

MEDICAL NEGLIGENCE

20 STEPS TO EFFECTIVE PREPARATION OF A MEDICAL NEGLIGENCE CASE AND MAXIMISING THE CHANCES OF EARLY SETTLEMENT

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INTRODUCTION

This paper is meant to be a very practical one, as opposed to a theoretical one. It will not be a tour de force of seminal case law and recent case law. This paper is primarily designed as a nuts and bolts guide or 'primer' for lawyers who are interested in taking instructions in medical negligence cases. Its objective is to help you enter this field more confidently and competently and to assist the practitioner in managing such cases more effectively and efficiently. I have written two other papers that are useful companions to this one.² If either of these additional papers are not disseminated along with this one, and you would like to receive a copy please contact me.³ I have also prepared a general client questionnaire that will be included with this paper. This is meant to be used a useful checklist to ensure that all relevant information is obtained as soon as practicable.

I wish to emphasise at the outset that medical negligence cases cannot and should not be handled and prepared like a standard or pedestrian personal injury case. Any firm that approaches a medical negligence case in that fashion could be heading for lots of trouble. You cannot just take basic instructions in one conference, shoot off a simple letter of demand to a prospective defendant, obtain a general report from your client's current GP or treating specialist, make a request for any relevant hospital records, obtain a medico-legal report and think that you are ready to commence a medical negligence claim. That could be a potential recipe for disaster, both for your client and your firm.

How you go about processing a potential medical negligence claim that comes in your door is of vital importance to you and your client. The purpose of this paper is to provide you with a convenient checklist system that you can refer to and utilise to process a potential medical negligence claim. It always should be referred to as a "*potential medical negligence claim*" until such time as you have completed every step in the check list and reached the firm conclusion that the claim has merit, is capable of being proved (the injury, the negligence and causation), is capable of achieving the required thresholds for non-economic loss damages contained in the *Civil Liability Act 2002* and is capable of being adequately financed to conclusion either by your client or by your firm on a conditional fee basis.

The steps contained in *Part A* of the check list are all steps which ought to be taken before a medical negligence claim is pleaded, filed and served on the named defendant or defendants. The only exception to this would be where a limitation period is about to expire and a statement of claim has to be filed urgently in order to preserve your client's cause of action from being extinguished. The steps would be equally relevant and applicable where you find that a limitation period for filing the claim has already expired and the issue is whether or not to put on a motion seeking an extension of that limitation period relying on one of the statutory grounds for extension.

It should never be the other way round. I suggest that a practitioner should never draft a statement of claim and file and serve it before the steps contained in the checklist have been completed. This caution has gained more emphasis since the *Civil Liability Act 2002* and the *Civil Procedure Act 2005*

¹ Christopher J Whitelaw is a Sydney barrister. This paper has been revised and updated for presentation at the State Legal Conference, Sydney, on 31 March 2006.

² The two companion papers are - Settlement Strategies – Effective Use of ADR in Complex Litigation and An Alternative Approach to Settling Medical Negligence Disputes.

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came into force. As soon as you file the claim you and your client will become subject to stringent case management timetables and directions set by the court, all geared towards driving you to an early hearing date. Once the claim is served you will immediately find your time being consumed with responding to voluminous requests for further and better particulars, possible motions to strike out the claim or parts of the pleading or motions for summary dismissal etc. Dealing with and responding to these kinds of pressure will severely distract you from completing a thorough evaluation of your client's claim. This creates a ripe environment for error to occur. You may soon find yourself fighting a rear guard action as the defendant's lawyers set about trying to tear down and impeach your client's case – and quite often the case they will be discrediting and dismantling will not even be the best case your client has available to him or her because you never even got around to discovering that case and pleading it properly. These are the inherent risks of commencing a medical negligence case prematurely without first having thoroughly evaluated and tested it by following the steps contained in the checklist. Proceeding in this hasty and ill-prepared fashion may lead to any of the following embarrassing and disastrous consequences:

- i. Having a court strike out the whole of the claim;
- ii. Having a court strike out parts of the pleading;
- iii. Having to spend a huge amount of wasted time responding to requests for further and better particulars, which might have been avoided had the case been better prepared;
- iv. Providing the defendant with particulars that are wrong or inaccurate or misleading and which may cause prejudice to the outcome of the case;
- v. Obtaining expensive experts reports based on inadequate instructions, inadequate historical data or inadequate or incomplete clinical data so as to render those reports useless, ineffective or misleading. Alternatively they may be rendered useless because the wrong questions were put to the expert for his or her opinion. In the end it is all a waste of time and money;
- vi. Getting the defendant and the defendant's insurer off side and antagonistic very early in the piece and possibly jeopardising your client's chances of obtaining an early settlement;
- vii. Finding yourself in the very embarrassing position of being forced to have the case set down for trial when you know that it is not properly prepared. If the risk of losing is considered high you may have to advise your client to consider a settlement offer which is far beneath the client's expectations based on your earlier indications concerning quantum;
- viii. Incurring a great deal of extra expense in trying to fix up the case later on before it goes to trial – which, if you are doing the case "on spec" will probably have to come out of your own pocket and will probably never be recoverable on party/party costs, or, if it is being funded by your client, may cause you serious embarrassment in trying to explain the reasons for all the extra expense (given that it could have been avoided if the case had been thoroughly prepared before commencing action);
- ix. Losing the case because of inadequate preparation;
- x. Losing a motion seeking extension of a limitation period because of inadequate investigation and evaluation of the claim resulting in you possibly not selecting the best defendant to sue or pleading the claim in a fashion which will make it easier for the defendant to argue prejudice due to the delay in bringing the claim. That may shut the door on your client's claim forever.

The steps contained in *Part B* of the checklist cover preparation work post filing and service of the claim. That includes steps such as discovery, interrogatories, subpoenas, preparation of experts and preparation of early settlement discussions.

I would like to conclude this introduction by quoting some words from a book written by an American trial lawyer who specialises in medical negligence cases as his words are equally relevant and apt for the Australian lawyer:

"Medical negligence litigation is difficult and complex. The defendant is often a hardworking and respected physician who has been negligent on a particular occasion, causing injury and damages to the plaintiff. The doctor's conduct is seldom grossly negligent or reckless, and juries will often excuse simple negligence out of sympathy.

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“The defendant always has more than enough expert witnesses willing to testify on his behalf, no matter how egregious the conduct, but the medical profession’s conspiracy of silence and noncooperation hampers the plaintiff in seeking similar assistance and expertise. It is not surprising therefore, that only a small percent of legitimate claims are pursued, that plaintiffs lose the majority of medical negligence lawsuits, and that only 50 percent of the claims made that are resolved out of court result in a payment.

*“To achieve success, you must very carefully screen your potential cases and accept only the meritorious ones. You need to conduct thorough informal and formal discovery and cautiously select expert witnesses. You must analyse and plan the order of discovery and identify all problems and weaknesses in both your case and the defendant’s position.
.....thoughtful preparation is the key to success.”²*

It is the same in Australia – many cases have to be settled in the end for relatively small amounts or simply on the basis that each side pay its own costs. This will be disastrous for your firm if you have outlaid a lot of money on disbursements only to find out that the case is not viable to take to trial. As in the United States, the majority of medical negligence cases in Australia that go to trial are won by the defendant.

Knowing these facts the plaintiff’s attorney who receives instructions in a medical negligence case should have two chief objectives – firstly, to cull out quickly the hopeless claims and cease to act any further unless the client, against your advice, insists on proceeding and is able to fully fund the case or at least is able to fully fund the case to completion of the evaluation stage; and secondly, with meritorious claims, to prepare them in such a way that will maximise your chances of an early out of court settlement.

So, what needs to be done before your firm makes a commitment to prosecute a medical negligence claim? In my paper you will find that it contains two separate checklists – *Part A* to cover what should be done before commencement of proceedings and *Part B* to cover what should be done after commencement of proceedings.

The Part A checklist will hopefully assist you in conducting a full and thorough investigation and evaluation of a possible medical negligence claim prior to drafting, filing and serving a statement of claim and accepting the responsibilities which will follow once proceedings are on foot.

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PART A: THE PRE-FILING CHECKLIST

In summary:

Step 1: Instruction taking and Information gathering

*Step 2: Obtaining the primary evidence to prove negligence, causation and damage-
(a) documents and (b) lay witnesses*

Step 3: Evaluating the primary evidence

Step 4: Obtaining Expert Opinion

Step 5: Deciding whether there is a viable action to bring – to commence or not to commence

Step 6: Deciding where to file and when to file

Step 7: Assessing prospects for early settlement prior to commencement of action

² “Winning Medical Negligence Cases – A Guide for Plaintiff Lawyers” by W. Trine and P. Luvera, ATLA Press, 1993.

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Step 8: Should we requisition a jury?

Step 1 – Initial instructions and information gathering;

- i. Getting adequate and relevant preliminary information – consider devising a cost effective pro-forma client questionnaire which will enable you to collect the essential information you will need. The client may not have all the information you require at the first meeting in which case you can get down as much as you can and then send the client away with the questionnaire and your instructions with respect to how to properly complete it. The importance of a well-designed client questionnaire cannot be overemphasised. It achieves two important outcomes – it helps keep the costs down in the evaluation stage and it ensures that you obtain the best evidence possible to assist you in conducting an effective evaluation. Your instruction-taking questionnaire will assist you from the very start in formulating your strategy or ‘game plan’ for the successful prosecution of the claim. It will include, inter alia, the following types of evidence gathering –
 - a. Evidence of incapacity – before and after descriptions from some independent non-related person, supported, if possible, by photos showing what your client used to look like and what he or she was capable of doing (e.g. sports activities);
 - b. Fitness for work pre injury and post injury;
 - c. Future income prospects;
 - d. Out of Pocket Expenses.
- ii. Recognising what prima facie causes of action might be available to your client (using the answers in the questionnaire);
- iii. Identifying applicable limitation periods and expiry dates (using the answers in the questionnaire);
- iv. If a limitation period has expired – identifying prima facie grounds to seek extension (using the answers in the questionnaire);
- v. Considering the need for further instructions and information prior to preliminary advice and arranging further client conference if necessary. For instance, if it appears that conversations between your client and a prospective defendant (or employees or agents of the prospective defendant) might be relevant to formulating a cause of action, you may need to obtain a complete and chronological summary of every statement which your client can recall being made in his/her presence and/or every conversation held with him/her and identifying on each such occasion every person who was present. You must also ensure that you have complete instructions from the client concerning such things as:
 - * prior medical history
 - * all symptoms before, during and after the alleged negligence
 - * a complete list of every symptom described to the prospective defendant by either your client or some other family member (the name and identity of each person present on each occasion should also be obtained)
 - * a complete and chronological list of all tests and examinations performed by the prospective defendant
 - * photographs (e.g. before and after the alleged negligence) if they might be relevant;
 - * diagrams or sketches if they might assist in better understanding the evidence;
 - * the names and contact numbers of any potential witnesses who might be able to give relevant evidence;
 - * the particular evidence which has led your client to believe that he or she has a claim in negligence (or on some other legal basis) against a particular doctor or hospital.

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All these are core areas for instruction taking and at the earliest possible time should be incorporated into a *comprehensive statement* to be read, approved and signed by the client. It is essential to pin the client down to the known facts as soon as possible and to have him or her sign off on them so that any advice you give after that point can be referred back to those set of instructions. It will afford you protection if at some later point of time the client's story changes or information comes to light which you were not previously aware of;

- vi. Evaluate your client's credibility – is he or she genuine? Is he or she believable? Will a judge/jury sympathise with him or her?
- vii. Providing preliminary written advice covering:
 - * prima facie cause(s) of action? Refer to the strengths and weaknesses, pros and cons;
 - * advice regarding statute of limitations concerning each potential cause of action;
 - * prima facie defences available to prospective defendant(s) including any possible contributory negligence(potential impact on quantum)?
 - * primary evidence gathering requirements – liability and damages. You need to discuss with your client the items and activity necessary for an adequate investigation of the potential claim and the kinds of costs involved in such an investigation;
 - * need to engage counsel? At what stage? [If you are not familiar in this area of practice then it is obviously prudent to engage counsel's services at an early stage.]
 - * letter to the prospective defendant (consider your strategy)?
 - * preliminary view on quantum and costs v benefits analysis – is it worth taking it further? Here you must pay regard to the requirements of and statutory thresholds imposed by the *Civil Liability Act 2002*;
 - * fee agreement – options discussed. You should have a signed fee agreement with your client before proceeding to Step 2;
 - * client's responsibilities (e.g. collection of some medical records, providing further information etc.) and financial liabilities explained.

It is important, during your further investigation and preparation of the case, to regularly revisit these initial instructions and see if they need to be revised or updated. You need to be continually matching up your evidence with the legal requirements for proof and considering its adequacy. Do not fall into the trap of just accumulating evidence indiscriminately without evaluating it for its relevance and weight within the overall strategy or game plan you are developing. Step 2, which follows, covers the obtaining of primary evidence. This primary evidence needs to be matched up with your client's own instructions and any inconsistencies will need to be highlighted and explored.

Step 2 - Obtaining the primary evidence – negligence, causation, damage

(a) Documentary

- * from all treating doctors, clients and hospitals (and make sure they are complete records and clear and legible copies and make sure you also request the medical records and discharge summaries for any previous admissions). Check that they include admissions records including signed consents, nursing notes, operating theatre notes (if applicable), progress notes, medication charts, x-rays or scan reports, pathology or histology reports, daily charts (blood pressure, fluids etc.) and discharge summaries. If you are not sure you have received all the relevant records – engage a medical expert to assist you to determine this as it is critical to the evaluation process;

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- * past medical records relating to any previous injuries or claims which could be relevant (details of which should be in the client questionnaire);
- * FOI applications if necessary (getting your client to apply may reduce the compliance costs);
- * Full Medicare claims history;
- * request summary of client's medical history from family GP – including full copy set of his or her client attendance and treatment records and copies of any letters received from specialists patient has been referred to;
- * x-rays, CT scans, MRI reports, including any for past injuries or degenerative conditions.

Once this step is completed, before moving on to the next step (evaluation) organise the primary materials into convenient categories for easy access and reference. Once the categories are established they can be added to later on if any additional data is received.

Strive as soon as possible to organise materials into chronological order and sequence.

The importance of early and efficient organization of your primary materials cannot be overemphasised. It will allow the subsequent preparation work to be done for efficiency and it will minimise the risk of some crucial bit of evidence being lost, misplaced or overlooked. Any experts you later engage will love you for doing this and making their jobs so much easier.

Since the *Civil Liability Act 2002* came into force it is now paramount that every solicitor who is involved in investigating, evaluation or preparing a medical negligence claim pay regard to Part 1A of that Act – titled "Negligence". Division 2 of Part 1A (sections 5B and 5C) deal with "Duty of Care" and Division 3 (sections 5D and 5E) deal with "Causation". Similarly, they must give close consideration to Division 6 "Professional Negligence" when considering whether or not there has been a breach of a duty of care. When considering the issue of "Damages" they must pay regard to Part 2 of the Act – "Personal Injury Damages".

(b) Lay witness evidence

Try and locate any potential witnesses as soon as you can and obtain signed statements. However, do not hold up a lot of hope that hospital employees or medical assistants will rush forward to give you their statements. On the contrary, you will probably encounter a veil of silence and reluctance to cooperate. The best you may be able to accomplish is obtaining statements from friends or relatives who either saw things or heard things said which might assist proof – either of liability or of damages. They might also be able to provide useful evidence concerning your client's state of health and well being before and after the accident. Every effort should be made to obtain these statements as quickly as possible as they may provide valuable assistance in your evaluation of the case and your decision whether and on what basis to accept the case.

Step 3 – Evaluating the primary evidence

* Prepare a comprehensive *chronology*. This will be much easier to do if you have utilised an effective client questionnaire and if you have first organised all the primary materials which you have gathered into logical and convenient categories and within each category organised the materials into chronological sequence. The chronology will commence with the client's date of birth and will include the following types of entries:

- * prior accidents
- * injuries received in prior accidents
- * doctors seen and treatment received arising out of these prior accidents
- * prior illnesses or diseases or diagnosed medical conditions (including doctors seen, findings made and treatment administered)
- * prior claims for damages (what for and the outcomes)

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- * all prior medical investigations – x-rays, scans etc.
- * prior contacts with the prospective defendants and what occurred on each separate occasion (including any advice or warnings given). In relation to statements made by doctors or hospital staff, you can refer to your earlier chronology of such evidence already extracted from your client (see above)
- * prior contacts with all medical personnel connected with your particular medical condition, injury or treatment which is the subject of your particular medical condition, injury or treatment which is the subject of the potential damages claim;
- * details of any medical products involved in the treatment;
- * details of all relevant post treatment and post discharge care and management
- * the occurrence of or awareness of the injury complained of
- * steps leading up to occurrence or awareness of the injury complained of
- * steps leading up to client becoming aware of a possible legal cause of action arising out of the injury or mishap;
- * steps taken since gaining that awareness of a possible cause of action for damages.

- * Identify and summarise the evidence contained in the primary materials (e.g. symptoms, history given, test results, complaints made etc.) which when combined with your clients instructions seems to crystallise a cause of action against a particular defendant;
- * Carefully compare the “facts” which you have now obtained in any medical records with the “facts” contained in your client’s signed comprehensive statement – do they match up? Identify all inconsistencies so that you can seek further instructions from your client in due course.
- * Prepare a *glossary of key medical terms* contained in the primary materials to help you understand their contents. Good knowledge of medical terminology is extremely useful in this area of law. It will help you interpret more quickly and correctly what you are reading. An excellent course in medical terminology is offered at the Prince of Wales Hospital in Randwick. The course is taught in the evening over a period of some 14 weeks. The cost is minimal;
- * Check your *medical dictionary* (make sure it is a good one) concerning key medical findings contained in the medical records (e.g. patient suffered a cerebral embolism resulting in partial paralysis – look up “embolism” in your medical dictionary) and you may find valuable leads to help you in your evaluation of the evidence you have gathered;
- * Conduct a *medline search* or search other medical web sites to see what you can find out about recognised symptoms, methods of treatment and risk minimisation;
- * If any drugs or prescriptions are involved in the case – check the relevant entry in MIMS and obtain a copy of the patient information sheet supplied with it and see what it says regarding such things as dosage, possible adverse reactions and warnings concerning its proper use;
- * If the case seems to involve either negligent treatment or a misdiagnosis of a particular condition it would also be worthwhile to check both your medical dictionary and a recognised textbook to investigate what were the known risks or known symptoms associated with that condition and also the recognised or recommended responses;
- * If the case appears to involve a “failure to warn” (informed consent) basis of negligence – make sure you carefully examine the records to see if it contains any record of warnings or advice given to the client prior to the medical procedure being carried out and ensure that you have obtained full instructions or information concerning your client’s need for the treatment, whether it was elective or not, whether there were other alternatives explained and your client’s awareness of the risks either from the prospective defendant or from some other source or sources. This is all relevant to whether your client can realistically and genuinely say that

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had the doctor told him of the risks he or she would not have agreed to the operation or whatever. The credibility of such a cause of action needs to be tested as soon as possible;

- * Prepare a careful outline (to be sent to your chosen experts) of your identified potential breaches of duty of care and the key facts/evidence which tends to support them (with easy to follow references to the materials to make it easy and quick for the expert to access the facts/evidence you are referring to);
- * Now and only now are you properly ready to seek an opinion from your chosen medical expert or experts with a view to obtaining a high quality evaluation of the medical evidence focused on the key issues and the key evidence. This will ensure that money spent in obtaining a report will be well spent and not wasted.

Step 4 – Obtaining Expert Opinions – The Medical Evaluation

- * Treating doctors v Medico Legal Experts – where do you begin? A report from a treating specialist who is very familiar with your client's past history (including the facts or circumstances which you are investigating as possible negligence), if favourable, will usually carry more weight in court than a report obtained from a medico legal specialist who may only see your client on one occasion and has to rely on materials provided to him to analyse the facts. However treating doctors are not always willing to cooperate and are often reluctant to become involved in litigation. They will give you a report outlining what they have done to assist your client and provide a prognosis, but will usually refrain from expressing any adverse judgement about a medical colleague;
- * If a GP has been closely involved with the management of your client's medical condition or injury, or has been associated with your client's health care for a long time – it is always a good idea to start off by requesting a report from that GP to supply relevant background material and the GP's own views concerning your client's complaints. The GP may turn up some highly relevant fact from your client's history which has never fallen from your client's own lips and which could have a major impact on whether or not a cause of action exists. Care should be taken to avoid asking the GP, or indeed any treating doctor, to give an opinion (or at least a direct opinion) concerning the issue of fault and breach of duty. This should be left to a medico-legal expert retained in the case.
- * Consider retaining the services of an experienced medico-legal general physician first – to help crystallise the key medical issues, identify the potential defendants, identify the key relevant evidence and any prima facie breaches of applicable standard of care and to exclude the 'red herrings'. This preliminary evaluation may also assist in identifying the key areas of medical practice involved and choice of experts to consider for obtaining reports. This may help avoid wasted expense in approaching specialists too soon. The general physician will probably assist you in marshalling the key relevant evidence and the key issues to put before the selected specialists. Similarly, the advice received may obviate the need to engage a whole lot of other specialists at high cost.
- * If you need assistance in the location of suitable experts contact the Australian Lawyers Alliance (ALA) which maintains an extensive data bank of experts in different fields of practice. You will need to become a member of ALA to gain access to that data bank. You may also wish to seek guidance from counsel concerning choice of experts. Be aware however of "no win no fee" experts whose neutrality and independence may be brought into question. Similarly, make sure that any expert you retain is free of a "reputation" for being too partial to plaintiff interests such that little or no weight will be accorded to their opinion either by the opposing legal team or by the court.
- * Before writing your request letter to your expert – try to speak to him or her first. This is very important and useful if it can be arranged. You need to sound him or her out and get an impression whether that expert is right for the case. The cost of the service will be high so choosing the expert correctly the first time will ensure the money is well spent. Give the expert a rough outline of the circumstances of the case and the kind of issues that you have identified. Tell the expert who the prospective defendant is. Make sure that the expert understands that you are seeking his or her opinion to assist with possible litigation against that prospective defendant and whether he feels comfortable about being engaged and retained as an expert

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witness in your case. Ask the expert to summarise the kinds of medical records he will expect to receive with your letter in order to carry out a thorough and complete evaluation.

- * Requesting an expert opinion (in written report) – how should it be done? What you definitely should not do is send off a typical or generic personal injuries/workers compensation pro forma letter requesting a report. You need to carefully tailor your request letter to the particular needs of the case. You need to put a lot of thought into its contents and the specific questions you wish to have the expert answer. If you have completed the elements of preparation contained in Step 3 above then this task will be a lot easier.
- * Make sure that you do not overlook the requirement, specified in the Court Rules, for the expert to state within the body of his or her report, that he or she has read and is aware of the contents of the Experts *Code of Conduct* and agrees to be bound by it. If your expert is new to medico-legal reporting you should draw the expert's attention to this statutory requirement and enclose a copy of the Code of Conduct with your covering letter. A report that fails to comply with this mandatory requirement may be ruled inadmissible at the hearing.
- * You will then send with your letter to the expert your chronology, your outline of issues and summary of key evidence, the results of any helpful research you have done and the relevant primary documents arranged in a binder folder in easy to access categories. It will be checked to make sure all contents are legible and that it includes any 'special requests' made to you over the phone by the expert.
- * What do you exclude from your request letter and in the materials sent to the expert? You exclude any material that is clearly not relevant and you exclude from the materials and from your letter any or any reference to documents which might cause undue prejudice to your case if the defendant's lawyers called for its production.
- * You should make it clear in your request letter that the expert, in providing a report, should identify only those documents or materials that he or she is relying on in expressing his or her opinion. Otherwise the defendant may be entitled to call for access to all materials sent to your expert with your request for a report. They would be entitled to have access if you planned to call that expert as one of your expert witnesses at the trial. Adopt a policy of damage control and try to avoid unnecessary embarrassments or setbacks. Manage your materials with care.
- * When you receive your expert's report - read it with great care keeping yourself very focused on the issues that were to be evaluated by the expert. Has he done a good enough job? Has he done what you asked him to do? If not, call the expert and explain the problem and ask him if he will do a supplementary report to cover those matters that he overlooked in his first report. Make sure that you vet his report for any unhelpful remarks or observations which are not relevant to his conclusions and which might get a judge or jury offside or which might unnecessarily antagonise the prospective defendant. Anything that seems 'personal', argumentative or which appears to be advocacy rather than true objective medical commentary and analysis should be excluded and the report re-written if necessary. You need to constantly consider how the report will impact on the mind of the judge hearing the case. You need to manage your experts effectively and give them whatever assistance you can to facilitate the obtaining of a well written and effective medical opinion which will provide maximum assistance to your client's case.
- * What if the report is well written but expresses conclusions unhelpful to your client's case? If the opinion received is against there being a cause of action to pursue, or makes it a very problematic proposition, the issue is whether the internal reasoning in the report convinces you that there is no viable case to pursue. If it does not then you might need to consider the need to seek another opinion from a different expert.
- * How eminent or well recognised does my expert have to be? This will very much depend on the nature of the case and the issues. The importance of finding an expert with a high profile and widely accepted leadership and eminence in that field of medical practice becomes greater when:
 - * the prospective defendant is highly regarded in his field;
 - * the alleged negligence occurred during the course of a difficult medical procedure which saved your client's life or spared him a worse fate;

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- * the area of practice involved is somewhat esoteric and not widely performed within the medical community;
 - * It is a negligent treatment case rather than a misdiagnosis case;
 - * there are multiple defendants in the case and it is difficult to pin point exactly who was to blame;
 - * where proof of causation is problematic or complex.
- * On the other hand, if the cause of action is straight forward (e.g. an alleged misdiagnosis of some condition) and backed up by an x ray or scan which was clearly misinterpreted by the defendant, then you may not need to engage any experts beyond a general medico legal physician and a radiologist. Probably most of your experts evidence in that sort of case would be going towards proving the full extent of your client's injuries and disabilities.

When conducting your evaluation of the medical evidence as part of your overall evaluation of the case it is worth taking notice of some useful decisions that reveal how the judicial mind approaches the evaluation of medical evidence. These decisions will provide extremely useful guidelines for you to adopt when reviewing any expert opinions you receive.

Joyce v Yeomans (1982) WLR 549 pr Brandon LJ at 556

Maynard v Midlands RHA (1984) 1WLR 634

Chambers v Jobling (1986) 7 NSWLR 1 per Mahoney JA at 25-26

X&Y v Pal 23 NSWLR 26per Mahoney JA 31B – 33G.

Makita (Australia) Pty Ltd v Sprowles 2001 NSWCA 305 (see per Heydon JA re requirements to ensure admissibility of expert evidence)

CSR Ltd v Della Maddalena [2006] HCA 1 (2 February 2006) re assessing credit of experts and procedural fairness by trial judge.

See also "Recent Cases" in 68 ALJ 74; and *Dealing with Expert Witnesses* by Chesterman J in NSW Law Society Journal Nov. 1998 p. 50 et seq.

As part of your own review and evaluation of the case you will need to consider whether the methodology (e.g. to prove causation) employed by your own experts will stand up to the sort of analysis recommended in these cases. If it does not, then unless you can find a way to overcome this problem through discussion with your expert, you may need to consider whether it would be in your client's better interests not to serve that report and to look for another expert. It has been said that 'choosing an expert witness and preparing him or her for the hearing is a delicate task calling for tact, diplomacy, courage and maturity on the part of the lawyer.'³ Your expert should be chosen because he or she is known for a sound methodological approach which will satisfy the requirements of judicial scrutiny.. At the opposite end of the spectrum are those who are sometimes referred to a "liars for hire."⁴

Step 5 – Is there a viable claim or claims? – The Legal Liability and Quantum/Financial (Cost/Benefit) Evaluation

- Is the claim capable of proof – i.e. damage, breach (duty of care) or contravention (FTA or TPA) and causation? ⁴

³ *Plead Well, Prepare Well, Paper is Vital – Medical Negligence Cases in the District Court* – College of Law, CLE 99/42 (delivered by His Honour Judge Mahoney QC).

⁴ Also be aware of the contents of Practice Note 70 in the Supreme Court and its District Court equivalent [now refer UCPR] – affecting the number of experts you can call at the hearing.

⁴ Please be aware of the recent amendments to the TPA [*Trade Practices Amendment (Personal Injury and Death) Act*], which I believe became law in February or March 2006. This new law prevents anyone relying on Part V Division 1 of the TPA to sue someone for personal injury damages or for damages arising out of someone's death.

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- Is it a treatment/diagnosis case or a failure to warn (“informed consent”) case? This will be relevant to your assessment of requirements of proof and cost of the case
- Have all possible areas of negligence and/or misleading or deceptive conduct been considered – e.g. pre-treatment or pre-admission advice/warnings, post admission contacts with doctors and/or hospital staff including oral communications; consent forms signed by patient; post operative care and management and post discharge care and management;
- Is there a related product liability claim? Is there a misleading or deceptive conduct cause of action? Is Federal Court jurisdiction available? Would it be less costly and more efficient to proceed in that jurisdiction?
- Evaluating the likely defences – is contributory negligence likely to be raised? Are there any potential statutory defences? Have you identified all possible defendants?
- What are the prospects for early settlement – how watertight, problematic or complex is the claim or claims (on the medical and legal evaluation)? How strong or persuasive is your client’s evidence? Can it be confidently taken to a settlement conference at this early stage? Do you have enough evidence to convince the defendant’s insurer that you have a solid claim that it should take seriously? Is the injury and causation self evident on the evidence you have?
- If early settlement or any settlement is unlikely – how will the balance of the case be funded? Need to cover all aspects – cost of all likely disbursements – e.g. further reports, counsel’s fees (unless counsel agrees to do it on conditional fee agreement), filing fees, subpoena and discovery costs, searches, FOI etc. Can client fund disbursements or contribute to them. Is litigation loan possible? Realistic estimates are essential.
- What is the claim or claims worth if proved? If the litigation is likely to prove expensive – need to do careful costs benefit analysis – the likely damages may not justify the expense unless the risk of losing is considered negligible. In this context you must take account of the impacts of the *Civil Liability Act* and *Legal Profession Act* on the financial viability of conducting any personal injury case for a plaintiff where the probable damages able to be proved will come in under \$100,000.
- Fee Agreement – needs to be done with considerable care and proper disclosure;
- Choice of Counsel and when to brief.

STEP 6: Deciding when and where to file the claim:

- Is there a claim under the Trade Practices Act? If so, federal jurisdiction might be an attractive option to consider (although maybe less attractive these days with the imposition of higher filing fee and daily sitting fees);
- Is the claim worth more than \$750,000? - if not, then you have to commence in the District Court [Economic loss will have to be very carefully assessed];
- If no imminent expiry of a limitation period – when to file is a matter of strategy. If early settlement looks like a good prospect maybe filing should be delayed until that has been explored. If evidence to support negligence or causation or extent of injury is shaky or incomplete – maybe you should hold off until that is more fully addressed so that you can minimise your exposure to hostile motions and/or requests for further and better particulars. On the other hand, if case looks solid but potential damages are large – probably best to file without delay as chances of an early settlement (pro-filing) are probably remote.

STEP 7: Deciding whether to attempt settlement prior to filing the claim (strategy issue)

This step is really covered within Step 6.⁵

STEP 8: Deciding whether or not to requisition a jury

This needs to be considered before you file your statement of claim because the court rules require the election to be made quite soon after the claim is filed. In the District Court a jury demand must be filed not later than 2 months before the scheduled status conference (this can only be extended in

⁵ Be aware that a protocol was established some years back by the major medical defence insurers to promote early settlement of genuine claims. Hence, if you are able to assemble persuasive and credible evidence to substantiate both the alleged negligence and the damage suffered in consequence then it may be a good idea to utilize this protocol before filing any proceedings in court. If you are not aware of this protocol call the medical insurer and ask them about it. Once they receive the required information they guarantee to review it and respond to it expeditiously.

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exceptional circumstances). The court, however, has discretion not to permit a jury even if a party requests it unless an allegation of fraud is included in the claim. Most actions these days are not tried in front of a jury.

The issue of whether or not to requisition a jury is usually made in consultation with counsel who will be briefed to appear at the trial.

A strategic decision has to be made as to whether your client's case is one which might be more effectively presented before a jury rather than a judge. Would a jury be more sympathetic? Would a jury be likely to award more damages? Are the issues suitable for a jury or are they such that presenting the case to a jury would unduly add to the length and cost of the trial? Would the requisition of a jury strengthen your negotiating position in any settlement discussions – or weaken it?

Having said this the fact should be acknowledged that at least in New South Wales personal injury jury trials, even in medical negligence suits, are now rare. This is the direct result of legislative interventions. READ THE UNIFORM CIVIL PROCEDURE RULES.

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PART B – THE POST-FILING CHECK LIST

If you have completed all the steps in *Part A*, then you are ready to draft your statement of claim and get the proceedings under way. After you have instituted proceedings it will then become a matter of fine tuning your client's case and making sure no stone is left unturned in your obtaining of relevant evidence and your evaluation of that evidence. This may necessitate some amendments to the pleadings along the way. While doing this, opportunities for fruitful settlement negotiations should not be overlooked.⁵ The steps in Part B are as follows:

1. **Step 9** – The Statement of Claim & providing adequate particulars: Drafting the Statement of Claim and the Part 9 Rule 27 (District Court) or Part 33 Statement of Particulars (Supreme Court) ⁶ and arranging for them (and any other additional documentation as required by case management practice notes - e.g. Heads of Damages Assessment) to be filed/served (Note: service in the District Court must occur not more than 2 months post-filing)
 2. **Step 10**: Effective Case Management: Timely compliance with any court timetables as required by case management practice decisions is important. (Note: Actions should not be filed, unless to avoid expiry of a limitation period, until you are ready and able to comply with the case management timetable in the selected jurisdiction);⁶
 3. **Step 11**: Responding promptly and efficiently to defendant's requests for further and better particulars
 4. **Step 12**: Analyzing the Defence and seeking further particulars of it if necessary;
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5. **Step 13**: Effective preparation of your client for the defendant's compulsory medical examinations:
 6. **Step 14** : Obtaining essential discovery of relevant material
 7. **Step 15** : Evaluating need for Interrogatories
 8. **Step 16**: Effective organization of trial materials.

⁵ Strategies for early settlement are covered in the companion papers I referred to above – see footnote 2.

⁶ Now check the Uniform Civil Procedure Rules (UCPR) that now applies in all State Courts.

⁶ Failure to take heed of this caution may lead to your case being sent to a "show cause" hearing and facing the prospect of summary dismissal by the judge for non-compliance with the standard timetable and directions without acceptable excuse.

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9. **Step 17:** Developing your trial strategy
10. **Step 18:** Achieving an early settlement
11. **Step 19:** Preparing your client for the witness box
12. **Step 20:** Obtaining and preparing lay witnesses to support the claim – both on liability and on quantum.

Step 9: Drafting the Statement of Claim

Unless you have accumulated good skills at drafting a pleading it is probably best to brief counsel to draft and settle the claim rather than spend considerable time yourself attempting to produce a good pleading. Unless your first draft is a particularly good one it is quite likely that counsel, if briefed to settle it, will simply start afresh rather than try to “fix up” your draft.

Any particulars of negligence which will depend on expert evidence to prove should be drafted in consultation with the expert to make sure that the evidence you anticipate will come from the expert is in fact the evidence he or she is able to give. Requests for further and better particulars should be anticipated and you should attempt to provide all relevant and essential particulars in the pleading so as to minimise time and effort in responding to later requests for further particulars from the defendant’s lawyers. It is good practice and makes good economic sense to master all your evidence and sources of “proof” before the statement of claim is served. A well drafted statement of claim, properly and adequately particularised, will ensure that you are not quickly forced on to the back foot following service by aggressive defence tactics focusing on poor pleading and/or inadequate particularisation of the claim. This will allow you to move quickly to the next stage of preparation – discovery, interrogatories⁷ and witness preparation. This will further ensure that your client’s chances of early settlement are maximised.

Any of you who regularly do personal injuries work will also know that your Part 9 Rule 27 Statement of Particulars (but now see UCPR) and any supporting documents including medical reports available to the plaintiff when the action is commenced must be served with the statement of claim.

Step 10: Adhering to Case Management Timetables:

Most actions will now be commenced in the District Court. You need to be fully acquainted with the current case management procedures and timetables. Relevant practice notes should be studied. The aim of case management is to better ensure fulfilment of the objective of more orderly, cost effective and expeditious disposal of civil actions. The court aims, by adherence to the timetables, to dispose of actions within 12 months and at the latest, within 2 years from the time the action is commenced (excluding those actions which had to be commenced before they were ready due to time limitation problems.)

Actions should therefore not be commenced until they are ready to meet the requirements of the timetable as to preparation and hearing. This means that general preparation must be well under way before commencement. In a medical negligence case this means you should have completed all the steps in Part A above. It should also not be commenced until settlement has been adequately explored. Once filed, an action must be served on the defendant within 2 months. The court has discretion to extend this time in exceptional cases.

Adjournments and extensions of time sought on behalf of the plaintiff will not generally be granted, and if they are applied for the plaintiff must be personally present in court.

Applications for Discovery, Notices to Admit or to administer interrogatories must be made within 4 months of filing the statement of claim. A certificate as to the state of preparation for hearing must be filed within 4.5 months after filing the claim. The final updated part 9 Rule 27 statement of particulars

⁷ Keep your eye on the standard timetable issued when a defence is filed. It is very easy, in a busy practice, to overlook the deadline for seeking to administer interrogatories. You need to allow sufficient time to brief counsel to advise on the need for discovery and/or interrogatories and for the drafting of same. Quite often the final decision as to whether or not to employ interrogatories will need to await the outcome of discovery and subpoenas.

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(in District Court) [Check UCPR] must be filed within 6 months of filing the claim and a status conference, prior to fixing the hearing date, will usually occur within 7 months from the date the claim is filed.

Step 11: Responding to Requests for further and better particulars:

This is an important aspect of pre-trial preparation and should be done promptly, diligently and accurately. It seems that many solicitors, particularly those unfamiliar with this area of practice or inadequately resourced for it, neglect this aspect of case preparation badly. This can sometimes add significantly to the costs of the case and cause delays. It is not uncommon for counsel, when briefed, to find in the brief a great deal of correspondence between the firms of solicitors dealing with the issue of particulars. Often you find repeated requests from the defendant's lawyers complaining either that particulars have not been provided or that inadequate particulars have been provided. Defendant lawyers will object to the case being set down for trial until such time as their requests for particulars have been properly complied with. Plaintiff solicitors who are not prepared to deal with voluminous requests for particulars of the claim tend to drag their feet and this often causes an inexcusable delay in the case being brought on for trial or made ready for settlement negotiations.

A well-drawn pleading will of course minimise time later spent on dealing with requests for further particulars. But some defence lawyers have tried to develop requests for particulars into an art form, regardless of how well the pleading has been drafted. Tactical decisions will need to be made upon receipt of lengthy requests as to which ones to supply the further particulars sought and which ones to decline to do so and the reason to be given for declining to do so. This is an important aspect of case preparation and if done well will pay dividends – firstly by improving your chances of negotiating an early settlement, and secondly by ensuring that if the matter goes to trial you will not be troubled by objections to certain kinds of evidence you wish to adduce or certain arguments you wish to pursue on the basis that it is irrelevant or prejudicial because it has either not been properly pleaded or particularised in the claim presented to the defendant.

If you lack the necessary skills to make these tactical decisions regarding requests for particulars, then consider briefing counsel to assist you. It will help avoid your file becoming very thick very fast simply dealing with disputes over particulars which could probably have been avoided.

Step 12 : Analyzing the Defence and Seeking further particulars if necessary

A defence must be filed within 3 months from the date an action is commenced if the usual case management timetable is being followed. Most defences tend to be concise – simply admitting, not admitting or denying the allegations contained in each paragraph of the statement of claim. Some will include a defence of contributory negligence or an allegation of a failure to mitigate the claimed loss or damage. Usually very little is admitted.

In a well pleaded defence, the only content which might cause you to consider seeking some further particulars is that of any raised defences of contributory negligence, failure to mitigate or intervening conduct (a *novus actus interveniens* – which breaks the chain of causation). Contributory Negligence defences are often pleaded in a standard fashion using stock phrases. Given that the defendant lawyers love to seek a plethora of further particulars with respect to every ground of negligence pleaded a bit of reverse psychology probably will not go astray. Formulate requests which will force them to reveal whether this is a real defence of just a sham defence.

The defence should be evaluated to ascertain:

- i. any specific defences being raised – other than straight denials or “No admissions”. Specific defences would be such things as a defence based on expiry of a limitation period for commencing the action, a claim of *novus actus interveniens*, a claim of contributory negligence and a claim of a failure to mitigate;
- ii. what is being admitted and the manner in which such admissions might assist your client's case or reduce the cost of proving it;
- iii. what is being denied – this will allow you to highlight the key “issues in dispute” which you will have to prove in your case;

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- iv. what is neither being admitted or denied, the “not admitted” answers. Some of these may simply be because the fact being asserted in your pleading is simply outside the defendant’s own knowledge. However, if it may be due to lack of information, which if you can supply proof of it to the defendant may result in the “not admit” being later changed to an admission of that fact. The trickiest ones are where the defendant responds “not admitted” to a fact that you know must be within his, her or its knowledge. By responding in this fashion, that is not admitting to it but not making a categorical denial of it, the defendant is quite likely just trying to be difficult and opportunist by forcing you to prove something which it knows to be true but which it believes might be difficult for you to prove.
 - v. The way to deal with this is to prepare as quickly as possible a carefully drafted Notice to Admit Facts.⁸ This will put more tactical pressure on the defendant once it receives your notice, because it knows that if declined to admit the fact and you later prove it, it may be required by the court to pay you full indemnity costs in proving that fact.
-
- vi. any indications that the defendant intends to blame some other defendant, not yet joined by you in the proceedings as the guilty party;
 - vi. an indication that you have incorrectly named or described the defendant.

Step 13: Effective preparation of your client for defendant’s medical examinations

This is a very important area of preparation and is often totally ignored or overlooked. Inevitably, once the claim has been served on the defendant, and particulars of the claimed injuries provided, the defendant’s lawyers start to arrange their own medical examinations of the plaintiff. This can happen quite quickly and the number of examinations arranged may be many. Letters start arriving from the defendant’s lawyer simply advising the details of medical appointments arranged with certain named doctors and requesting that your client attend. Quite often the defendant lawyer does not even bother to inform you of the specialist qualifications of the doctor they are requiring your client to see.

It is my observation that many plaintiffs’ lawyers simply advise their clients of the dates and times of the appointments and explain their obligation to attend. Nothing is done to prepare them for the appointment and contact with the defendant’s chosen experts. Many clients later report that the experience was a bad one. Some of them become quite distressed during it and as a result of it. This can be due to any number of factors, such as:

- * The doctor was rude or abrupt;
- * The doctor started to cross-examine me about the accident;
- * The doctor did not listen to what I was saying to him;
- * He only spent 10 minutes with me and now he writes all these pages in his report about how I am completely OK!

In addition, it is quite common to find in a defendant’s expert report attacks on your client’s credibility and verbatim reporting of things alleged to have been said by your client which place your client in a poor light.

How can these kinds of problems be avoided?

1. Brief your client first – before sending him or her off to the appointment. Explain how it works and what they might expect. Prepare them mentally and emotionally for the possibility of an unpleasant experience;
2. Assess your client’s vulnerability to “wrong impressions” or misunderstandings during the medical examination – give whatever advice, pointers or cautions you think might be necessary;

⁸ Be aware of District Court Practice Note 18 [now check UCPR replacement] relating to proof of out of pocket expenses. You should employ Notices to Admit to put pressure on the defendant to reach agreement on out of pockets before the hearing.

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3. Recall that under Part 25 rule 6 of the SCR (and the DCR equivalent) [Now refer to UCPR] the plaintiff has the right to have a medical expert chosen by him or her attend with him or her at a medical examination arranged by the defendant. This could prove to be expensive (e.g. if the plaintiff's GP was to attend the appointment with him), but if the right to do this was exercised carefully and thoughtfully it might avoid more difficult problems down the line after you have been served with a report containing a lot of damaging observations to which you client responds "That is all a lie – he did not ask me to do that?; or, I never said that to him, etc. etc." Your case immediately becomes more problematic because your client's credit has been put into issue and to salvage it you must necessarily lock horns with the doctor or the quality and content of his medical examination of your client.

The decision on whether to assert this right and incur the expense of your own chosen doctor attending with your client at the appointment might need to turn on your prior knowledge and experience of the defendant's expert and your own appraisal of your client – eg. Background, personality traits, emotional nature, previous experience with defendant doctors etc.

The cost of paying for your client's GP to attend with him or her at the arranged medical appointment may very well be offset by the advantage of having available to an independent verification of how the medical examination was conducted, the specific investigations carried out and any responses made by your client to proper questions addressed to him by the examiner. It may diminish the risk of the examiner making any remarks in his or her report or stating any observations which are prejudicial to your client unless they are well founded.

Step 14: Obtaining Pre-Trial Discovery of Relevant Material⁹

Prompt and effective discovery will vastly improve your chances of early settlement of any meritorious claim. Discovery is the disciplined and precise use of all procedural tools to translate facts into admissible evidence. The touchstone for discovery is 'relevance' to the issues raised in the case.

So it is your duty and in your client's best interests to pursue discovery of "discoverable information" as quickly and as vigorously as you can. Failure to do this may prompt a defendant who is not impressed with the contents of your statement of claim and/or supporting evidence to assume an aggressive stance and put on a motion for summary dismissal.

Prompt and effective discovery may be the difference between winning and losing the case either on an interlocutory motion or at a final hearing.

Discovery is also essential to obtaining solid and reliable expert opinions to support your case. There is little point in seeking expensive expert reviews of the evidence and paying for costly reports when important evidence may not yet be to hand. The missing evidence, when later made available to the expert (hopefully not while he is sitting in the witness box under cross examination!) may cause him or her to resile from the favourable opinion upon which your client's case depends.

Finally failure to conduct effective and complete discovery of relevant material may place you at risk of a professional negligence suit if, as a result of that failure, your client loses the case or receives diminished damages.

The procedural steps to follow would be:

1. Analyse what documentary discovery is still required – by reference to the issues and the evidence or information you have already managed to obtain prior to commencing the action, including any documents obtained under the FOI Act;
2. Analyse what relevant documentation can be specifically identified and which you know exists and which you believe is in the possession, power or control of the defendant or some other entity and which can be obtained under a subpoena;
3. Once this has been done evaluate the need for further discovery – either by informal discovery by arrangement with the defendant or by court order. It may be that the defendant is willing to

⁹ Remember that there is no automatic right to discovery in personal injury matters. If you consider discovery is warranted and the defendant will not agree to give informal verified discovery then you must file a Notice of Motion and seek the appropriate order from the court.

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provide you with most of what you are seeking by way of “informal discovery”, that is, without the need for a court order. However, non-verified informal discovery will leave you unprotected if during the trial the defendant produces further documents of which you were totally unaware. For this reason, if you consider there is real need for general discovery, it should be obtained, either informally or formally, on a verified basis. This places an obligation on the defendant to make all necessary inquiries to ensure that it has discharged its legal duty to discover to you all relevant documentary material. It will also flush out any claims of privilege or confidentiality with respect to specific documents, which can be contested in advance of the trial if necessary. It will also facilitate and make easier your task of tendering relevant documents at the trial. It will forensically assist you by forcing the defendant to disclose what bits of information he or she had, and was therefore aware of, at the time of making a particular diagnosis, commencing certain treatment or giving certain advice. Failure to give full and proper discovery may expose a defendant to attacks on his or her credibility if you are able to confront the defendant during the trial with a document which he obviously must have had access to or read but which he failed to include in his list of documents.

4. One common objection made by defendants to attempts to obtain production discovery either by way of a subpoena or an order for general discovery in personal injury cases is that compliance would be too oppressive. If the defendant is able to convince the court that it would be oppressive to give general verified discovery then the order may be refused. However, it should be noted that the court has the power to order more limited discovery. If you consider that in the circumstances of your client’s case, as pleaded, the defendant may be in a position to resist an order for general discovery, you should attempt to delineate with some precision, in your correspondence to the defendant, and in your application to the court, the classes or categories of documents which you require to be discovered. The time period to be applied to each class or category should be carefully considered so as to minimise your vulnerability to a claim of oppression.

There is insufficient time and space to give you a full illustration of what I mean so an example will have to suffice. What we are concerned with here are not the more obvious relevant discoverable material – such as the clinical records relating to the defendant’s treatment or management of your client. If the defendant is a hospital you may also wish to gain discovery of and inspection of such documents, if they exist, as:

- * reports made to Medical Committee or Board of Directors with respect to the incident involving you client;
- * medical staff by-laws or protocols;
- * policies, procedures, rules, regulations, guidelines, directives to staff, recommended practices etc. which might be relevant to what you are investigating concerning the injury to your client;
- * diagnostic reports;
- * equipment records;
- * staffing records for certain specified days or weeks

and so on.

Once you have obtained the discovery you require arrange inspection and evaluation of the discovered material as soon as possible. If you lack competency to properly evaluate the material then you will need to consider retaining the services of an expert to do this for you. Para-medical staff (eg. With nursing qualifications), if you plan to do a lot of this kind of work, would probably prove very useful and cost effective over time.

Step 15: Evaluating the need for Interrogatories

Interrogatories are another form of discovery. It another tool available to you to try to pin down the facts prior to the start of the trial. However, to be an effective tool, they must be carefully drafted and confined to material issues in dispute (ie what is typically referred to as the ‘proper scope’)

In personal injury claims there is no automatic right to administer interrogatories. In the District Court leave is sought by notice of motion under Part 22A rule 5 [Now refer UCPR]. The onus is on the plaintiff to convince the court that such an order is necessary. A court will usually make such an order if it can be demonstrated that proof of some relevant issue would otherwise be difficult or that allowing interrogatories would save costs. They will not be permitted if the court considers that their real purpose is that of a ‘fishing expedition’ to try and make out a case which does not yet exist.

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The court has a very wide discretion as to whether to allow interrogatories and, if allowed, to confine their use or ambit. Interrogatories which are considered unreasonably lengthy, burdensome, prolix, oppressive to answer, unnecessary or scandalous will usually be struck out if objected to by the defendant.

If not done skilfully, interrogatories, as a potential aide to discovery, may prove a disastrous wast of time and money. If you are not experienced in this area then experienced counsel's assistance should be sought.

The last thing to be said about interrogatories is don't administer them until you have carefully considered what forensic advantage you hope to gain from them. Keep in mind that any interrogatories that you are permitted to administer will be most carefully scrutinised by the defendant's legal advisers and the answers given will be drafted so as to advantage the defendant as much as possible, or at least to ensure that it will not be capable to doing damage to the defendant. Unless your interrogatories are skilfully framed so as to maximise your chances of gaining some forensic advantage out of them, they may achieve nothing for your client other than giving away your game plan to the other side.

Step 16: Effective organization of trial materials

This is probably self-evident. The better your materials are organised the easier it becomes to manage that material and to utilise it. The usual practice is to place the materials into binder folders that are divided into easy to access categories. Once the categories are established, and organised chronologically, any later obtained documentary evidence can be easily stored in the appropriate location. Make sure you keep any "originals" separate from working copies. Use one type of dividers for the main categories and label them. Use other dividers to mark any sub-categories. Whatever system you use make sure it is easy to use. You need to know where things are and be able to access it quickly. It will also minimise the chances of anything getting lost or misplaced. Once the information in each category is complete, it is useful then to number each page so that when you compiling your chronologies or letters to experts you can easily refer to documents you wish to highlight or bring to someone's attention (e.g. Folder 1, Section D, p 12).

Establishing this system from the start may assist you in the following ways;

- * Preparing chronologies – You should start the chronology as soon as possible and then keep updating it as new facts come to light;
- * Briefing your medical experts;
- * Briefing counsel;
- * Responding quickly and effectively to requests for further and better particulars;
- * Preparing of subpoenas;
- * Formulation of interrogatories;
- * Drafting a statement of claim.

Step 17: Developing an effective trial strategy

Now that you have completed your gathering in of relevant evidence, obtained your expert opinions concerning liability and damages and received and reviewed the defendant's evidence and expert opinions, it is time to formulate your trial strategy. This means developing a case theory that your evidence will support and that the jury or judge is likely to accept. It must be consistent with the applicable law and it must take into account the perceived strengths and weaknesses of your client's case and the defendant's case.

To do this effectively you need to look at the evidence from the defendant's point of view. Consider what tactics, lines of attack or arguments you would pursue if you were acting for the defendant. This is the best way to show up the weaknesses in your own case as well as in the defendant's. Once this is done you can then focus on how to best present your case at trial so as to maximise your client's chances of success.

Developing an effective case theory and trial strategy is something that should be done in close association with your chosen counsel. Keep doing reality checks on your own thinking by referring

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everything back to the two most basic questions: Firstly, what do I have to prove?, and secondly, what evidence do I have to prove it with? Keep your common sense and objectivity close at hand. Avoid the danger of becoming too subjectively aligned with your client's cause as this may interfere with the discharge of your professional responsibilities to him or her as a lawyer.

Preparing a trial strategy must include an evaluation of the strengths and weaknesses of your own witnesses – both lay and expert. Especially if it is going to be a jury trial – you need to consider how each witness will impact on the jury. You should obviously give your witnesses whatever legitimate assistance you can to prepare them for the trial experience and to ensure that they will be as effective as they possibly can. Anticipate defence lines of cross examination and attack for each witness and consider how you can best prepare your witness to meet it. Take them through the key territory and satisfy yourself, as best you can, that they will be able to negotiate the terrain. Adjust your strategy to take into account the perceived strengths and weaknesses of your witnesses – not just the content of their evidence but their personalities and how you consider they will resent to the judge or jury.

Further, consider the ways and means to present your case to the judge or jury to achieve maximum impact. Will you employ any demonstrative evidence? Can any of the experts better present their evidence with the use of slides, diagrams or any overhead projector? Will a video presentation assist the court's understanding on some technical point?

Next, exhaustively review the facts you need to get into evidence and identify any admissibility objections that might be raised by the defence. Satisfy yourself that you have selected the best way to get that fact into evidence and that you are ready to meet any objection to its admissibility.

Finally, prepare your closing address on the evidence.¹⁰ This will fill force you to demonstrate your proof on each issue and to show how the facts fit the law. It will assist you in identifying any flaws in your case theory.

Other matters which either you or your counsel may wish to give some attention to prior to the start of the trial might be:

- * Pre-Trial Discovery. The new UCPR are more helpful in this area than former Court Rules.
- * To what extent, if any, does your client's version of events contradict or differ from the facts that have emerged through discovery or from issue of subpoenas? Can the differences be reconciled, and if not, how will you best deal with these differences at the trial?
- * If it is intended to tender any documentary material, such as medical records, should a working copy of these records be prepared for the judge or jury with the salient portions you intend to rely upon highlighted or flagged to ensure that they are not missed or overlooked?
- * Will you be asking the court to make rulings to keep out any of the defendant's evidence – if so, on what basis will you make these applications?
- * If it is a jury case, what type of juror (male/female, young/etc) is more likely to identify with your client's case?
- * How will you open to the judge or jury?
- * Which witnesses will you call and in what order?
- * Have you looked for and addressed any inconsistencies in the statements of your witnesses?
- * What witnesses is the defence likely to call?
- * What is the best line of approach to take with each of the defence witnesses?
- * If it is a jury case, what can be done to simplify the case and keep the jury focused on the key evidence you wish to rely on?
- * What is the most effective way to present the law to a jury to convince them to accept your theory on liability?
- * What is the simplest and most effective way to prove causation to a jury?
- * If there is going to be evidence that shows that your client was dishonest or exaggerated the extent of his injury or disability – how is that going to be addressed during the trial?
- * Can any aids be employed at the hearing to better explain your case, or some of the medical evidence, to the judge or jury?
- * Do you intend to call or adduce any evidence where, to ensure that it will be admissible, the required form of notice has to be given under s. 67 or s.99 of the Evidence Act.
- * If you intend to tender any plans, photos or model, have you complied with the requirements for pre-trial disclosure (DCR 28/11)? [Now see UCPR] 8

¹⁰ This will usually be done by counsel briefed to appear at the final hearing.

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Step 18: Pursuing all opportunities to achieve early settlement ⁷:

Unless you are supremely confident of winning your client's case in court attempts at settlement should be maintained parallel with your preparations for trial. The stronger your case on liability starts to appear (due to your diligent efforts in preparing it) the stronger your prospects will be to settle it. It is of course essential to form a fair and reasonable view of the probable range of damages. This requires you to make a very objective appraisal of your own evidence. Reasonable compromise is part and parcel of settlement negotiations. Settlement will be difficult to achieve if you hold an inflated view of what the case is worth which is not justified on a fair and accurate appraisal of the whole of the evidence.

You can only settle a case on your client's instructions. Prudence and professional standards demand that you present to your client a balanced assessment of the evidence and possible outcomes if the case goes to trial. If, during settlement negotiations, you recommend putting a particular offer or accepting a particular offer put by the defendant, the better your client appreciates the strengths and weaknesses of his or her own case, the easier it will be for you to obtain rational and responsible decisions from your client concerning those offers. The process of educating your own client about his or her case should be an ongoing process from he start to the end. It is very bad practice to only start telling your client about the weaknesses, holes or gaps in his case shortly before the matter is to go to trial. This will place undue stress on your client and may provoke him or her into believing that you are trying to sell his case short just so you can guarantee payment of your own fee. Always keep your client properly informed and dispel as soon as you can any exaggerated views he or she might have about either prospects of success or quantum.

Once you have to hand all of your medical evidence and expert opinions and discovery and inspection have been completed, instructions should be sought to put on a formal offer of compromise under Part 19A of the DCR [now see UCPR]. This rule was designed to be an effective aid to the settlement of actions before hearing. Practice Note 42 in the District Court has now further strengthened it. All practitioners should be aware of the contents of this Practice Note. It gives guidance as to the contents of the Offer of Compromise in order to maximise its effectiveness to promote early settlement.

Step 19: Preparing your client for giving evidence at the hearing

Your client may or may not be your most important witness in the case. If the extent of damage inflicted is fairly obvious and the grounds of alleged negligence do not depend on proving alleged conversations between your client and the defendant, then your client will probably not be the star witness. In a case of this nature you will usually be able to prove all elements of your case through other witnesses and by the tender of documents.

Restrict your client's evidence to only those matters which he or she has direct knowledge or experience of. Provide your client with an adequate understanding of the rules of evidence relevant to the giving of oral evidence so that hearsay and opinion evidence and statements of 'conclusions' can be avoided as much as possible. Instruct your client as to the proper way of giving evidence about conversations.

Make sure that your client's statement contains any relevant fact upon which any of your experts relied in expressing a medical opinion and that your client understands that importance of getting that evidence out in the witness box.

Give your client some idea of how counsel will conduct the examination in chief – that is, the likely sequence that will be followed in extracting the evidence that your client has to give. This will assist your client in his own preparation.

Play the devils advocate with your client on the areas likely to be the subject of cross examination and assess his or her capacity to deal with such lines of cross examination. Give whatever guidance you can to help them prepare more effectively.

Explain the adversarial system to your client and explain that attacks on his or her own credibility or reliability are par for the course and he or she should not take them too personally and should not allow himself or herself to get provoked by such attacks.

⁷ I refer you to my paper *an alternative approach to settling medical negligence disputes* written for this conference some years ago, that should accompany this paper. Whilst some of my ideas might be thought to be a bit too idealistic it might stimulate you to consider more options to promote early settlement.

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Step 20: Preparing experts and lay witnesses for giving evidence

This is another area of trial preparation that is often neglected with rather alarming consequences.

Preparing the Expert

Experts need to be consulted at two stages of case preparation – prior to drafting and filing the statement of claim; and after the action has been commenced and discovery of relevant material has been completed. In the first instance they are assisting you in deciding whether you have a prima facie case or not, and subsequently they are helping you identify the strengths and weaknesses of your case based on the totality of the available evidence. In the later instance, the reliability of their opinions is inextricably linked with the reliability and effective organization of the evidence being put before them or drawn to their attention.

It is not uncommon to find that an expert has been requested to see your client and to provide a report (on liability and /or damages) in the following circumstances:

1. Relevant evidence has not been provided to them;
2. A comprehensive statement has not yet been obtained from the client;
3. No chronologies have yet been prepared;
4. No evaluation of the primary evidence has been undertaken.

In short, the steps in Part A of this paper have not been adhered to. All they are often given, in advance of the arranged appointment, are an assortment of clinical records (many of them not being first generation legible copies, and many of them not being complete) and a brief letter advising them of the negligence or breach complained of and asking them to provide you with a report based on the enclosed materials and, if they needed to see your client, based on any insights gained from that meeting. The experts usually summarise the material they have been given when requested to provide an opinion, and it is not usual to find that they have been provided with some material, which was not essential to their task, which is prejudicial to your client's case and which the defendant invariably sees access to if the report is subsequently served without any amendment.

This type of "preparation" is not helpful and in fact can operate to seriously frustrate your client's chances of early settlement, settlement for a higher figure, any kind of settlement and chances of victory if the case proceeds to a hearing. This could prove to be a heavy burden on the lawyer's conscience and may add to the risk of a professional negligence suit.

Your chosen expert can only help you as much as you help him or her. If you let him down then he obviously cannot do the best for your client. You can best help your expert by doing the following.

1. Complying with the steps in Part A;
2. Providing the expert with well-organised material;
3. Ensuring that if the material is voluminous that you assist the expert by providing him with helpful chronologies and summaries;
4. Ensuring that any copied clinical records are (a) complete and (b) legible. Trained para-medical staff will be able to assist you in determining whether you have obtained the full set of clinical records and not some edited version which has left out such things as drug, temperature, pulse, respiration and fluid balances sheets which could be vitally important in the medical evaluation of the case.
5. Drawing the experts attention to what you perceive are the critical issues in the case;
6. Alerting the expert to any piece of evidence which you consider to be of special relevance or importance and explaining why you take this view;
7. Alerting the expert to any perceived weaknesses in the case and explaining why you take that view.
8. Providing the expert with a comprehensive and signed off statement from your client.

In addition to this invite your expert to identify any gaps in the evidence provided and to inform you whether or not he requires that missing evidence to be confident in any opinion which he expresses in his report. You can then take steps to obtain that missing evidence and seek a supplementary report from that expert in due course.

Most of what I have said in Step 19 is relevant here. The more you can familiarise your witness with their own evidence, expected lines of cross examination and court procedure, the more likely they are

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to stay relaxed and to give their evidence smoothly and accurately. Demystify court culture for them if they are completely unfamiliar with it. Do what you can to put them at ease.

If you're a have a witness who is panicked about remembering his or her evidence ask whether ho or she would like you to convert their statement into a list of questions and answers (a Q & A sheet). You will have explained to your witnesses that you cannot lead them during their evidence. But if they can see the questions that will be asked, in advance, many witnesses will feel more confident in their recollections. However, if this is done, it would be advisable to also instruct the witness that he or she must try not to give their evidence in a stilted fashion and avoid appearing to the jury as if they have been queued up.

Experts are usually a different kettle of fish. Most of them have already had previous experience in giving evidence in court. The important points to remember for final preparation of your experts for the trial are:

- * Make sure that they have reviewed and are acquainted with all the relevant evidence both favourable and unfavourable to your case. This is to avoid surprise in the witness box. The last thing you want is one of your key expert witnesses seeming surprised by some piece of evidence which is suddenly put before him or her in the witness box under cross examination and conceding that he had not previously known about that piece of evidence. It is even worse if he or she then concedes that this piece of evidence undermines the opinion he or she has given. It is best to specifically draw your expert's attention to any piece of evidence that appears to be damaging or prejudicial to your client's case – either on liability or on quantum. Make absolutely sure that your expert is still prepared to back his opinion regardless of that evidence. By ringing it specifically to your expert's attention your expert will be ready to deal with it when it is raised in cross examination.
- * Make sure you have extracted from your expert the very best curriculum vitae possible. Some experts have never got around to preparing a thorough and comprehensive CV that adequately portrays their qualifications and level of expertise. Encourage them to put one together.
- * Test your expert's credentials. Be ruthless and thorough. Do not accept their qualification on face value. Does he or she have the right qualifications and/or clinical experience to "qualify" to give expert evidence in this particular case? If clinical background experience is essential do not settle for someone with purely academic qualifications and no extensive clinical experience. Failure to do this will leave you and your expert vulnerable to being disqualified or discredited or discredited at the very outset when defence counsel either objects to their giving evidence as an expert or so undermines their credentials that the weight to be attached to their expert opinion will be minimal.
- * Eliminate from your expert's report any content that is adversarial, confrontational, belligerent or too personal as regards the defendant. Make sure it sticks to the proper parameters of expert evidence.
- * Make sure that your expert has read and considered fully all opposing expert reports to be relied upon by the defence and is ready to explain why his opinion should be regarded as more accurate, persuasive and correct on the facts of the case.
- * Make sure that your expert is aware of the evidence that your client is going to give at the hearing and that he or she has double-checked that it is not inconsistent with anything said by your client to the expert in conference.
- * Make sure that your expert brings to court any published papers or articles which he has refereed to in his report, and is familiar with any papers, articles or research which any defendant experts have referred to in their served reports.
- * Make sure that your expert is aware of any relevant evidence that is to be given by your lay witnesses. Ask him to satisfy himself or herself that none of that evidence contradicts or refutes any of the facts upon which his opinion is based.

These are the 20 steps to effective trial preparation and to maximising your chances of early settlement. I hope they will be of assistance to you.

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Chalfont Chambers
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ADDENDUM

All practitioners should now be very aware of changes in this legal environment brought about by enactment of the *Civil Liability Act 2002* as amended by the *Civil Liability Amendment (Personal Responsibility) Act 2002* in New South Wales.

An excellent summary of the 'tort reform' that flows from this legislation can be found in January/February 2005 issue (Issue 66) of *Precedent* published by Australian Lawyers Alliance. I recommend that all persons practising in this area do read that issue of *Precedent*.

Practitioners should also be alert to any case management changes arising from the *Civil Procedure Act and Rules 2005*, which came into force on 15 August 2005. Wherever any Court Rules are cited in this paper, practitioners will need to check that the application of such Rules is not in any way affected by the *CPA* or *UCPR*.