

## PRACTICE NOTE SC CL 7

### Supreme Court Common Law Division - Professional Negligence List

#### Commencement

1. This Practice Note commences 1 March 2006.

#### Application

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

#### Definitions

3. In this Practice Note:

**Expert witness** means a person engaged by a party to give expert evidence in proceedings

**List** means the Professional Negligence List as provided by Part 14C of the *Supreme Court Rules 1970*

**PNL** means Professional Negligence List

**SCR** means the *Supreme Court Rules 1970*

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

**UCPR** means the *Uniform Civil Procedures 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 conference hearings

9. Proceedings in the List will be managed by way of conference hearings, the first of which will be appointed for approximately 3 months after proceedings are entered in the List.
10. Where proceedings are entered in the List under SCR Part 14C rule 3(2) (which relates to documents endorsed "Professional Negligence List"), the date of the first conference 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.
11. At a conference hearing, proceedings may be listed at a specified future date for a further conference hearing.
12. Conference hearings are held every Wednesday before a Registrar.

#### Action prior to first conference hearing

13. A statement of claim should be served promptly so as to allow ample time for pre-conference preparation.
14. 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.
15. It is expected that the parties' solicitors will have discussed the case before the initial conference hearing and will have:
  - filed defences and cross claims;
  - held medical examinations;

- narrowed issues;
- 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 conference hearing.

16. 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 conference hearings**

17. At a conference 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 and filing of affidavits or statements of evidence;
- an early separate trial on liability; and
- proceedings to preserve evidence.

18. 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.

19. At the last conference conducted by a registrar before proceedings are referred to the Common Law call up pursuant to 27 below, it is to be anticipated that the registrar will make such of the orders set out in Schedule 2 hereto as have not previously been made in the proceedings.

#### **Representation**

20. Each party not appearing in person must be represented at any conference 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**

21. At any conference 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.

22. Proceedings may be referred to mediation by the court with or without the consent of the parties if it considers the circumstances appropriate.

#### **Applications**

23. Applications may be made to the Registrar:

- orally at a conference hearing;
- on notice returnable at a conference hearing; or
- by letter to the registrar requesting that the proceedings be given a conference 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.

24. Applications may be made to the Professional Negligence List Judge by way of notice of motion supported by affidavit(s).

25. 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.

26. Urgent applications, and applications by consent, may be made at any time by arrangement with the Professional Negligence List Judge.

#### **Listing for hearing**

27. When ready for trial, proceedings will be referred to the Common Law call-up (notwithstanding that they will remain in the List) with no priority over other proceedings unless an order for expedition is made.

28. All applications for expedition should ordinarily be made to the registrar at a conference hearing, or by arrangement with the Professional Negligence List Judge.

#### **Expert witnesses**

29. Schedule 1 to this Practice Note applies whenever a party to proceedings in the List engages an expert witness.

30. The engaging party must, at the time of the engagement, provide the expert witness with a copy of Schedule 1.

31. This Practice Note does not limit the application of provisions relating to experts in the UCPR or in other Practice Notes.

#### **Registrar**

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

J J Spigelman AC  
Chief Justice of New South Wales  
1 March 2006

#### **Related information**

Practice Note SC CL 7 was issued and commenced on 1 March 2006.

This Practice Note replaced Practice Note SC CL 7 issued on 17 August 2005.

Practice Note issued on 17 August 2005 replaced Former Practice Note No. 104 on 17 August 2005.

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*

## SCHEDULE 1

1. In this Schedule a person engaged by a party with a view to giving expert evidence is referred to as an "expert witness".
2. An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.
3. A report made by an expert witness should (in the body of the report or in an annexure):
  - (a) include the person's qualifications as an expert;
  - (b) specify the assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
  - (c) specify any examinations, tests or other investigations on which he or she has relied; and
  - (d) specify any literature or other materials utilised in support of the opinions.
4. An expert witness should notify the engaging party of any change in the opinions in a report, and that party should then notify any other party who has been or is subsequently provided with the report accordingly.
5. (1) The court may direct the parties to request expert witnesses to:
  - (a) confer on a "without prejudice" basis;
  - (b) endeavour to agree; and
  - (c) make a joint statement in writing to the Court specifying matters agreed and matters not agreed together with the reasons for any such disagreement.
6. It is expected that an expert witness will exercise his or her independent, professional judgment in relation to such a conference and statement, and that an expert witness will not be instructed or requested to withhold or avoid agreement.

---

## SCHEDULE 2

### FINAL ORDERS

It is contemplated that, unless made earlier in the proceedings, these orders will be made at a final Professional Negligence List Conference prior to the matter being put into the call up list to obtain a hearing date.

**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 time between the last PNL conference and the call up to obtain a trial date will be short (a matter of weeks).
2. The time between the call up to obtain a trial date and the trial date will be long (4 to 8 months).
3. Counsel may not be briefed until after the call up.
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 set.
6. Pleadings are often amended after the trial date has been set.

**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 affidavit. 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 no 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 no 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.

#### 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 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 registrar or, if a judge has been appointed before that judge, for further directions.

---