tender Bundle

The Agreed Tender Bundle should include

- 1) the pleadings
- 2) Part 15 statement of damages particulars
- 3) plaintiff's schedule of loss and damage
- 4) defendant's schedule of loss and damage
- 5) agreed chronology
- 6) defendant's statement of facts and issues in dispute
- 7) plaintiff's questions for the trial judge
- 8) plaintiff's witness list
- 9) defendant's witness list
- 10) glossary of technical terms

The plaintiff should prepare one copy of the agreed tender bundle for the trial judge and one copy for each of the parties.

Individual Tender Bundles

Each of the parties should prepare their own bundle of documents which they intend to rely on at the trial. Each party should send the other an index for their individual tender bundle. The index should be served no less than 3 working days before the trial.

Each party should prepare a copy of their tender bundle for the trial judge.

The Individual Tender Bundle should include (but is not limited to) that party's

- 1) affidavits and statements by lay witnesses
- 2) expert reports
- 3) instructing letters

- 4) expert literature
- 5) selected primary documents

15. Liberty to Apply

There should be a general order for liberty to apply. But if a party is in default of an order for more than 14 days (for matters to be done more than 1 month before the trial) or for more than 7 days (for matters to be done less than one month before the trial) the matter should be brought before the List Judge or if a judge has been appointed, before that judge, for further directions.

