General Liability

Emerging Talent Series (Part 2)

Procedural Differences

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SUMMARY PACK

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A founding member of LEGALIGN GLOBAL

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RESOURCES

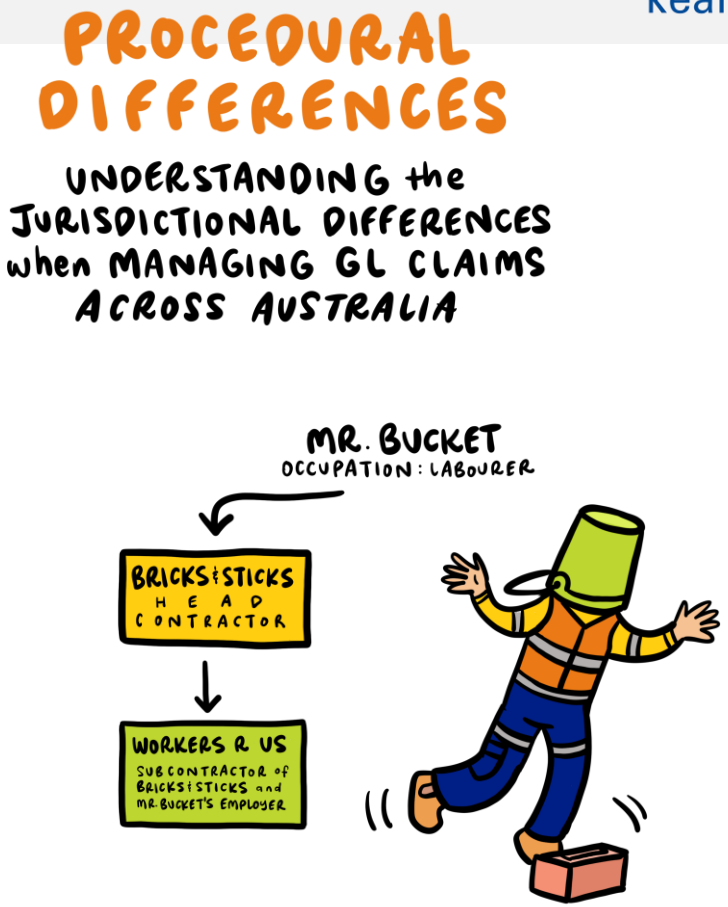
Video recording of the session:
https://vimeo.com/527623499/565d48878d

Presentation slides:
https://www.wottonkearney.com.au/download/10247/

Other W+K articles and insights:
https://www.wottonkearney.com.au/knowledge-hub/

FEEDBACK & QUESTIONS WELCOME!

We welcome any feedback you have on the presentation materials, format, or what could be done to improve the next session in our Emerging Talent Series. If you have any feedback or further questions, please don't hesitate to **email one of our presenters**.



Q&A – QLD

Whether you thought that the QLD PIPA Act had fulfilled its original purpose of resolving public liability claims more quickly and efficiently?

We certainly feel that PIPA has kept a considerable number of personal injury claims out of the courts. As to whether such claims are settling more quickly and efficiently, that's another issue. In our experience, the fact that claims need to be made by Claimants within 9 months of the date of injury or within one month of seeing a lawyer, whichever is the earlier, means that injuries may not be sufficiently stable so as to justify obtaining a medico-legal report from an independent expert. That can result in a delay while further treatment is obtained or to allow a medical condition to stabilise. If the injury involved a work-related issue and therefore the involvement of WorkCover, that too can mean that the WorkCover process needs to run its course prior to the PIPA process advancing. A further impediment to the swift disposition of claims is that claims brought under PIPA requires the 'front-loading' of both the Claimant's and Respondent's case. That is because there are restrictions on adducing evidence later in the litigated phase if that material has not been disclosed during the PIPA phase. That too can take time. It can also be costly noting that a party's 'best evidence' ought to be obtained during the PIPA process.

As a question regarding QLD pre-litigation steps, when is it necessary to serve contribution notices, are there consequences of not serving contribution notices and does that change if the other party has already been added as another respondent by the claimant?

It's necessary to serve a contribution notice on a person or an entity who is not a PIPA or WCRA respondent since it is the contribution notice that makes that person or entity a party to the claim. Whilst it's not strictly necessary to issue a contribution notice to a person or entity who is already a respondent, there are practical benefits for doing so especially if there is a contractual indemnity claim being made against that party. It allows for the case against the contributor to be set out in writing so that they can take their client's instructions and be in a position to meaningfully respond to the contribution claim at the compulsory conference. In saying this, if the matter becomes litigated, a respondent is not precluded from issuing a third party claim simply because that person or entity was not a party during the PIPA pre-litigation process if the defendant complies with the *Uniform Civil Procedure Rules 1999* regarding third party claims and if the limitation period for the contribution claim has not expired.

Q&A – VIC

You mentioned that on receipt of a Certificate of Assessment and the Prescribed Information, a respondent can refer to the Medical Panel for a second opinion as to whether the claimant's injuries satisfy the relevant threshold. Can a Medical Panel determination be appealed?

Yes, but only in certain circumstances. You cannot appeal the merits of a decision. However, you can appeal where there has been a substantial error of law such as if the Medical Panel failed to take into account relevant considerations. There is also an issue as to whether the Medical Panel can hand down its decision outside the 30 day time limit prescribed in the Wrongs Act 1958 (Vic). Previously, the Court's view was that any determination made outside the 30 day time limit was invalid. However, last year, the Victorian Court of Appeal disagreed meaning that a determination handed down outside the 30 day limit is not invalid.

Q&A – WA

If Courts do not actively enforce case management timeframes in WA, what avenues do parties have to progress matters and compel opposing solicitors to file documents in a timely manner?

The first step should always be to write to the opposing party, ask them to file the documents and if necessary, put them on notice that you intend to apply for an order if they do not comply within a reasonable timeframe. If they don't comply, specific orders can be sought from the Court and the consequence is generally that costs will be awarded to the applicant. If action is still not taken, then various applications – such as applications for default judgment, summary judgment, dismissal of the action or for pleadings to be struck out, can be made.

Why do "interested non-parties" need to be disclosed in WA?

An interested non-party is a person who provides funding or other financial assistance to a party, and also exercises direct or indirect control or influence over the way in which the party conducts the case. It's not exactly clear why Order 9A RSC was brought in, but it may have been to attempt to hold non-parties to a similar standard as the named party. Interested non-parties have a duty not to engage in conduct which is misleading or deceptive, to cooperate with the parties and the Court in connection with the conduct of the case, and to not purposely delay proceedings.

Q&A – NSW

Is there much difference in the NSW District and Supreme Courts for preparation of matters to hearing?

DISTRICT COURT

In the District Court, the timetable to hearing is less stringent but the Standard Orders require:

- The Plaintiff to serve a full chronology of relevant events to be served on the other parties at least 3 days prior to hearing (which is to be tendered in the Plaintiff's case). Each party is to serve, at least 3 days prior to hearing a schedule of:
  - medical/expert reports and any other documents to be tendered; and
  - damages; and
  - issues.
- Working copies of all medical/expert reports and documents which each party proposes to tender are to be available to the trial judge (in addition to the Original copy).

The District Court has now moved to concurrent evidence from experts where those experts are required for cross-examination and if their fields of expertise are the same or substantially the same. In that scenario, the experts should confer and produce a joint report stating areas of agreement/disagreement. There is no set time frame unless otherwise ordered by the Court as to when those joint reports ought to be prepared prior to hearing.

SUPREME COURT

The Supreme Court usually has a lengthy timetable to hearing which is usually entered once all pleadings and evidence has closed (although the Defendants are usually permitted to serve their statements quite close to the hearing date), and includes the following orders:

- Parties are to agree on questions to be put forward to expert conclaves (as early as possible prior to hearing but after the evidence has closed). Experts are to confer and produce joint reports on matters agreed/disagreed as soon as possible prior to trial.
- 4 weeks prior to hearing, the Plaintiff is to serve a draft schedule of likely damages (in the event liability is established).
- Around the same time, parties are usually required to file and serve Affidavits of Readiness for hearing (setting out matters completed and outstanding).
- At least 10 working days prior to trial, parties are to:
  - file and serve a final joint Memorandum of Issues and Facts which are agreed/disputed; and
  - a Chronology signed by Counsel.
- At least 7 working days prior to trial, parties are to file and serve written submissions.
- The parties are to file a Joint Court Book no later than 3 working days prior to trial.
- The parties are to confer on the draft schedule of damages, and at least 2 days prior to the hearing, the Plaintiff must file and serve the final schedule of damages showing what is agreed or otherwise the competing position of the parties.

UPCOMING SESSIONS:

- Session 3: **GL Key Issues & Jurisdictional Nuances** (29 April) Save the date to calendar
- Session 4: **Quantum Regimes by State** (20 May) Save the date to calendar

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