SUNSHINE COAST BAR ASSOCIATION CONFERENCE

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WHEN THINGS GO WRONG – (A MEDIATOR'S PERSPECTIVE)

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Introduction[1]

1) The theme for this conference is "*when things go wrong*". My paper discusses this issue in the context of a Mediation. As my practice has moved more towards mediating disputes, so my focus on the litigation process has changed. Consideration will be given in this paper to the position of Counsel in the context of a hypothetical typical Personal Injuries ***(PI)*** matter. I have been allotted 40 minutes and anticipate presentation of my paper will take about 35 minutes. This will leave about 5 minutes for questions, or a standing ovation for me giving you an early mark, as you see fit.[2]

Desmond and Rhonda

2) On 13 February 1994, Desmond Prior was a 29 year old Brisbane man married to Rhonda Prior. They had one infant child, Tamara. Without really knowing, but taking reasonable licence to draw inferences, Des and Rhonda were a happy young couple who adored their first born Tamara and looked forward to a long and rewarding life together.

3) Desmond was a painter by trade, and on the morning of 13 February 1994 he left his wife Rhonda and daughter Tamara at home and went to an address at Camp Hill. He had been contracted to paint the house there. Our work as lawyers often brings us into close contact with tragic events, and the journey by Desmond to Camp Hill that day was destined to later involve solicitors and Counsel in the aftermath of a tragic event.

4) Shorty before 13 February 1994, the owner of the Camp Hill house made arrangements for a husband and wife partnership called "*Jesberg Electrical*" to carry out some re-wiring. That work was done some weeks before Desmond arrived at the house.

5) Whilst the records I have seen do not tell me this detail, I can well imagine that Desmond arrived at the house and commenced preparations for the days work. He would have known he had to have the appropriate brushes, rollers, ladders, and tarpaulins; he would have known he had to have sufficient paint of the colour selected by his client; he would have known how long he could allow to complete the job; would not have known that it would be the last job he would ever carry out as a painter, or indeed as anything.

6) During the course of his work that day, Desmond was electrocuted and died.

7) A coronial enquiry on 13 October 1994 (precisely 7 months after the fateful day) found that Desmond died by electrocution. It was argued this happened when Desmond touched an inadequately insulated recently installed electrical cable. The likely

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[2] The opinions expressed in this paper are those of the author, and not necessarily of the Sunshine Coast Bar Association Inc.

defendants in the anticipated Lord Campbell's action were seen as being the partnership of Jesberg Electrical, and the South East Queensland Electricity Board.

8) Let me return for a moment to the conference theme of "*when thing go wrong*". It is rare for everything to go according to plan in the typical PI case. There is much scope for things to go wrong, so much so one might think it is the norm, and be tempted to be unconcerned about it. That approach is wrong on several levels:
   a) it completely ignores Counsel's duty to the client;
   b) it forgets that Counsel has a duty to the Court which includes marshalling and presenting the facts and the relevant law so as to assist the Court in the process of deciding the issues in a way that provides justice to the parties;
   c) it ignores the obligation we owe to ourselves to be competent.

9) The rational response to the fact that there is much to go wrong is to take reasonable steps to manage a risk that might occur. That is easily said, but what does it mean in practice? How does that relate to a personal injuries Mediation?

10) The short answer is, unsurprisingly, preparation. This raises another question: What is the difference between preparing for a trial, as opposed to preparing for a Mediation? Is there any difference? Can you appear for a plaintiff in a mediation on a next-to nothing preparation basis? The gist of this paper is to highlight the potential dangers of a lackadaisical preparation and the ways to avoid things going wrong. No party, not even the Mediator, should go into a Mediation unprepared.

11) Consider the question in the context of the PI claim process. Before the introduction of the *Uniform Civil Procedure Rules 1999* ***(UCPR)***, such a PI proceeding in the Supreme Court was commenced by the issuing and service of a Writ of Summons.

12) After the Registry issued the Writ, the only requirement for service of the initiating process was to serve it upon the proposed defendant within 12 months. After taking out the Writ, the plaintiff could then literally do nothing and wait for 12 months, and then make an application under Order 9 Rule 1 of the Rules of the Supreme Court for leave to renew the Writ. An observer of day to day litigation practice 30 to 40 years ago would have seen it was a regular occurrence for the Daily Law List to include Chamber Applications for the renewal of a Writ that was about to have its first birthday, or had already had it. Such a Writ did not cease to exist. Rather, it was regarded as being "*stale*", but capable of being renewed under Order 9 Rule 1.

The Prior Application

13) Let's return to the tragic case of Desmond Prior. Mrs Prior (Rhonda) received advice from a solicitor who (as it turned out) was less than fully competent.[3] An Application was made and it came before Justice Helman of the Queensland Supreme Court. This was before the UCPR came into force, and the Rules of the Supreme Court still applied. In *Prior & Prior v Jesberg, Jesberg & South East Queensland Electricity Board [1998] QSC 174,* Helman J explained the Application before him as follows:

> *"This is an application by the plaintiffs pursuant to Order 9 Rule 1 of the Rules of the Supreme Court for leave to renew the writ of summons in this action. The writ was issued on 12 February 1997 and is therefore no longer in force. Order 9 Rule 1 is as follows:*
>
> *"(1) Original writs of summons shall be in force for 12 months from the day of the date thereof, including the day of such date, and no longer; but if any defendant therein named has not been served within that time, the plaintiff may, before the expiration of the 12 months or within such further time (if any) as the Court or a Judge may allow, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for 12 months from the date of such renewal, inclusive of such date, and so from time to time during the currency of the renewed writ.*
> *...*
> *(3) A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ." "*[4]

14) Note the timetable extracted from the report:

#	Event	Date
1	Desmond's death and accrual of the cause of action	13.02.1994
2	Coronial Inquiry	13.10.1994
3	Issue of writ	12.02.1997
4	Order 9 Rule 1 Application for leave to renew	02.09.1998

15) It can be seen that the solicitor waited 1 day short of 3 years to issue the Writ. This was in circumstances where there had already been a finding that death was by

[3] So much so he was later removed from the roll of solicitors.
[4] A copy of *Prior & Prior v Jesberg, Jesberg & South East Queensland Electricity Board [1998] QSC 174* is annexed to this paper.

electrocution. There was no apparent need to commission a multitude of reports about liability or quantum, and no apparent reason why the matter should not have proceeded expeditiously. It could have and should have been completed before the expiration of the 3 years limitation period.

16) This sort of farce was one of the drivers of the changes to the PI proceedings landscape over the last couples of decades or so. The scope of this paper does not extend to a history of how and why these changes were made, or to catalogue all of them. It is sufficient to observe that they were all part of a commendable effort to make the running of PI cases more efficient. The changes are now reflected in legislation, including:
   a) the *Workers Compensation and Rehabilitation Act 2003* ***(WCRA)***;
   b) the *Motor Accident Insurance Act 1994* ***(MAIA)***;
   c) the *Personal Injuries Proceedings Act 2003* ***(PIPA)***; together with aspects of
   d) the *Civil Liability Act 2003* ***(CLA)***.[5]

17) The result is that PI cases are generally conducted through these steps:
   a) a Notice of Claim ***(NOC)*** is delivered to the party alleged to be responsible;
   b) after exchange of relevant information, a Compulsory Conference ***(CC)*** is held;
   c) at the end of the CC, each party provides the other with a Mandatory Final Offer ***(MFO)***;
   d) after the expiry of a period of time, the Claimant can then commence a proceeding to seek damages.[6]

18) Assume for the moment that Desmond's widow Rhonda and her daughter lived about 30 years later and that the event occurred in 2023. They would be guided through the process set out above and arrive at the Compulsory Conference stage. In preparing for the CC, Counsel for the plaintiffs might consider:
   a) liability should not be a problem, given the Coronial findings;
   b) the 2 defendants will have exchanged notices for contribution *inter se*, and they can fight that out;
   c) there is no need to worry about liability; and
   d) Quantum should be simple enough – we'll just ask for millions and see where we can get them to.

19) What could possibly go wrong? The answer is plenty. Such a *laissez faire* approach is replete with risk. But there are some simple steps that can limit risk, and those steps should be taken if you are representing someone at a Mediation. This is true not only

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[5] See also the *Civil Proceedings Act 2011* and Regulations under the various Acts.

[6] For example, see PIPA s 40(4) which requires each MFO to remain open for 14 days during which the proceeding cannot be commenced.

for a Mediation after the proceeding has commenced, but also when the parties agree to hold the CC as a Mediation.[7]

20) As Counsel for a plaintiff at such a Mediation, the task is to present the case for the plaintiff as well as you reasonably can. You cannot possibly begin to do this if you do not have a comprehensive statement from each witness. Considering Rhonda only at this stage, her statement should give (at least) the following:
    a) her name, DOB and address;
    b) her occupation;
    c) her history of schooling, other education, and employment, including what she did in the partnership;
    d) what plans she and Desmond had about life:
        i) more children?
        ii) travel;
        iii) investments;
        iv) retirement plans;
    e) how the passing of Desmond has affected her and her plans;
    f) how (if possible) that can be compensable in money.

21) Once you have those witness statements, and each has been signed and dated, how else can one optimise the prospects of success at the Mediation? As Counsel I have most usually acted for plaintiffs in PI matters, although I have acted for defendants as well. When acting for a plaintiff, it is of fundamental importance that the plaintiff's evidence is presented as clearly and completely as possible. My invariable practice is to take the plaintiff's finalised witness statement, and transform it into a series of questions and answers. I call it the Evidence in Chief, or EIC document.

22) The EIC document should list every question you intend asking the witness, and the answer of the witness to each question. The EIC document should elicit each material fact that the witness can attest to. The EIC document should then, together with any other admissible evidence, establish all the material facts to make out the cause of action and the causal connection between the demonstrated negligent act or omission and the damages claimed. There are a number of reasons why this practice is of assistance, including:
    a) it serves as a checklist of the matters you need to establish to make out your case, and will assist in drafting the Advice on Evidence;
    b) most witnesses are fearful of giving evidence. It is an unusual and frightening environment. This fear can sometimes almost paralyse the witness, and frequently leads to evidence being forgotten, or misstated. However, the witness knows that

[7] See PIPA s 38.

they have provided the answers to each question. They have seen and read the EIC document. That fear will be allayed;

c) as Counsel you can ensure that every fact you need to elicit from the witness is dealt with in the EIC and given as the *viva voce* evidence of that witness. You will not be wondering if you have missed something out. You will not need to trawl through notes you have made on the fly to ensure you have covered everything. If the Question is in the EIC, and it is crossed off to show you have asked it and received the answer, that part of the job is complete;

d) it sometimes happens that proceedings are interrupted. A fire in the building. A medical emergency affecting the witness, your opponent, the Judge or anyone. The interposing of another matter. Whatever the source of the interruption, you will know exactly where your line of questions had reached, and will be able to restart without missing a beat;

e) it is of assistance if a review of the transcript reveals an error;

f) you can effectively pre-empt much of the cross examination by raising the issues in EIC, and you have a record of that when it may be time to object on the basis that the evidence on the point has already been given.

23) Once you have the EIC documents, what else do you need to optimise the prospects of success at the Mediation? How do you demonstrate to the other side that the case for Rhonda and Tamara Prior is a good one, and deserves serious consideration?

24) The answer may be that you present to the other side some sort of statement setting out the facts you rely upon to prove the case for Rhonda and Tamara, and a rational calculation of the damages that flow from the demonstrated negligent acts or omissions. But how, I hear you ask, should I do that? Well the answer is in the Rules. The documents you need to provide are called Claim, Statement of Claim and Statement of Loss and Damage.[8]

25) But why do I need to prepare the SOC before the proceeding is even commenced? Shouldn't that wait until after the Compulsory Conference, and after the exchange of MFO's, and after the expiration of the 14 day period under PIPA s 40(4)? Not only should you not delay preparation of the SOC in that way, you should be eager to prepare the SOC as doing so gives forensic advantage.

26) Rule 5 of the _Uniform Civil Procedure Rules 1999_ ***(UCPR)*** is well known and often quoted. It says:

[8] See UCPR Rule 9 Form 2; Rule 22 Form 16; and Rule 547 respectively.

"5 (1) *The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.*

(2) *Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.*

(3) *In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.*

(4) *The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.*

Example-
The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

27) Does Rule 5 have any relevance to a matter that has not reached the end of the pre-court procedures? In my view it does. Some references to PIPA will illustrate the point. Section 4 of PIPA speaks of the "*main purpose*" of the Act as follows:

"(1)The main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.

(2)The main purpose is to be achieved generally by—

(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and
(b) promoting settlement of claims at an early stage wherever possible; and
(c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial; and
(d) putting reasonable limits on awards of damages based on claims; and
(e) minimising the costs of claims; and
(f) regulating inappropriate advertising and touting; and
(g) establishing measures directed at eliminating or reducing the practice of giving or receiving consideration for a claim referral or potential claim referral, or soliciting or inducing a claimant to make a claim, in contravention of this Act."

28) In my view, it is not possible to rationally interpret PIPA s 4 without keeping a weather eye on the fact that the scheme under PIPA (as with the WCRA and MAIA) is not focussed solely on time efficiency in settlement of claims, but also seeks to promote a proper outcome to the matter. That is why PIPA s 4(2)(c) uses the language " *a person may not start a proceeding in a court based on a claim without being <u>fully prepared for</u>*

resolution of the claim by settlement or <u>trial</u>". The link between the requirement to be "*fully prepared*" and to be so in readiness for "*trial*" is clearly expressed.[9]

29) So, is it permissible to attend a Mediation as Counsel for a party without being *".. fully prepared for resolution of the claim by settlement or trial"*? The answer must be in the negative. If one is to be "*fully prepared for … trial*", how can that possibly be done if there are no witness statements? But that is just the beginning of the advocacy to be performed at the Mediation. When acting for a plaintiff I believe it is important to prepare a credible Claim, Statement of Claim and SLD. In most PI cases, the Claim will not be a source of concern. However the SOC must be prepared, and it must articulate the material facts relied upon and demonstrate casual connection between the allegations of negligent acts or omissions and the relief claimed. What better way is there to show the other side that you have a case they need to consider seriously? Similarly, with Quantum, the SLD must be grounded in facts and be realistic. Blue Sky ambit claims are a waste of time.

30) Division 2 of PIPA is consistent with the position that the pre-court steps should be conducted bearing the UCPR in mind. Section 21 says:

"The purpose of this division is to put the parties in a position where they have enough information to assess liability and quantum in relation to a claim."

31) PIPA s 36 speaks of the Compulsory Conference. It shows that the possible trial must be kept front of mind by introducing the concept of a "*certificate of readiness*". It says:

"(1) Before starting a proceeding in a court based on a claim, there must be a conference of the parties (the compulsory conference).

(2) Any party may call the compulsory conference—
(a) at a time and place agreed between the parties; or
(b) if the relevant day has passed, at a reasonable time and place nominated by the party calling the conference.

(3) For subsection (2)(b), the relevant day is the later of the following days—
(a) if there is only 1 respondent to the claim, the day 6 months after the claimant gave the respondent a complying part 1 notice of claim or, if there is more than 1 respondent to the claim, the day 6 months after the day the claimant last gave a respondent part 1 of a notice of a claim under section 14(1);

[9] See also, for example, s 5 of the <u>*Workers' Compensation and Rehabilitation Act*</u> 2003, where it says the scheme should maintain a balance between providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and ensuring reasonable cost levels for employers; and also ensure that injured workers or dependants are treated fairly by insurers.

(b) if, under section 12, a person to whom part 1 of a notice of a claim is given gives notice to the claimant that the person is a proper respondent to the claim—the day 6 months after the person gives notice or, if there is more than 1 person to whom part 1 of a notice of a claim is given, the day 6 months after the day after the last person gives notice to the claimant.

(4) The parties may, for good reason, dispense with the compulsory conference or the signing of a certificate of readiness under section 37(1)(d) by agreement."

32) PIPA s 37 then fleshes out the concept of the "*certificate of readiness*". It says:[10]

"(1) At least 7 days before the compulsory conference is held, each party must give each other party—

(a) copies of all documents not yet given to the other party that are required to be given to the party under this Act; and
(b) a statement signed by the party verifying that all relevant documents, in the possession of the party or, if the party has legal representation, the practitioner acting for the party, that are required to be given under this Act have been given as required; and
(c) details of the party's legal representation; and
(d) a certificate (certificate of readiness) signed by the party.

(1A) A statement mentioned in subsection (1)(b) or a certificate of readiness must, if the party has legal representation, be signed by the practitioner acting for the party.

(2) The certificate of readiness must state that, having regard to the documents in the party's possession—

(a) the party is in all respects ready for the conference; and
(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; and
(c) medical or other expert reports have been obtained from all persons the party proposes to call as expert witnesses at the trial; and
(d) the party has fully complied with the party's obligations to give the other parties material required to be given to the parties under this Act; and

[10] Emphasis added.

(e) if the party has legal representation, the practitioner acting for the party has given the party a statement (a costs statement) containing the information required under subsection (4).

(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.

(4) A costs statement must contain—

(a) details of the party's legal costs (clearly identifying costs that are legal fees and costs that are disbursements) up to the completion of the compulsory conference; and
(b) an estimate of the party's likely legal costs (clearly identifying costs that are estimated legal fees and costs that are estimated disbursements) <u>if the claim proceeds to trial and is decided by the court;</u> and
(c) a statement of the consequences to the party, in terms of costs, in each of the following cases—
(i) if the amount of the damages <u>awarded by the court</u> is equal to, or more than, the claimant's mandatory final offer;
(ii) if the amount of the damages <u>awarded by the court</u> is less than the claimant's mandatory final offer but more than, a respondent's, or the respondents', mandatory final offer;
(iii) if the amount of the damages <u>awarded by the court</u> is equal to, or less than, a respondent's, or the respondents', mandatory final offer.

(5) The court may, on the ex parte application of a party, exempt the party from an obligation to give or disclose material to another party before trial if satisfied that—
(a) disclosure would alert a person reasonably suspected of fraud to the suspicion; or
(b) there is some other good reason why the material should not be disclosed.

(6) In this section—
party does not include contributor."

33) How can a costs statement contain a realistic "*estimate of the party's likely legal costs*" if no real attempt has been made to identify who the witnesses (lay and expert) are, what they will say, how that translates into a SOC, how long the trial is likely to take, and what the SLD will look like.

34) The courts have on many occasions stressed the importance of early identification of the strength of the case. In *Watkins v State of Queensland [2007] QCA 430*; [*2008] 1 Qd R 564* , the importance of the pre-court steps was explained at [67] as follows[11]:

"*The purpose of the provisions of Div 1 to Div 4 of pt 1 of ch 2 of the PIPA is to ensure that sound claims are admitted and unsound claims are abandoned; in this way, unnecessary litigation of those claims is to be avoided. ... The evident purpose of these provisions of the PIPA inevitably inform the actions of those who act in conformity with their requirements. That purpose is to ensure that good claims are paid and bad claims are* ***abandoned before proceedings are commenced in court;*** *that is to say, the "dominant" purpose is that there should not be litigation of the claim at all if that is reasonably possible."*

35) See also in *Britten v CPT Manager Limited [2009] QSC 336*, where McMeekin J said at [7] (footnotes omitted):

"*In assessing the reasonableness of the defendant's conduct it is not irrelevant to consider the statutory context in which the plaintiff's offer was made. Section 40(8) of the Act requires the court to have regard to the mandatory final offers made in making decision about costs "if relevant". Section 4 of the Act states that the main purpose of the Act is to 'assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.' Such purpose is to be achieved by 'providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and promoting settlement of claims at an early stage wherever possible.' Thus an important public policy consideration reflected in the provisions of the Act is the avoidance of litigation by early settlement. To facilitate that policy the Act requires that the parties be "in all respects ready for the conference and trial" and that the legal practitioner acting so certify prior to the conference being held".*[12]

36) Despite this, experience shows a tendency at times to regress to the good old days. Scant regard is paid to time constraints. The obligation to focus early and sharply on the real issues is given lip service rather than a productive response. Ambit claims with no prospect of coming to fruition are made. Evidence is considered necessary only when the trial is about to commence, if at all.[13]

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[11] Per Keane JA. Emphasis added.
[12] Whilst McMeekin J used the phrase *"in all respects ready for the conference and trial",* it appears to be a reference to the combined effect of PIPA s 37(2)(a) with 37(2)(b) and (c), together with PIPA s 4(2)(c), rather than a direct quote from the Act.
[13] See the paper by Justice Henry, Far Northern Supreme Court Justice, "*Proving and Advocating Quantum in Personal Injuries Trials*", 2024, NQLA Conference, Townsville.

37) Recently I was acting for a defendant in a historic Institutional child sexual abuse claim, and it was proposed by the solicitor for the plaintiff that the certificate of readiness under PIPA s 37 be dispensed with. I found that to be almost bizarre. For the reasons set out earlier in this paper, I see the appearance at a Mediation as very much and advocacy opportunity. The better prepared you can demonstrate your case to be, the more likely you will get an acceptable outcome, either at the Mediation, or at the almost inevitable eleventh hour negotiations at the door of the Court.

38) Quite apart from the plaintiff deciding to not take up that advocacy opportunity, as Counsel for the defendant I advised not to dispense with the Certificate for these reasons:

a) I wanted to know if the plaintiff was ready for the conference and the trial - PIPA s 37(2);
b) I wanted to avoid the plaintiff making any decision on the basis that they had another witness to confer with – PIPA s 37(2)(b) and (c);
c) I wanted to know that the plaintiff had been advised about the likely costs of going to trial – PIPA s 37(2)(e) and 37(4);
d) I wanted to be sure that no other documents were going to suddenly turn up after the CC – PIPA s 37(1); and apart from those reasons
e) In my view, to dispense with the CC because it is easier than complying with the requirements of PIPA s 37 does not satisfy the requirement of "*good reason*" in PIPA s 36(4);
f) that means that the certificate would be "false or misleading in a material particular" – PIPA s 37(3); and
g) that amounts to professional misconduct – PIPA s 37(3).

39) The force of the argument I have advanced above is, in my view, augmented when one has regard to:

a) the Purpose of the Act – PIPA s 4;[14]
b) the obligations of UCPR Rule 5;[15] and
c) the Barristers Conduct Rules.[16]

To Recap

38) Rule 5(3) UCPR says **"***In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way*."

39) Rule 3 UCPR says the UCPR "..*apply to civil proceedings*…".

[14] See para 27 above.
[15] See para 26 above.
[16] See especially the underlying Principles in Rule 5; and Rule 41 re being the mere mouthpiece of the Client.

40) PIPA speaks of the concept of compliance with PIPA by reference to the typical practicalities of a "*trial*" by the time of the CC. See PIPA s 37(2)(b); 37(2)(c); 37(4)(b) and 37(5).

41) Even though UCPR does not directly apply to the NOC (as no proceeding has yet been instituted), if a Claimant is to be "*ready for trial*",[17] then:
  a) the allegations of fact to constitute the cause of action should be identified;
  b) any documents relevant to the issues should be disclosed;
  c) any expert reports should be produced; and
  d) the Claimant should be given a Costs Statement that sets out the costs if the matter proceeds to trial and determination by the Court.

42) Hence, the case that the Claimant foreshadows in the NOC should be consistent with the requirements of the UCPR for a matter being heard in a trial.

43) The sound reasons to prepare witness statements and pleadings for Mediations include:
  a) it is fundamentally good advocacy;
  b) it promotes the perception that you are adequately prepared for the task at hand;
  c) it invites the opponent to tell you why your case is defective. You get a free kick if they do;
  d) it is consistent with one of the important aspects of practice as a barrister, and that is appropriate expectation management of the client;
  e) it prepares you for the Mediator's "reality testing".

44) So what can go wrong at a Mediation? Many things, but the worst outcome must be a failure to use the opportunity to settle on reasonable terms because of a lack of proper preparation. One of the main tools of a Mediator is the use of "*reality checking*" to test the strength of the position taken by the party, and to open their minds to compromise. A Mediator will:
  a) ask the parties to do a short list of the major points they wish to make;
  b) ask to be provided with the documents the parties consider support their position;
  c) ask to what effect a witnesses evidence will be;
  d) conduct reality checking against that material.

45) If the preparation I have referred to above has been done and in good time, you are more likely to withstand the reality testing, and secure a better outcome.

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[17] This concept flows from the s 37(2)(a) concept of "*ready for the conference*", and the s 37(2)(b) and (c) requirement that to be "*ready for the conference*", a party must be ready for "*the trial*" insofar as witness statements (including expert witness statements) are concerned.

46) I should add, before closing, that the principles espoused in this paper are not relevant to PI matters only. I see them as being relevant to a wide variety of cases, including:

a) Wills and Estates disputes, such as FPA's;
b) Commercial disputes;
c) Contractual disputes;
d) In short, anything that at the end of the day is an argument about money.

47) Thankyou for your time and attention.

John Lee LLM

Barrister / Mediator: Nationally Accredited.

ANNEXURE

Prior & Prior v Jesberg, Jesberg & South East Queensland Electricity Board [1998] QSC 174