



PRACTICE NOTE SC CL 1

Supreme Court Common Law Division - General

Commencement

1. This Practice Note commences on 25 May 2020.

Application

2. This Practice Note applies to all civil proceedings in the Common Law Division of the Supreme Court of New South Wales.
3. This Practice Note should be read in conjunction with other Common Law Division Practice Notes and specifically those of the individual lists.

Definitions

4. In this Practice Note:

ADR means Alternative Dispute Resolution and includes mediation under Part 4 of CPA and arbitration pursuant to Part 5 CPA.

Affidavit of Readiness means an affidavit setting out that all evidence and statements have been served and all Court orders have been complied with.

Chief Judge means the Chief Judge at Common Law or any judge nominated to perform duties on behalf of the Chief Judge.

Concurrent expert evidence means two or more expert witnesses giving evidence at the one time.

CPA means *Civil Procedure Act 2005*.

Evidentiary statement means a statement by the plaintiff which will form the basis of his or her evidence in chief or where the plaintiff is a corporation or is unable as a result of age or disability to give evidence a statement by an appropriate officer of the corporation or by that person through whom it is intended to provide the factual basis for the plaintiff's case in chief.

Registrar means the Registrar (Common Law Case Management).

the List Judge means the Judge appointed by the Chief Justice to be the List Judge for specific lists within the Common Law Division.

Duty Judge means the Judge designated from time to time to be the Judge of the Common Law Duty List.

Duty Registrar means a Registrar appointed by the Prothonotary to consider applications by parties and provide procedural advice and assistance to both practitioners and litigants in chambers on Level 5 of the Supreme Court.

Single expert witness means an expert witness jointly retained by the parties or appointed by the Court in accordance with UCPR Part 31 r 31.37(2).

UCPR means the *Uniform Civil Procedure Rules 2005*.

Introduction

5. The purpose of this Practice Note is to outline the case management practices of the Common Law Division in civil proceedings and the General Case Management List.

Commencement of Proceedings

6. The UCPR determine the Division and List that a matter is allocated to (see UCPR 1.16-1.21). The lists in the Common Law Division include the Administrative and Industrial Law List, the Defamation List, the High Risk Offenders List, the Possession List and the Professional Negligence List.
7. Proceedings in the Division must be commenced by way of Summons or Statement of Claim (see UCPR 6.1 and 6.2).

Venue

8. The venue for proceedings in the Division is Sydney.
9. Where a party proposes that a case or number of cases should be heard at a venue outside Sydney, this should be raised with the Registrar or Judge managing the case. The party should provide information to the Court as to the availability of the courthouse in the area where it is proposed to have the sitting.

Default Proceedings

10. Proceedings that may be wholly dealt with by entry of a default judgment are not allocated a Directions Hearing on filing. Instead, the matter proceeds administratively, until a default judgment is entered, the matter is discontinued, consent orders are made, a defence is filed, or the proceedings are dismissed under UCPR 12.8.
11. Where a defence is filed, the matter will be listed for a Directions Hearing before a Judge or the Registrar. It will then proceed as a defended matter in either the General Case Management List (in accordance with this Practice Note) or the Possession List (see Practice Note SC CL 6).

Case Management Generally

12. In proceedings other than default proceedings, the Court will allocate a Directions Hearing when the Summons or Statement of Claim or defence (as appropriate) is filed. They will then be initially listed for case management before a Judge or the Registrar and may subsequently be referred to the Registrar (where a matter has been case managed by a Judge) or to a Judge (where a matter has been case managed by the Registrar) for case management.
13. All matters will be initially allocated to the Registrar for case management except for the following matters which will be allocated to a Judge for case management:

- proceedings filed in the General List relating to intentional torts, wrongful arrest, false imprisonment, malicious prosecution and misfeasance in public office;
 - all proceedings filed in the Defamation List;
 - all defended proceedings in the Possession List;
 - all proceedings filed in the Professional Negligence List;
 - all representative proceedings filed pursuant to Part 10 of the CPA; and
 - all proceedings filed under the Crimes (High Risk Offenders) Act 2006.
14. This Practice Note should be read in conjunction with any practice note that relates to the specific lists referred to in the preceding paragraph.

Strike Out for Inactivity

15. Parties should note the provisions of UCPR 12.7. If proceedings are not prosecuted with due despatch an order dismissing the proceedings or striking out a defence in whole or in part may be made.
16. UCPR 12.8 permits the Court to make an order dismissing the proceedings of its own motion if it appears from the Court's records that for over five months no party has taken any step in the proceedings.
17. A notice will be emailed or posted to a party's address for service before the Court considers whether a matter will be disposed of under UCPR 12.8. Where there is no response to the notice issued, the Court may determine whether the proceedings should be dismissed in chambers without further notice to the parties. Upon receipt of the notice a party may write to the Registrar objecting to the disposal of the proceedings under UCPR 12.8.
18. Upon receipt of notification from a party objecting to the dismissal, the matter will be listed before either a Judge or Registrar for a Show Cause hearing. At the Show Cause hearing the parties will have the opportunity to make submissions about dismissal and must provide an affidavit explaining what steps have been taken in the matter. Where the Judge or Registrar is satisfied that sufficient cause has been shown, an order of dismissal will not be made. Orders will then be made to progress the proceedings.
19. Where the Registrar is not satisfied that sufficient cause has been shown, the proceedings will be dismissed or referred to a Judge for dismissal.
20. If a case is in the Possession List the Court may dismiss the proceedings if it appears from the Court's records that for over nine months no party has taken any step in the proceedings. Such dismissal may occur without any notice to the parties.
21. If in proceedings there is no appearance by a plaintiff at a listing, then the Judge or Registrar may stand the matter over to another date and direct that not less than five days before that date a notice of the adjournment is to be served on the plaintiff, advising that the proceedings may be dismissed if there is no appearance by or on behalf of the plaintiff at the adjourned hearing pursuant to UCPR 13.6.

The Registrar's Directions List

22. Proceedings in the Division will generally be managed by way of Directions Hearings conducted by a Judge or the Registrar.

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23. The Registrar sits each weekday at 9:00 AM to hear the Directions List.
 24. Parties should discuss their matters prior to each Directions Hearing and prepare Short Minutes of proposed Orders to hand up at the hearing.
 25. Each party not appearing in person must be represented at the Directions Hearing by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made, or who is able to obtain such instructions should the matter be stood in the list.
 26. The purpose of a Directions Hearing is to ensure the just, quick and cheap disposition of proceedings in accordance with the overriding purpose set out in section 56 of the CPA. Each party is obliged to notify the Court and the other parties if they are aware of any substantial default that cannot be cured by the making of consent variations to directions or timetable.
 27. The tasks at a Directions Hearing include, but are not limited to:
 - (a) considering whether the proceedings would more appropriately be heard in the District Court and making a consent order accordingly;
 - (b) defining the matters in issue, including liability. If no defence (or defence to cross-claim) has been filed the Registrar may direct that there be judgment as to liability on that claim;
 - (c) considering whether there should be a separate trial of the liability issue held before the trial of issues as to quantum, especially in the case of a child plaintiff where the assessment of damages may take some time before being able to be determined;
 - (d) directing that a party serve or all parties serve or file and serve witness statements – the purpose of such a direction being to facilitate clarification of issues and realistic negotiations for settlement;
 - (e) considering whether ADR is suitable;
 - (f) making consent orders for the completion at the earliest possible time of interlocutory steps such as discovery, interrogatories, views, medical examinations and expert reports;
 - (g) directing that a party or all parties serve or file a statement of damages - the purpose of such a direction being to facilitate what heads of damage are genuinely in dispute and to provide a basis for realistic negotiations for settlement.
 28. Directions Hearings, other than the first Directions Hearing for cases to be heard in Sydney, may be conducted by telephone. Parties wishing to avail themselves of this facility must advise the Sydney Registry at least seven days prior to the date of the scheduled Directions Hearing. This written advice is to be forwarded to the “Common Law List Clerk” and must indicate a telephone number that the party or relevant legal representative wants to be called at for the Directions Hearing. Such advice is to be sent by email to the Listings (Civil) email address set out on the Contact Us page on the Supreme Court website.
 29. It is expected that prior to the first Directions Hearing the parties’ legal representatives will have discussed the case and will have:
 - (a) narrowed issues and identified any matters of agreement;
 - (b) agreed on suitable interlocutory, directions or arrangements;

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- (c) prepared a draft timetable for the future management of the proceedings;
 - (d) prepared draft short minutes of any orders or directions to be sought at the directions hearing; and
 - (e) discussed the possibility of settling the dispute by ADR.
30. The Registrar will first deal with urgent matters or referrals. Where the Registrar is satisfied that the matter is urgent, the proceedings will be referred to the Duty Judge if it will take less than two hours to hear. Otherwise the matter will be referred to the Chief Judge to allocate a hearing date.
 31. The Registrar will next deal with consent matters before calling over the remaining list.
 32. If previous directions have not been complied with, the parties must provide an explanation for the delay by way of affidavit and must be able to satisfy the Registrar that the matter will be able to progress in accordance with the obligations imposed upon them by the CPA. Where the Registrar is not satisfied with the explanation, a costs order may be made or the matter may be referred to a Judge.
 33. Matters will not be adjourned generally and in most cases will not be adjourned for lengthy periods. Any requests must be supported by an affidavit setting out the basis for lengthy adjournments.
 34. Consent applications to adjourn a Directions Hearing to a later date must be made to the Registrar in writing, no later than 48 hours before the Directions Hearing. Such applications must be supported by an explanation of the circumstances in which agreement on an adjournment has been reached. If not notified by the Registrar that the adjournment has been granted, the parties must appear at the Directions Hearing.
 35. Proposed consent directions and orders and consent applications to adjourn a Directions Hearing may be sent to the Registrar, Common Law Case Management email address set out on the Contact Us page on the Supreme Court website. When the parties request the Registrar to make consent orders in chambers those orders must include the vacation of any date for Directions Hearings or the hearing of motions that the parties no longer require, and the new date for directions. If there has been default in a previous timetable, the parties are required to provide an explanation for non-compliance.
 36. In personal injury actions, where a matter is unlikely to be ready to proceed for a period of time the parties should be able to inform the Registrar whether a separate hearing on liability will be sought prior to the determination of the question of quantum. Affidavits in support of lengthy adjournments must be filed providing evidence of the status of the injury and when it is claimed that the injury will stabilise.
 37. Any matters, other than personal injury claims, that are not ready for referral to obtain a hearing date within 6 months of the first directions date (or in the case of matters commenced in the Administrative and Industrial Law List within 3 months), are to be referred for judicial case management.
 38. Personal injury claims, other than those referred to in paragraph 37, that are not ready for referral to obtain a hearing date within 12 months of the first directions date, are to be referred for judicial case management.

Claims in tort, contract and debt

39. At the first Directions Hearing a plaintiff is to provide to each party an evidentiary statement. If it is intended to raise other issues not covered by the evidentiary statement an amended evidentiary statement is to be served on each party as soon as practicable after the need to amend the evidentiary statement arises.
40. Each defendant is to serve on the plaintiff within 28 days of receipt of the evidentiary statement a statement of issues in dispute. The statement of issues in dispute is to set out concisely those facts which the defendant intends to establish in respect of each issue in dispute by the evidence that is to be led.
41. A plaintiff is to serve on each party within 14 days of receipt of the statement of issues in dispute a statement identifying those issues and the facts set out by the defendant which are agreed or not.

Evidentiary Orders prior to Allocation of a hearing date

42. The Judge or Registrar will order:
 - (a) the plaintiff to serve any further witness statements or affidavits to be relied on at the hearing including any statements additional to those served under paragraph 40;
 - (b) the defendant to serve any witness statements or affidavits to be relied upon at the hearing;
 - (c) the plaintiff to serve any witness statements or affidavits in reply; and
 - (d) the parties to serve copies of any documents to be relied upon.
43. A witness may only give oral evidence at trial with leave.

Expert Witnesses

44. The Court is concerned about the number of experts often expected to give evidence particularly in personal injury cases. The practice of having a large number of experts qualified, both medical and otherwise, whose opinions may be overlapping and whose reports either are not used or are of little assistance to the Court when tendered, is costly, time-consuming and productive of delay. The attention of practitioners in cases in which a claim is made for personal injury or disability is drawn to Practice Note SC Gen 10 which deals with "Single Expert Witnesses".
45. Where it is considered that an unnecessary expert has been qualified or is sought to be called to give evidence, the Court may:
 - reject the tender of the expert's report;
 - refuse to allow the expert to be called; and
 - disallow any costs incurred in qualifying the expert, in having the expert's report prepared or in calling the expert to give evidence.
46. As a guide, the number of expert witnesses giving evidence on behalf of a party shall be limited to:

- (a) one medical expert in any speciality, unless there is a substantial issue as to ongoing disability, in which case the number shall be limited to two in any relevant speciality concerning that disability; and
 - (b) two experts of any other kind.
47. Expert accountant and actuarial reports will as a rule be considered unnecessary except in special circumstances where they are shown to be of assistance in the assessment of damages, for example, in proceedings under the Compensation to Relatives Act 1897 or where a claim is made for the costs of future fund management.

Concurrent expert evidence

48. All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternative manner.
49. At the first Directions Hearing the parties are to produce a schedule of issues in respect of which expert evidence may be adduced and identify whether those issues potentially should be dealt with by a single expert witness appointed by the parties or by expert witnesses retained by each party who will give evidence concurrently.
50. In the case of concurrent experts, within 14 days of all expert witness statement/reports being filed and served, the parties are to agree on questions to be asked of the expert witnesses. If the parties cannot reach agreement within 14 days, they are to arrange for the proceedings to be re-listed before the Court for directions as to the questions to be answered by the expert witnesses.
51. In the case of concurrent experts, the experts in each area of expertise are to confer and produce a report by the date specified in the order of matters agreed and disagreed setting out the reasons for their disagreement.
52. After joint experts reports have been provided, further questions may only be asked of the experts by agreement, or with the Court's prior leave. In that event the experts are to confer again and to produce a further report prior to a specified date, again specifying the matters agreed and disagreed and the reasons for any disagreement.

Single expert witness

53. At the first Directions Hearing a single expert direction will be made in respect of those issues considered appropriate for a single expert. In all proceedings in which a claim is made for damages for personal injury, a single expert direction as to damages will be taken to have been made at the first Directions Hearing unless otherwise ordered.
54. A single expert direction, when made in those terms, means that the following are to be taken as having been made, with such variations as may be specified at that time or subsequently:
 - Any expert evidence is confined to that of a single expert witness in relation to any one head of damage, including but not limited to the nature, extent and cost of required nursing care or domestic care (including claims under *Griffiths v. Kerkmeyer*), physiotherapy, speech therapy, home modification, motor vehicle or aids and equipment, being of the kind customarily given (by way of example) by rehabilitation consultants, occupational therapists, nursing or domestic care providers, architects, builders, motor vehicle consultants, and by aids and equipment suppliers.

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

Mediation/Arbitration

55. At any Directions Hearing, the Court may consider whether the proceedings are suitable for ADR.
56. Parties must actively consider whether the matter is suitable for mediation or arbitration. Under UCPR 20.3 the Court may require each active party to state whether they consent to referral of the matter to mediation. If mediation has not been agreed, the parties must advise the Judge or Registrar at an appropriate Directions Hearing why the matter is not suitable for mediation. The Registrar may refer the matter to a Judge where the parties indicate that mediation is not agreed.
57. If the matter appears to the Court to be appropriate for resolution by mediation or arbitration, the Court will refer the proceedings for mediation or arbitration.
58. The Court may give directions requiring statements from parties including a timetable to enable parties to be prepared for mediation.
59. Should a matter not resolve at mediation then the parties are to file a Joint Memorandum of Agreed Facts and Issues in Dispute within 14 days of the mediation.
60. Parties are reminded that the Court has trained registrar-mediators available to conduct mediations on application.
61. Parties should also note the provisions of Practice Note SC Gen 6 which deals with the Court's Mediation practices.
62. Where the Court refers proceedings for arbitration, the court may give directions for the conduct of the arbitration.

Allocation of hearing dates

63. Upon the service of lay witness statements or affidavits, matters will be referred to the Chief Judge to determine if it is appropriate to list a matter for hearing and allocate to a Judge for pre-trial case management. This practice does not apply to matters filed in the Administrative and Industrial Law List, the Possession List and the Professional Negligence List.
64. When a case is ready for a hearing the parties should be in a position to advise the Chief Judge in relation to the following matters:
 - (a) the available dates of counsel, instructing solicitors and witnesses;
 - (b) the availability of expert witnesses for conclaves and preparation of a joint report following the conclave;
 - (c) a reliable estimate of the length of the hearing;
 - (d) whether there is a need for expedition;
 - (e) whether there are overseas, interstate or country witnesses proposed to be called;
 - (f) whether there is a need for audio visual facilities;
 - (g) whether the case has been mediated;
 - (h) whether the case should be heard in part or in whole at a venue other than Sydney;

- (i) any outstanding issues on which directions are required;
 - (j) the need for interpreters.
65. Matters ready for hearing will usually be listed for hearing by the Chief Judge.
66. At the time of allocation of a hearing date the Court will make the Usual Order for Hearing as set out in Annexure "A".
67. Once the matter is listed for hearing, case management to the extent necessary will be conducted by a Judge to be allocated by the Chief Judge.
68. Listings can be viewed on the case via the Online Registry or via the Online Registry's Court Lists (within two weeks of the hearing) or on the published Court List on the Court's website after 3:30 PM the day before the hearing.
69. Judges and Court Rooms may not be allocated until the day before the hearing. The Court Room should be checked on the day of the hearing.

Vacating Hearing Dates

70. All applications to vacate a hearing date must be made immediately upon the party seeking to have the trial date vacated becoming aware of the existence of the grounds that will be relied upon in seeking such an order. Such applications should be discussed with the other parties to the proceedings before the Court is approached.
71. Other than in exceptional circumstances, such applications must be made by motion supported by affidavit.
72. The application will be listed on a date suitable to the Court. It may be heard by the Duty Judge, the appropriate List Judge or the Trial Judge if allocated. Where a hearing date for the substantive proceedings is set, motions to vacate are usually determined by the Duty Judge.
73. Applications to vacate a trial hearing should not be made at the hearing other than in exceptional circumstances.
74. Applications to vacate a specially fixed motion are usually dealt with by the appropriate List Judge or the Registrar.
75. Other than in exceptional circumstances, such applications should not be made at the hearing of the motion.
76. Such applications must be made in writing supported by an affidavit and listed before the List Judge or Registrar to hear from the parties and make appropriate orders.

Applications by Motions

77. Applications must be brought by motion supported by an affidavit. Motions will be returnable before the appropriate List Judge or Registrar in the Directions List or in appropriate cases before the Judge case managing the matter.
78. Where motions are expected to take more than two hours to hear, the Registrar will either allocate a hearing date or refer the matter to the Manager, Listings.
79. Motions that will take less than two hours to hear and which are ready to proceed will be referred to the Duty Judge at 10:00 AM. The Duty Judge will then give an indication as to when the matter is likely to be heard during that week.

80. Motions that are within the Registrar's delegated powers will be allocated a date for hearing before the Registrar and orders made for their preparation.



T F BATHURST AC

Chief Justice of New South Wales

21 May 2020

Related Information:

Practice Note SC CL 5 Supreme Court Common Law Division – General Case Management List

Practice Note SC CL 6 Supreme Court Common Law Division – Possession List

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

Practice Note SC Gen 6 Supreme Court – Mediation

Supreme Court Rules 1970

Civil Procedure Act 2005

Uniform Civil Procedure Rules 2005

Amendment History:

18 May 2020: This Practice Note replaces former Practice Note SC CL 1 which was issued on 8 May 2018.

8 May 2018: This Practice Note replaces former Practice Note SC CL 1 which was issued on 17 August 2005. 17 August 2005: Practice Note SC CL 1 was issued and commenced on 17 August 2005.

Annexure A

- (a) Expert evidence to be given concurrently, if not already ordered.
- (b) Orders for Experts in their respective areas of expertise to confer and engage in a conclave by a specific date and provide a Joint report on matters agreed or disagreed setting out the reasons for their disagreement by a Court ordered date.
- (c) Where evidence is to be given by way of affidavit or witness statement, the parties are to discuss and as far as possible agree on any objections to the affidavits or statements. A schedule of any disputed objections is to be filed no later than seven working days before the hearing. The Trial Judge will rule on any remaining objections.
- (d) The parties are to file and serve a final joint Memorandum of Issues and facts which are agreed and those which are disputed together with a Chronology signed by Counsel by no later than 10 working days before the hearing.
- (e) The parties are to file and serve Affidavits as to Readiness for Hearing by a prescribed date.
- (f) The parties are to file and serve written submissions by no later the seven working days before the hearing.
- (g) The parties to file a Joint Court Book by no later than three working days before the hearing.

Additional Standard directions for Personal Injury Matters listed for hearing

- (h) The plaintiff is to serve at least four weeks prior to the hearing a draft schedule of damages, outlining in detail the heads of damage, and what damages are likely to be in the event of liability being established.
- (i) Prior to the hearing the parties are to confer about the schedule of damages. The plaintiff must also file and serve the final schedule of damages showing what is agreed and, if not, the competing position of the parties at least two working days before the hearing.