



PERSONAL INJURY AND CIVIL CIRCUIT USER GROUP MEETINGS 2017

Key Points Bulletin – 5 July 2017

During April and May 2017, their Honours Justices Jack Forrest, Rita Zammit and Andrew Keogh chaired a number of meetings of representatives of law firms and members of the Bar who frequently appear in the Civil Circuit List (CCL), the Personal Injuries List (PIL) and the Dust Diseases List (DDL) of the Common Law Division of the Court.

The following Key Points emerging from these meetings are offered for the benefit of users of these Lists generally. Practitioners are encouraged to provide feedback concerning these issues or others concerning the general management of cases in the CCL, PIL or DDL at any time to Kate Clark, Deputy Registrar – Common Law: kate.clark@supcourt.vic.gov.au

GENERAL MATTERS

1. Issuing in the Supreme Court

a. Transfers to County Court

- The Common Law Division triages matters to consider whether they may more appropriately be dealt with by the County Court. Factors for consideration include the resources required to hear the case, complexity of the matter and the likely quantum of damages.
- VWA recovery claims in which an associated worker's claim for damages has resolved will also be considered for transfer to the County Court.
- Parties are given an opportunity to make submissions in the event they disagree that the County Court is a more appropriate jurisdiction.
- If a matter is fixed for trial, the County Court will endeavour to allocate an equivalent date.

b. Circuit matters

- Save for dust disease matters, claims with a regional character should be initiated in the CCL as per Practice Note SC CL 1 Civil Circuit List. This includes medical negligence matters involving regional hospitals and/or medical practitioners which are often incorrectly filed in the PIL.
- Regional dust disease claims should be initiated in the DDL.

c. E-filing

- A new e-filing system has been introduced in the Commercial Court and will be rolled out to the Common Law Division from 2018.
- The system will allow parties to file, pay fees, review files and communicate with the Registry via a web portal.

d. Court documents:

- Practitioners are asked to ensure that all Court documents include the information required by Rule 27.03(11), especially the name and e-mail address of an individual in the firm to whom reference can be made.

2. Case Management:

a. Personnel

- The Judge in Charge of each List¹ is assisted by Judicial Registrar Julie Clayton and, in the case of the PIL and DDL, by Associate Justice Ierodionou.
- A team of lawyers assists the judicial officers with management of cases and perform tasks such as scrutinising pleadings and requests for consent orders; flagging issues; overseeing compliance with orders; preparing matters for pre-trial directions and applications; and liaising with practitioners and self-represented litigants. The lawyers are also involved in project work for developing case management processes; drafting practice material; arranging seminars and consulting with stakeholders.

b. Standard timetabling orders

- Practitioners are asked to consider the appropriateness of interlocutory timetables they set for themselves, and in particular to set realistic dates by which they will

¹ CCL - Justice Jack Forrest (Justice Andrew Keogh from Term 3 2017); PIL - Justice Rita Zammit; DDL Justices Rita Zammit and Andrew Keogh

be ready for mediation and trial. This is particularly important in medical negligence claims and those involving catastrophic injuries.

- The Court understands that circumstances may change as the matter progresses, but has observed considerable non-compliance with timetabling orders. Practitioners are therefore urged to seek extensions of time limits to avoid the risks associated with breach of Court orders.

c. Directions hearings

- Minutes of proposed consent orders should be provided to the Court at least 48 hours prior to any directions hearing. Late submission of minutes means the Court cannot guarantee a response prior to the hearing and could result in unnecessary attendances and, in some circumstances, costs orders.
- Practitioners should not assume that proposed consent orders will be made and, unless they receive advice from the Court to the contrary, attendance at the directions hearing is required.
- The Court has experienced a significant increase in institutional abuse initiations and is likely to require attendance at a first directions hearing in these cases. This is to enable close monitoring of the impact of this increased practice area on the list and the progress of these matters through the Court. The Court will review this practice over the coming months to determine whether it will be maintained.
- Feedback from practitioners has been positive in relation to the effectiveness of Post-Mediation Directions Hearings in the PIL and CCL in keeping matters on track for trial. The Court expects that parties will be in a position at these hearings to address it on further timetabling orders as well as any issues which remain in dispute. Parties will also be required to confirm the estimated duration of trial.

d. Interlocutory applications

- In general, a summons with supporting affidavit material is required for all interlocutory applications, particularly those for an expedited trial or to refix a trial date, even by consent.
- On occasion a summons may not be required and practitioners should in the first instance complete and send an Interlocutory Application Information Form to the list email address as per the relevant Practice Note.

- Practitioners should make any necessary interlocutory application as early as possible in order to preserve their trial date.

e. Conclaves and joint reports

- The Court has been ordering conclaves and joint expert reports in appropriate personal injury claims. The practice has been found to be effective in narrowing issues.
- The Court is conscious of upfront costs and logistics associated with conclaves. It endeavours to balance these factors with potential savings of costs/court time associated with trial and will continue to evaluate their worth.

f. Pleadings

- Pleadings are scrutinised by the Court at an early stage of the litigation and are often found to fall short of what is required by the Rules.
- Particularisation of allegations in psychiatric claims arising from alleged bullying/stress is vital.

g. Joint Memoranda and Key Document Folders

- Orders for the preparation and filing of a Joint Memorandum identifying the factual and legal issues in dispute are commonly made at Final Directions Hearings (PIL and DDL) and Call-over (CCL) as well as a Key Documents folder.
- The Joint Memorandum should concisely set out the basic facts of the case and the major issues in dispute, as well as any significant matters that have been agreed between the parties.
- The Key Documents folder should contain a bare minimum of documents that may be of assistance to the trial judge prior to the commencement of the matter and should not resemble a voluminous Court Book.
- There appears to be a common misassumption that if a document is not in the Key Documents folder, it cannot be relied on.
- A recent paper of Justice Hargrave, [What a Judge Wants: Documentary Advocacy](#), is very useful in providing parties with clarity around what are 'key documents'.
- Once a matter has been allocated to a trial judge, it is suggested that parties contact the chambers of the trial judge to ascertain what documents they require.

h. Trial dates

- PIL matters are allocated trial dates as part of first directions. While the tendency for personal injury claims to settle before trial is factored into the Court's listing processes, late adjournments of trial are problematic, both for the Court and parties as re-fixtures lead to delays and additional costs and make it difficult to list other cases at short notice.
- Figures indicate that in 2015/16 approximately 48% of medical negligence matters were listed for trial on at least 2 occasions. Medical negligence matters are currently listed for trial approximately 12 months from the time of the first directions order and parties in these types of cases may wish to request a later trial date at the outset to ensure readiness for trial.
- Alternative listing practices, such as waiting until after unsuccessful mediation to allocate a trial date, have been considered by the Court. Practitioner feedback is that this is not the desired course. Listing practices will remain in place and the Court will review the situation in 6 months.

i. Finalisation of proceedings

- Where matters have settled, the Court will list the proceeding for directions in 4-6 weeks to allow either the filing of a Notice of Discontinuance or minutes of proposed orders to be submitted to finalise the proceeding.
- Until the matter is finalised, the matter is reflected as 'open' on the Court's system and this affects Court metrics.

j. Applications for Solicitor/Client Costs

- Plaintiff practitioners should ensure, when seeking final orders to dispose of workplace injury claims, that they consider the necessity for leave to make a solicitor/client costs application pursuant to the relevant provisions of the *Accident Compensation Act 1985* or *Workplace Injury Rehabilitation & Compensation Act 2013*.
- Applications need not be accompanied by detailed bills of costs.
- The Court's current practice of requiring certification from an independent costs assessor is under review.

k. Appearances by juniors:

- The Court encourages junior practitioners to appear at directions hearings however they must be familiar with the proceeding and able to answer questions from the Bench.

3. Mediation

- The importance of practitioners going to mediation armed with an estimate of their costs was emphasised. The Court is considering making this a standard order.
- The Court is also considering whether orders requiring multiple defendants to confer prior to mediation in relation to contribution should be built into standard timetabling orders.

4. Structured settlements for plaintiffs under a disability

- The Court is considering whether it may be possible to forego the need for counsel's opinion in support of applications for approval of compromise where the settlement is for general damages only and equates to a statutory maximum entitlement. A Notice to the Profession outlining the circumstances under which this requirement may be dispensed with will be published in the event of a change in the Court's current practices.

CIVIL CIRCUIT LIST

5. Regional courthouse redevelopment

- Construction of the new Shepparton court complex is well under way and, subject to completion, the first civil circuit sittings at Shepparton are scheduled for Feb/March 2018.
- An upgrade of the Bendigo courthouse is in the planning phase.

6. Accelerating cases

- Where there is more than one regional circuit per year, e.g. Latrobe Valley, the Court may contact parties to accelerate matters to an earlier circuit if the parties consent.

7. Case management

- Pre-trial management of matters in the CCL has devolved from Associate Justice Daly to Judicial Registrar Clayton although the circuit trial judge will continue to conduct the call-over.

- First and Post Mediation Directions teleconferences are now conducted on the first Thursday of every month, instead of Friday as previously. Directions hearings where all practitioners are Melbourne based will continue to be conducted in court on Fridays.
- Interlocutory applications are usually heard in Melbourne in much the same way as matters in the PIL and DDL, but may be listed during the relevant circuit if appropriate.
- Depending upon availability, a judicial officer may be able to conduct judicial mediations during circuits. The amenability of proceedings to judicial mediation will usually be considered at call-over.
- Documents produced in regional court registries pursuant to an Order 42A subpoena may be forwarded on request to the Principal Registry for inspection in Melbourne. Practitioners wishing to arrange this should email subpoenas@supremecourt.vic.gov.au.

8. Call-over

- While a regional practitioner may appear from the relevant circuit court via video-link at the call-over in Melbourne, current facilities do not allow a simultaneous video-link to another regional court/area. Subject to the circuit trial judge's agreement, it may be possible to arrange a telephone link to the other region. Requests for such telephone links should be made as early as possible prior to call-over to civil.circuits@supcourt.vic.gov.au
- The order of the listing of cases in a circuit is a matter for the circuit trial judge although jury trials are usually given priority over causes.
- The Court will consider whether to adopt a policy of giving causes not reached in a circuit a degree of priority in the next sittings. In the meantime, this should be raised with the circuit trial judge at the call-over.

9. Progress of circuit

- Practitioners/counsel appearing in proceedings in a circuit should keep in touch with the circuit trial judge's associate/s to monitor the progression of their matter in the list.

DUST DISEASES LIST

10. General trends

- The Court commends practitioners practising in this area, noting that parties are cooperative and efficient in circumstances where there are pressures and tight timelines.
- A cluster of silicosis cases has been observed. These cases differ from asbestos cases in terms of latency, causation and age of plaintiff. If the medicine is controversial, tools like conclaves and joint reports will need to be considered.

11. Pre-trial conferences

- While dust cases often move along at a pace, it is expected that practitioners will advise the Court at least 48 hours before a PTC is scheduled if an adjournment is required.
- The Pre-trial Conference Calendar on the DDL page of the Supreme Court website assists practitioners to nominate suitable PTC dates, particularly if an adjournment is required.

12. Contribution only proceedings

- Where contribution and/or third party claims remain on foot after settlement of the plaintiff's claim, the Court will grant some leeway in terms of adjournments to allow for further information gathering/negotiation, but notes that had the plaintiff's claim run to trial, contribution would have had to be dealt with at that time anyway.

13. Management of regional dust cases

- Regional dust cases are managed in the DDL but will be given a trial date in the relevant circuit and listed in the circuit Call-over rather than having a Final Directions Hearing.
- The Court endeavours to accommodate urgent cases, and, unless there is a competing matter, a dust case would usually be afforded priority in the circuit, or considered for trial in Melbourne.

14. Admissions by defendants

- Defendants are encouraged to make admissions as early as possible and should provide a draft amended defence to the plaintiff ahead of seeking leave to file and serve to encourage earlier communication of issues.

15. Reinstatement of companies

- Applications to reinstate a deregistered company should be made in the Commercial Court's Corporations List where requests for priority in urgent cases are usually accommodated.