Personal Injury Claims: Making the Dream Come True

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North Queensland Law Association Conference - Friday 27 May 2022

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Introduction

1 When a client consults a lawyer to make a claim for personal injury compensation, and the lawyer takes on the case, the client is looking to the lawyer to exercise professional skill to secure appropriate compensation within a reasonable timeframe. Preparation and evidence gathering is key to making that dream come true.

2 The majority of claims are resolved at or just after the compulsory conference. Nearly 84% of all CTP claims are resolved without litigation. MAIC's

statistics for 2020/21[1] are that 48.9% are settled prior to conference; 25.9% settled at or within 14 days of conference and 9.1% settled before litigation.

3 The statistics for WorkCover settlements are not available online to confirm, but the rates of settlement are probably higher at the conference stage given the no-costs regime for injuries < 20% DPI.

4 In my own experience, PIPA cases (particularly hybrid claims) seem to be more difficult to resolve at compulsory conferences.

5 The percentage of all cases that make it to a full trial is very small. In a seminar delivered by the Hon Duncan McMeekin QC in October 2019,[2] one of his slides noted:

"The Disappearing Trial

Why do 99.93% settle?

- Around 10,300 workers' comp and motor accident common law claims each year in Qld
- 2018 – 8 trials
- 75% of litigation in regional areas – 5 times more likely on per capita basis
- 0.07% of claims go to trial
- 2 plaintiffs lost entirely
- In five the damages were near to or above the District Court monetary limit
- In three the damages were less than $400,000"

[1] https://maic.qld.gov.au/publications/annual-ctp-scheme-insights-2020-21/
[2] The Hon Duncan McMeekin QC, *When to Hold & When to Fold*, QLS Personal Injury Seminar, 11 October 2019

6 This paper will concentrate on the preparation of claims for personal injury from initial instructions to the compulsory conference; with tips for achieving best outcomes for clients.

Extent of preparation for the conference

7 The extent of necessary preparation of claims prior to the conference is informed by:

(a) statutory requirements;

(b) relevant case law;

(c) professional duty of care owed to the client.

Statutory requirements

8 The three personal injury claim regimes differ slightly in the requirements before certifying readiness for the compulsory conference.

9 S 290A(2) of the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA) provides:

"(2) A certificate of readiness must state that—

(a) the party is completely ready for the conference; and

(b) **all investigative material required for the conference has been obtained, including witness statements from persons,** other than expert witnesses; and

(c) medical or other expert reports have been obtained from all persons the party proposes to rely on as expert witnesses at the conference; and

(d) the party has complied fully with the party's obligations to give all other parties material that is relevant and required to be given for the claim; and

(e) the party's lawyer has given the party a statement (a ***financial statement***) containing the information required under subsection (3)."

10 S 37(2) of the *Personal Injuries Proceedings Act* 2002 (PIPA) is similar in terms to the WCRA but differs in that, while certification is for readiness for the conference only, the requirements are:

"…

(b) **all investigative material** required by the party **for the trial** has been obtained, **including witness statements from persons**, other than expert witnesses, **the party intends to call as witnesses at the trial**;

(c) medical or other expert reports have been obtained from all persons the party proposes to call as expert witnesses **at the trial**;

…."

11 S 37(3) of PIPA has a sting in its tail:

"(3) A practitioner who, without reasonable excuse, signs a certificate of readiness knowing that it is false or misleading in a material particular commits professional misconduct."[3]

12 S 51B(6) of the *Motor Accident Insurance Act* 1994 (MAIA) differs again in that certification is for readiness for the conference **and the trial** and:

[3] See also s 32 as to the consequences of failing to make disclosure as required

"…

(b) **all investigative material** required **for the trial** has been obtained (**including witness statements from persons**, other than expert witnesses, the party intends to call as witnesses at the trial); and

(c) medical or other expert reports have been obtained from all persons the party proposes to call as expert witnesses **at the trial**;

…."

13 The statutory provisions therefore make clear the state of readiness that the claimant's case must reach before certifying for the compulsory conference.

14 The theme of this paper is not about how to avoid the requirements for disclosure of material. However, it is acknowledged that one reason for hesitation to commit evidence of witnesses to writing is the obligation to disclose material thereby giving the other side the opportunity to investigate and refute by other evidence. But that is inherent in the disclosure process which "…**encourages sound claims to be advanced and resolved** and unsound claims to be abandoned".[4]

15 The question of legal professional privilege differs between WCRA claims on the one hand and MAIA & PIPA claims on the other.

16 The nature of the claim and the extent of investigation and preparation should inform strategic decisions.

17 A legitimate concern, particularly in WCRA claims, is how best to present witness evidence, including the claimant's evidence.

[4] *Allen v State of Queensland* [2010] QSC 442 at [36]; *State of Queensland v Allen* [2012] 2 Qd R 148 at [100]

18 The disclosure obligations and abrogation of legal privilege differ between the schemes. The following table summarises when material must be disclosed:

Classification of document	WCRA	PIPA	MAIA
Investigative reports	Yes – s 284(2)(a) WCRA	Yes – s 30(2) PIPA	Yes – s 48(2) MAIA
Medical reports	Yes – s 284(2)(b) WCRA	Yes – s 30(2) PIPA	Yes – s 48(2) MAIA
Rehabilitation reports	Yes – s 284(2)(c) WCRA	Yes – s 30(2) PIPA	Yes – s 48(2) MAIA
Signed statements made by the claimant and lay witnesses	Yes – s 284(2)(d) & 279(1)(a) & (6) WCRA *WorkCover Queensland v Jones* [2009] QDC 274 ordered disclosure of signed statement attached to correspondence to the claimant	No – s 30(1) PIPA if statements are covered by legal professional privilege: *Mahoney v Salt* [2012] QSC 43 "…the draft statement and the signed statements are properly the subject of legal professional privilege, and are not required to be disclosed to the applicant" Yes – if attached to an "investigative report" *Turpin v Allianz Australia Ins Ltd* [2001] QSC 299; this extends to "unsigned statements [which] were not attached to the investigator's report…but are a part of the investigator's Report" *Frasson v Frasson* [2020] QSC 171; also where privilege has been lost or does not apply (see *Watkins v State of Queensland* [2008] 1 Qd R 564 below)	No – s 48(1) MAIA if statements are covered by legal professional privilege; *Mahoney v Salt* [2012] QSC 43 "…the draft statement and the signed statements are properly the subject of legal professional privilege, and are not required to be disclosed to the applicant" Yes – if attached to an "investigative report" *Turpin v Allianz Australia Ins Ltd* [2001] QSC 299; this extends to "unsigned statements [which] were not attached to the investigator's report…but are a part of the investigator's Report" *Frasson v Frasson* [2020] QSC 171; also where privilege has been lost or does not apply (see *Watkins v State of Queensland* [2008] 1 Qd R 564 below)

Solicitor's file notes of discussions with claimant and lay witnesses; draft statements of witnesses	No specific authority directly upon the issue under the WCRA but see – s 284(2)(d) & 279(1)(a) & (6) WCRA Definition in s 279(6) is not exclusive: "***relevant documents*** means reports and other documentary material, *including* written statements made by the claimant, the worker's employer, a contributor, or by witnesses." Note that referring to PIPA in *Watkins v State of Queensland* [2008] 1 Qd R 564, Keane JA at [61] said "…it must be accepted that the communications in question, including the solicitor's diary note … are "documentary material about the incident" in respect of which the claim has been brought…."	No – s 30(1) PIPA see above; *Felgate v Tucker* [2011] QCA 194; *State of Queensland v. Allen* [2012] 2 Qd R 148 Yes – where privilege does not apply ie., through waiver of privilege or has been lost *Watkins v State of Queensland* [2008] 1 Qd R 564; this extends to "unsigned statements [which] were not attached to the investigator's report…but are a part of the investigator's Report" *Frasson v Frasson* [2020] QSC 171	No – s 48(1) MAIA see above; *Felgate v Tucker* [2011] QCA 194; *State of Queensland v. Allen* [2012] 2 Qd R 148 Yes – where privilege does not apply ie., through waiver of privilege or has been lost *Watkins v State of Queensland* [2008] 1 Qd R 564; this extends to "unsigned statements [which] were not attached to the investigator's report…but are a part of the investigator's Report" Frasson v Frasson [2020] QSC 171

Correspondence between the claimant and their lawyer	No – s 284(1) & (2)(d) WCRA However, Explanatory notes to Bill in 2004: "Although the clause maintains legal professional privilege over correspondence that passes between a party and their lawyer, relevant documents attached to this correspondence must be disclosed"; Signed statements attached to correspondence must be disclosed: *WorkCover Queensland v Jones* [2009] QDC 274; Final position about correspondence signed by the claimant confirming their instructions not finally decided but see the criticism in *Schonell v Laspina, Trabucco & Co Pty Ltd* [2013] QSC 90 at [25]	No – s 30(1) PIPA	No – s 48(1) MAIA

19 Leaving to one side WCRA claims; providing privilege is not waived or lost, draft statements, file notes and correspondence to the client covered by legal privilege remain confidential and are not liable to disclosure.

20 WCRA claims may be managed by noting that correspondence between "the party and the party's lawyer"[5] is covered by legal professional privilege and remains confidential. However, as will be discussed, it is a questionable practice to ask the client in correspondence to acknowledge the correctness of instructions about liability and quantum matters to avoid making a statement.[6]

21 One suggestion may be that when drafting a file note that may become liable to disclosure, the note clearly record that the contents of the file note have not

[5] S 284(1) & (2)(d) WCRA
[6] *Schonell v Laspina, Trabucco & Co Pty Ltd* [2013] QSC 90 at [25]

yet been reviewed and adopted by the witness. In that way, when the witness is formally proofed and a signed statement is obtained, any inconsistency between the file note and the statement is negatived because it is apparent on its face that the file note has not been reviewed and adopted by the witness as correct.

22 An interview with an unhelpful witness in a WCRA claim may be noted in correspondence with the claimant and privilege applies. However, the danger in going into too much detail is that your claimant may feel compelled to adopt someone else's version of events.

Relevant case law

23 In *Schonell v Laspina, Trabucco & Co Pty Ltd,*[7] Martin J said:

> "[21] In the ordinary course of litigation, an accusation of recent invention (which is plainly raised in this case) would be met by a signed statement by the person accused of the invention which would demonstrate the consistency of the person's account. ***That cannot occur in this case because of the method used by the plaintiff's instructing solicitors to take instructions.***
>
> …
>
> [Martin J then discussed the objects and disclosure provisions of the WCRA]
>
> …
>
> "[25] During the cross-examination of the plaintiff, Mr Campbell called for the statements given by the plaintiff to his instructing solicitors. He relied on s 279 of the *WCR Act*. From the argument which then ensued it appears that the plaintiff's solicitors deliberately did not obtain a signed statement from the plaintiff in order that there would not be a document

[7] [2013] QSC 90

> which fell within s 279. They instead took his instructions, reduced them to writing and asked him for his comments. The plaintiff then revised the document and returned it to his solicitors. The production of this document was resisted at trial but, after some negotiation, a redacted version was provided. Because the documents were provided I do not need to decide whether the actions of the solicitors – **remarkable not least for commencing an action seeking damages of $2,000,000 without a signed statement** – would have protected the documents from disclosure. It would, at the very least, seem that the solicitors acted in a way which was contrary to the objects of the *WCR Act.*"

24 Mr Schonell's damages were assessed at $1.4M less the statutory refund but his claim was dismissed as he failed to make his liability case.

25 There are many examples of cases where an expert's opinion was undermined by arguments that the opinion was not itself based upon admissible evidence. For example:

- *Rogers v Interpacific Resorts (Australia) Pty Ltd* (expert accountant's report depended on four matters of fact being established where it was argued that "…pre-accident writings by Mr Rogers, together with a paucity of evidence, meant that the claim as an exercise in mathematical modelling was speculative");[8]

- *Beaven v Wagner Industrial Services Pty Ltd* (hearsay statement of the claimant contained in the report from an expert ergonomist was inadmissible and therefore those assumptions relied on by the expert were not proven) [the plaintiff had not given direct evidence of the impugned facts at the trial];[9]

[8] [2007] QSC 239
[9] [2018] 2 Qd R 542

- *Sutton v Hunter* ("…the basis for the accountant's opinions [were] not proved or admissible, and the reasoning is not explained, or explained sufficiently").[10]

Duty to the client

26 Mr Rogers was dissatisfied with the assessment of loss of earning capacity in *Rogers v Interpacific Resorts (Australia) Pty Ltd.*[11] He sued his solicitors in negligence. He was initially represented by senior counsel but in the end acted in person (Mr Rogers was a solicitor in South Australia). He claimed that, because of the solicitors' breaches of duty of care, retainer, and fiduciary duty he lost the opportunity to have received considerably more for past and future economic loss.[12] The litigation was extensive with interlocutory skirmishes about pleadings, re-litigation abuse of process, the extent of the duty of care and fiduciary duty owed by his lawyers and the advocate's immunity from suit.

27 The Court of Appeal heard an appeal from a strike out order.[13] The Court held that legal work relating to matters connected with preparation for the trial was covered by the advocate's immunity. **However, that immunity did not extend to the pre-proceedings stage of the matter**:

"[59] These provisions require solicitors to carry out before the commencement of litigation much of the work which previously was done after the commencement of litigation as preparation for the trial of a personal injuries claim. **The solicitor's work now includes doing that which is required to obtain and produce information and documents with a view both to use in the PIPA processes** and, if the claim is not settled earlier, their use as evidence at a trial. Perhaps the most significant provisions for present purposes are those provisions which

[10] [2021] QSC 249
[11] [2007] QSC 239
[12] *Rogers v Roche (No 1)* [2017] 2 Qd R 306 headnote
[13] Ibid.

prevent a party from using in litigation a document which should have been but was not disclosed as required in the pre-litigation process and the provisions for costs orders in the litigation to be influenced by defaults in complying with the PIPA processes.

[60] …In this case the claim is for loss said to have been caused by the conduct of the solicitors **in failing properly to prepare the claim, including by obtaining available supporting documents and evidence, and presenting it to the defendant as required by PIPA**. The appellant does not claim that this alleged negligence, together with the operation of any provision of PIPA, made it impracticable to redress the inadequacies in the evidence during the subsequent litigation. On the contrary, in the claim based upon the respondents' alleged conduct during the litigation, **the appellant claims as an aspect of the alleged negligence that the respondents "failed to redress the inadequate preparation during the PIPA stage"**. The conduct of the respondents alleged in this section of the claim had no more than an historical connection with the subsequent litigation. There is not here that intimate and functional connection between the work of an advocate and the conduct of the case in court and its resolution by judicial decision which is required to attract advocate's immunity.

…

[66] …A result of my conclusions is that **the appellant is entitled to claim that the first and second respondents did not perform their retainer** (except in so far as that allegation is referrable to the alleged inadequacies in preparation of the claim during the litigation stage). The subparagraph struck out by the primary judge therefore did not necessarily attract advocate's immunity and it was also not a re-litigation abuse of process."

28 The Court of Appeal permitted Mr Rogers' claim to continue in respect of breaches of duty in the PIPA [pre-proceedings] stage and for breach of

fiduciary duty (which was unaffected by the advocates' immunity defence). A search of the court file reveals that the claim went into amended pleadings over 2017 but did not go to trial. The claim was discontinued on 17 August 2018.

29 In summary, the Court of Appeal has considered that a lawyer has a duty in the pre-proceedings stage to obtain available supporting documents and evidence, and presenting it to the defendant.

30 *Schonell's* case[14] is an example where a signed statement taken at an early time in the claim could have been used to rebut an allegation of recent invention. Is that not part of the lawyer's duty to protect?

31 Having signed proofs of evidence means that the claimant and witnesses are locked into versions of events. The lawyer has a basis to resist later complaint that the lawyer has misunderstood instructions. However, proper investigation to corroborate as far as possible the version of events before statements are signed is imperative.

Credibility and reliability of claims

32 Credible persuasive claims:

- Are usually settled promptly
- Leave less room for argument at ADR/trial

33 What affects the credibility and reliability of a claim:

- Inconsistencies in versions of events. (I.e., Notice of Claim; statutory declarations in response to request for information compared to contemporaneous medical notes and other documents)

[14] *Schonell v Laspina, Trabucco & Co Pty Ltd* [2013] QSC 90

- Inconsistent reporting of symptoms/history.

- Inconsistencies in quantification of damages for past economic loss, past special damages and care and assistance damages.

- Lack of corroboration on key issues.

- Exaggeration.

- Fraud. (I.e., non-disclosure of income by client including cash income; "engaged in a calling" without notifying WorkCover).

Case example – *Meechan v Savco Earth Moving Pty Ltd*

34 Mr Meechan was struck on a building site by a boom from an excavator. The trial judge made the following findings:[15]

> "[33] Mr Meechan admits that the versions of the incident given by him in writing and orally to WorkCover, to its doctor and on five occasions to those treating him were not accurate; on one occasion admitting he lied and, on another occasion, saying he "misled the truth". Mr Meechan conceded that on several occasions he had not accurately described how he was injured, as he had deliberately left out the role Mr Harris played in his injury. He explained that he had done this because Mr Harris was his friend that got him the job and he was quite scared that he would get Mr Harris in trouble; as Mr Harris did not have a licence to operate the excavator.
>
> [34] In the written submissions of Mr Meechan, it is said that the motivation for the inconsistencies was both "understandable and in one sense honourable". It is also true that not too much necessarily has to be made

[15] [2021] QDC 14; see also as an example *Clarricoats v JJ Richards & Sons Pty Ltd* [2017] QSC 214

of the fact that the history recorded in medical notes differs from the patient's account in sworn testimony.

[35] It is, however, necessary to make a factual finding about the precise circumstances of the incident, and in doing so it is impossible to choose the evidence of a person who has failed previously to give accurate accounts of the incident and who, particularly taking into account the medical evidence (which I will discuss later), is prone to exaggeration. I am also influenced in preferring the evidence of Mr Harris to Mr Meechan, though to a lesser extent, by the circumstances said by Mr Meechan to pertain to his earnings since approximately 2010; of which more will also be said later in this judgment.

…

[116] It was admitted by Mr Meechan in his evidence and submitted by Savco that the schedule does not show the full extent of Mr Meechan's earnings. Savco, for its part, contends that an inference should be drawn against Mr Meechan for failing to disclose to Centrelink and the Australian Tax Office his full earnings. Mr Lynch submitted in his closing address that there was in fact no default by Mr Meechan; apart from a failure to submit tax returns at all.

…

[121] It is unnecessary to resolve the full extent of Mr Meechan's income or his default with the taxation or social welfare authorities.

[122] For present purposes it is sufficient to find, as I do, that the evidence does not sufficiently demonstrate that any loss after the time he was paid by WorkCover was caused by the injury. The employment history of Mr Meechan after that time is little different from that before it. His cessation of employment with Ezi Roll Doors reinforces the view that Mr Meechan was not very interested in obtaining employment."

35 Mr Meechan failed on liability; damages assessed at $39,000. However, the Court of Appeal was more sympathetic; allowing the appeal and finding for the plaintiff on an 80/20 basis and reassessing damages resulting in a net award of more than $100,000.[16]

Practical tips

Collecting evidence

36 For a new claim there are several key questions the lawyer should consider:

- What was the scope of the duty (common law, contractual or statutory) owed by the proposed respondent?

- Can a breach of duty be identified (s 9 *Civil Liability Act* 2003 "CLA"; s 305B WCRA)? What evidence supports foreseeability and whether risk was not insignificant? Most importantly, what specific precautions were available to be taken that would have avoided the injury to the claimant?

- Has an injury been caused by the breach of duty (s 11 CLA; s 305D WCRA)? That is, but for the failure to take the precautions, the claimant would not have suffered injury. Or would the claimant have suffered injury anyway?

- Can the injured person's evidence be corroborated, by documentary evidence or other witness evidence, on key issues proving the breach of duty and causation, the injuries and damages?

[16] *Meechan v Savco Earthmoving Pty Ltd* [2021] QCA 264 per McMurdo JA, Fraser JA agreeing; Bond JA dissenting as to contributory negligence percentage

37 Collect the evidence early. Kylie Downes QC (as she then was)[17] wrote multiple articles for the QLS Proctor collection over several years. The first article in the collection "Collecting evidence" is highly recommended reading for all litigation lawyers, including personal injury solicitors.[18] The article highlights the importance of collecting evidence early from various sources including statements:

"The first and most vital piece of evidence in any case is for you, the solicitor, to take a statement from your client or from the person providing the instructions on behalf of your client. Take the time to do this and do not allow the client or the client's representative to draft their own statement or to feed you the story in multiple emails. This is because such a self-drawn statement is likely to be riddled with irrelevant facts and inadmissible opinions and is unlikely to contain all of the relevant facts which you require….

…

Play the detective. Take the time to track down witnesses and documents. If you can speak to one person who was present at the event in question or locate one relevant document, then you may get a lead to other witnesses or the existence and location of other relevant documents. Always ask all witnesses if they have personal notes, emails, diary notes and photographs and then ask to see them and obtain copies of them, if possible…."

38 There are other Proctor articles in the collection which are relevant to evidence gathering including briefing experts. That article confirms the importance of being able to prove the facts underpinning the expert's opinion opinion.

[17] Kylie Downes QC became a judge of the Federal Court on 2 August 2021
[18] https://www.qlsproctor.com.au/2020/08/collecting-evidence/

39 Her Honour's entire Proctor collection "Back to Basics" is now available as V3 free of charge on the QLS website to members.[19]

40 A signed and dated statement is the gold standard for proving lay evidence. Unsigned file notes, rough draft statements and such memoranda which may not have been adopted by the claimant or other witness are potentially detrimental to your case and yet are potentially disclosable in WCRA matters. Signed file notes are better than no statement at all. However, it is even harder to avoid the impression that that in truth the words in the file note may be "…a contrived document probably authored by her lawyer and was thus not "direct" oral evidence".[20] There is also the issue where draft statements are a work in progress pending further investigations and verification from documentary evidence yet to be obtained.

41 Ensure consistency from other sources in the version of events; the injuries and their consequences before the claimant signs their statement and, later, their Notice of Claim.

42 A version given closer in time to the accident is usually reliable but not always ie., where person was in trauma/shock when giving a version, under the influence of pain killing medications. The GP may have misreported the claimant's conversation. So too a WorkCover case manager's notes (although these conversations are recorded). Have an enquiring mind.

43 Sources of corroboration/verification of prior versions must be considered – Photographs or CCTV of incident; photos of damage/injury; statements from witnesses; records from investigating bodies such as police; accident report forms; medical, hospital and QAS records.

[19] https://files.qls.com.au/OnlineContent/2021/BacktoBasics/PUB-BACKTOBAS3.pdf
[20] *Hunt v Lemura & Anor (No 1)* [2011] QSC 426, Henry J at p.6

44 Provide the claimant with details of the prior version/s they have given to others to refresh their memory before they give their final instructions for their statement and Notice of Claim.

45 Have the claimant's statement signed and dated as soon as all relevant enquiries have been made and all documentary material has been assessed. Don't leave it in draft for months or years on the file. Supplementary statements to update the progress of recovery, treatment on so on can be made as required.

Quantum statement

46 A separate quantum statement should encapsulate the plaintiff's evidence regarding their injuries, treatment, recovery, care, returning/attempts to obtain work and ongoing difficulties. Don't wait for a trial to prepare it; you need this for the compulsory conference. Begin work on it when you first seek instructions. Do periodic supplements to it during the claim as the treatment and recovery occur; or if there are setbacks or deteriorations in condition.

47 An excellent checklist for a personal injury case when taking the quantum statement is set out in Advocacy Basics for Solicitors.[21]

48 Henry J's comments in *Hunt v Lemura & Anor (No 1)*[22] should be considered when drafting the quantum statement. It is to be expressed by the claimant in the first person. The s 92 statement should not "make claims" under the relevant damages headings but should simply state facts relevant to the claim:

"It is obviously preferable to separate the exercise of calculating quantum from the exercise of adducing the evidence used in those calculations. The latter is probably a matter for evidence while the former is a matter largely for

[21] Tronc K & Dearden I, *Advocacy Basics for Solicitors* (Thomson Reuters Australia 1993) at pp 376 – 386; 391 – 394 (still available in PDF format) https://legal.thomsonreuters.com.au/advocacy-basics-for-solicitors-pdf/productdetail/103047

[22] [2011] QSC 426: https://archive.sclqld.org.au/qjudgment/2011/QSC11-426.pdf

submission. It might be helpful to think in language of "quantum statement" and "quantum calculations" in order to avoid mixing the two."[23]

49 It is suggested that schedules be drafted as follows:

- A schedule of the plaintiff's past income on a gross, tax and net basis.
- A schedule of the plaintiff's past special damages.
- A schedule of the care and assistance damages.

50 Copies of the following documents relevant to the statutory refunds are required:

- Updated schedule of WorkCover refundable payments.
- Updated Medicare schedule of past benefits.
- Schedule of any Centrelink refund.

51 Documentary evidence of the claimant's attempts to obtain work/apply for work should be collated and available for disclosure. The quantum statement should touch upon any difficulties which the claimant has encountered in obtaining work as well as the impact of any residual psychiatric difficulties.

52 Statements from the carers as to the care provided as well as "before and after" observational evidence are also useful.

Notices of Claim and statements generally

53 The witness statements, including that of the claimant, should be factual and not argumentative – limit the use of adjectives and speculative or exaggerated

[23] *Hunt v Lemura (No 1)* [2011] QSC 426

language. Just get the facts and let the facts speak for themselves in the part reserved for the version of events; the nature of the injuries and their consequences. Argument about how serious the event was or how serious the injuries were is a matter of advocacy reserved for the compulsory conference.

54 Remember that Notices of Claim are sworn as statutory declarations. They must be true and not misleading.

55 Remember that claimants get cross examined on the extra details that are added to a version that is inconsistent from a previous version. Can the extra details now being provided by the claimant be proven or are they the result of a fertile imagination and false memories? The defence will submit that an evolving story means a lying or (at the least) an unreliable claimant.

MVA claims

56 MAIA Notices of Claim must set out the claimant's employment status, gross average weekly income over the past 12 months and at the time of the statement. In many cases, because there is a very tight time limit after consulting a lawyer, these Notices are signed by claimants "off the top of their head" without verifying from the actual payslip and tax documents what their actual gross average weekly income has been. In one case, a CTP insurer representative made the point to me that the failure to provide an accurate amount for gross average weekly income in the sworn Notice of Claim was misleading and potentially dishonest, highlighting recent prosecutions for inaccurate representation made by claimants. A claimant's tax documents and Medicare history can be downloaded off their computer device within minutes from their MyGov account. Do not act on guesswork and speculation.

57 Don't just rely uncritically on the police officer's theory of what happened [although they mostly get it right – they attended the scene]. Analyse police report versions, police statements from witnesses, get onto Google Maps and look at the lay of the land, visit the accident site if necessary, assess the traffic

light sequencing; ensure version is consistent – if the proposed version is not consistent with the client's version in the police report then why?

58 Even if it is obvious that your client was a passenger or is shown as the driver of unit 2 in the police report, and liability is unlikely to be in issue, an early statement from the claimant is still very useful, especially to counter any allegation of recent invention down the track.

59 In many cases, not all injuries are recorded in the records of the hospital, QAS or the GP particularly where there has been a bad injury and the lesser injuries are not as important for the treating practitioners. In many cases, a claimant will see a specialist at a much later date and much will be made of the lack of documentary evidence proving that the claimant had a particular symptom at an earlier time. I have had cases where the solicitor's records were the only reasonably contemporaneous notes of symptoms of an injury which later formed a significant basis of a claim. This is another reason for an early statement to be obtained from the claimant.

60 Photographs of bruising, even if seemingly inconsequential, can often prove very useful in time to come where there might be a dispute as to whether someone has suffered a soft tissue injury.

61 Photographs of the damaged vehicles are also useful.

WCRA claims

62 In many cases, a claimant will not immediately consult a lawyer after a work-related injury because WorkCover statutory claims will provide for the client's needs for treatment, rehabilitation and income replacement. That means that in many cases the lawyer will not be in a position to take an early statement from the claimant soon after the event. It is imperative to corroborate and verify the claimant's version particularly where there has been some time delay between the event and the consultation with the lawyer.

63 Get the versions the client has already given – incident report, statement, emails, WC application, WC Comms Report (the statutory claim file manager will invariably take the claimant's version of events in the first contact with the claimant), WC Medical Certificates; medical reports and records [some doctors are known to be meticulous in taking versions, others are broad brush], statements from witnesses; records from investigating bodies (ie., WHSQ; mines dept).

PIPA claims

64 These are sometimes especially difficult to verify and corroborate. Try to obtain the early versions, seek corroboration and verification. Was there an incident report? Obtain witness statements; photographs or CCTV of incident; photos of damage/injury; statements from witnesses; records from investigating bodies; medical, hospital and QAS records; employment, payslip and tax documents.

65 My colleague Laura Neil delivered a paper in Cairns recently where she said "Did the claimant slip and fall in a shopping centre where there might be CCTV footage? Was there a witness who saw what happened? Was an incident report completed with Centre Management? Did your client go home and make a diary entry or write it on the calendar?"

Past economic loss

66 The claimant should be asked to produce their employment letters, contracts, past tax returns and up-to-date payslips.

67 Scrupulous calculations based on actual tax/payslip documents must be made. Cash income must be disclosed. If necessary, amended tax returns may need to be filed.

68 Where a claimant remains employed after the injury, and has used their sick leave or annual leave to recuperate from an injury, damages to restore the

leave bank can be claimed.[24] Obtain a schedule of leave entitlements from the employer along with a schedule of the wages or salary payments before and after the injury.

69 Where the claimant says they have lost an opportunity to work at higher income, it must be proven. Likewise, attempts to mitigate loss must also be proven. Don't wait for the defendant to raise the failure to mitigate. Get on the front foot. My colleague Laura Neil in her recent paper said "You will need evidence to prove it – is there a signed contract, can you obtain a statement from the prospective employer confirming the client's instructions, when they were due to start, how much they would have been paid etc….Have they been looking for work? If so, copies of job applications, or questionnaires they may have had to fill in disclosing their injury, should be obtained."

Past special damages

70 Global claims for expenses with no supporting dockets are difficult to prove. Try to prove the actual expenditure. Claimants can be brought undone in the witness box by greedy global special damages claims. All the cross examiner needs to do is to ask how much a particular item costs, how often they are used etc.

71 The claimant should be asked to keep an expenses log with documentary proof of expenses paid.[25]

Care and assistance damages

72 Witness statements are vital to prove the basis of an opinion of an occupational therapist; better still care diaries: *Shaw v Menzies*:

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[24] *Graham v Baker* (1961) 106 CLR 340 at 351; *Parker v Commonwealth* (1975) 49 ALJR 221; *Vesey v Commissioner of Fire Services & White* [1995] QSC 229; *Prindable v Dunn* (1989) QSC 141 and *Kenny v Eyears* [2003] QSC 439

[25] Tronc K & Dearden I, *Advocacy Basics for Solicitors* (Thomson Reuters Australia 1993) at p 392

"[73]…Accordingly, a plaintiff who includes a claim for damages for gratuitous care must adduce sufficient evidence to meet each of those thresholds. **It has been a long-standing practice that solicitors advise clients making a claim for damages for personal injury, particularly where the claim includes a component for gratuitous care, to keep a weekly diary recording tasks and time to perform them by family members.** As this case has demonstrated, failure to have some system, because of the requirements of s 59, may mean that a deserving plaintiff may not cross those thresholds."[26]

73 It is not only good practice, but is the best practice, to advise the claimant and their carers to keep a care diary. In many cases, there will be some frustration and fatigue by people in having to record this data. Some people are more diligent than others. If the care diary could be kept for at least six months, this would be very useful. Even a sample of data will prove very useful and can supplement an "after the event" care statement.

74 A suggested spreadsheet template for a weekly diary for the carer/s to keep follows (the times are just examples, and the following assumes an injured female with children who will satisfy s 59A CLA):

Period	Name of Carer	Care Activity	Average time spent per day in care activity	Average time spent per week in care activity
23 – 30 May 2022	Spouse	Personal care – hygiene, showering, dressing, grooming	30 mins	
	Mother	Making meals and cleaning up	60 mins	

[26] [2011] QCA 197; Lack of diary not necessarily fatal though: *Hooper v King* [2011] QSC 324; *McAndrew v AAI Limited* [2013] QSC 290; *Good v Czislowski* [2013] QDC 68; *McQuitty v Midgley* [2016] QSC 36; however, the 6/6 threshold not met in *Cornwell v Imarisio* [2018] QDC 138 and *Zavodny v Couper* [2020] QSC 42 despite evidence from the occupational therapists as the lay evidence did not prove care meeting the threshold

		personal to injured person		
	Mother	Changing linen, laundry personal to injured person	15 mins	
	Mother	Attending to meals for children and spouse previously provided by injured person	60 mins	
	Mother	Attending at medical appointments (2 days @ 60 mins)		120 mins
	Mother	Shopping for family		90 mins
	Spouse	Attending to financial matters, paying medical accounts		30 mins
	Yard Lads	Yard maintenance – actual cost		$50
	Cleaners R Us	Domestic cleaning – actual cost		$100
	Father	Transportation – outing for injured person		60 mins
Totals for the week			2.75 hours per day x 7 =19.25 hours	$150 spent plus 5 hours

75 Contemporaneous care diary evidence is preferred to "after the event" statements produced at the eve of the compulsory conference. They can be

annexed to a witness statement and thereby verified and then should be supplied to the occupational therapist before the OT gives their report.

76 Having regard to s 306C – 306H of the WCRA, only the paid care items would be recoverable in this example, but the gravity of the injury is demonstrated by the significant amount of care provided by the carers. The relatively small cost of keeping a care diary is likely to be offset substantially even by a modest increase in the ISV that might be awarded for general damages to take account of the need for care provided. A conversation at an early time about s 306C – 306H with the claimant's family might identify an opportunity to engage paid care and assistance where no gratuitous care has yet been provided.

Expert evidence

77 A claimant's claim for personal injury damages will need to be supported by expert evidence. The relevant expert should be briefed with the statements of the claimant and other witnesses relevant to the issue upon which the expert is asked for opinion. A detailed consideration of expert evidence is beyond the scope of this paper.

Final preparations for the compulsory conference

78 Any supplementary quantum and carer statements, source documents in relation to economic loss, special damages and care and assistance need to be collated and disclosed.

79 The schedule of damages provided prior to the compulsory conference would ideally be provided at least two weeks beforehand to give the insurer an adequate timeframe to consider its position at the compulsory conference. The schedule of damages will be consistent with the statements of evidence and documents which have been generated up to that time, but not a regurgitation of the evidence.

80 Laura Neil has already covered a checklist of things in her paper delivered last year in Cairns.

Further reading

81 $96: Tronc K & Dearden I, *Advocacy Basics for Solicitors* (Thomson Reuters Australia 1993) in PDF format.[27]

82 Free: Back to Basics: The essential Proctor collection with Kylie Downes QC Version 3 November 2020.[28]

83 Free: Neil L, *Navigating the Pre-Trial Phase of Personal Injuries Litigation – The Fundamentals,* 2021 (request from Laura's email address lneil@endeavourchambers.com.au)

[27] https://legal.thomsonreuters.com.au/advocacy-basics-for-solicitors-pdf/productdetail/103047

[28] https://files.qls.com.au/OnlineContent/2021/BacktoBasics/PUB-BACKTOBAS3.pdf