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Civil Procedure Act 2010 (Vic)

1 Overarching purpose of the *Civil Procedure Act* 2010

1.1 "The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute."[1]

2 Court to give effect to overarching purpose

2.1 "A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers … ."[2]

3 Aim of the County Court in civil litigation

3.1 The aim of the County Court in civil litigation is to list, hear and determine cases quickly and cost-effectively, consistent with the demands of justice and, in particular, with the requirements of the *Civil Procedure Act* 2010.

3.2 In particular, the parties:

(a) for the purpose of avoiding undue delay and expense, must not take any step unless that party reasonably believes that step is necessary to facilitate a resolution or determination of any application or trial;

(b) must co-operate with the Court in order to bring about the efficient conduct and disposal of the application or trial;

(c) must use every reasonable endeavour to reduce or resolve the issues in dispute;

(d) must ensure that every reasonable endeavour is undertaken to ensure the costs incurred are proportionate to the complexity and importance of the issues in dispute and the amount in dispute;

(e) must use reasonable endeavours to act promptly and minimise delay; and

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1 *Civil Procedure Act* 2010 (Vic), s7(1)
2 *Civil Procedure Act* 2010 (Vic), s8(1)

(f) have an obligation to disclose any document in their possession or control to the other party at the earliest reasonable time.

Parties expected to co-operate

3.3 At all times, the parties are expected to co-operate in the resolution of interlocutory matters so as to minimise the need for the Court's intervention prior to trial. In particular, parties are expected to sensibly respond to each other's enquiries regarding consent orders.

4 Certification Requirements of the *Civil Procedure Act* 2010

4.1 Part 4.1 of the *Civil Procedure Act* 2010 requires the parties to civil litigation to certify that the party has read and understood the overarching obligations and the paramount duty, and to file a proper basis certification.[3]

4.2 Although the failure to provide certification may not prevent the commencement of proceedings, the parties should note the Court may take into account any such failure in:

(a) determining costs in the proceeding generally;

(b) making any order about the procedural obligations of parties to the civil proceeding; and

(c) making any other order it considers appropriate.[4]

Management of the Civil Jurisdiction

5 Divisions and Lists

5.1 Rule 34A of the *County Court Civil Procedure Rules* 2008 (Vic) ("the Rules") provides a framework for the management of all civil litigation by the Court. Civil litigation is managed in two Divisions: the Common Law Division and the Commercial Division. Judge Misso[5] is the Judge in charge of the Common Law Division.

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3 *Civil Procedure Act* 2010, s41(1), s42(1)

4 *Civil Procedure Act* 2010, s46

5 Judge O'Neill retires as the Judge in charge of the Common Law Division from 13 August 2018

5.2 Rule 34A.04 of the Rules provides for the Common Law Division to be divided into the following Lists:

(a) the General List (managed by Judge Misso);

(b) the Defamation List (managed by Judge Smith);

(c) the Medical List (managed by Judge Saccardo and Judge Tsalamandris);

(d) the Applications List (managed by Judge Misso);

(e) the Family Property List (managed by Judge Kings);

(f) the WorkCover List (managed by Judge Wischusen);

(g) the Serious Injury List (managed by Judge Misso); and

(h) the Confiscation List (managed by Judge Murphy).

List Practice Notes

5.3 This Practice Note applies to the overall management of the Common Law Division. Practitioners should also consult the individual Practice Notes for the Medical List, the WorkCover List, the Family Property List and the Confiscation List.

Other Practice Notes and relevant documents

6 Self-represented litigants

6.1 Judge Saccardo manages proceedings involving self-represented litigants. He oversees the management of pre-trial steps in proceedings where a party is self-represented, in order to ensure, as far as is possible, the matter is in the best position to proceed on the day of trial. Refer to the Common Law Division Self-Represented Litigation Practice Note.

7 Applications by Practitioner for Costs

7.1 Applications by a Practitioner for Costs pursuant to section 134AB(31) of the *Accident Compensation Act* 1985 or section 344(7) of the *Workplace Injury Rehabilitation and Compensation Act* 2013 following resolution or judgment in a damages proceeding,

are managed by Judge Tsalamandris. The Practice Note, Application by Practitioner for Costs, is available on the County Court's website.

Communication with the Court

8 Email

8.1 Email is the preferred form of communication with the Court, and the following protocols must be followed:

(a) emails are to be sent to the appropriate addressees. Practice Notes relating to particular lists will indicate the appropriate email address. In the event of uncertainty, practitioners should view the County Court website or contact the Court by phone to confirm the correct address;

(b) emails should maintain the same level of formality expected of all communication with the Court;

(c) unless the communication concerns an application to be made without notice, emails are to be copied to all parties to the proceeding; and

(d) emails, like any other correspondence with the Court, are not the appropriate forum for raising contentious issues, unless the Court has invited written submissions via email.

Issue of Proceedings

9 eFiling

9.1 With the exception of self-represented litigants, documents filed in the Court are to be eFiled. See Civil eFiling on the County Court website for more information.

9.2 When a proceeding is issued, the plaintiff's practitioner is to nominate the Division and List that the proceeding is to be entered, specifying the principal cause of action.

9.3 Unless a further order is made by the Court, the proceeding will remain in that Division and List until it is determined or otherwise finalised. The Judge in charge of the Common Law Division may order a proceeding be removed to another List if, in his

or her view, that proceeding would be more appropriately dealt with in another List or another Division.

10 Contact details

10.1 Under the Rules of Court, practitioners are required to provide an email contact address on all Court documents.[6] Practitioners are expected to monitor the email addresses provided and advise of any change of address by filing a Notice of Change of Email Address with the Court.

11 Where certificate, consent or leave is required to recover damages

11.1 Where, as in applications under section 134AB(16) of the *Accident Compensation Act* 1985, section 335 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 and section 93 of the *Transport Accident Act* 1986, proceedings for the recovery of damages in respect of the injury cannot be brought without a certificate or consent from the relevant authority, or leave of the Court, the plaintiff's practitioner must ensure, when seeking to issue the proceedings, that such certificate, consent or leave has been obtained.

Original Documents and iManage

12 Original Affidavits

12.1 Civil files and all documents filed in a proceeding are now maintained in electronic format on the Court's iManage digital file system. Hard copies of filed Court documents are not kept in a physical Court file.

12.2 Any original document presented to the Court for filing or handed up in the course of a proceeding will be destroyed or returned to the party. Original documents including affidavits which are scanned and then eFiled with the Court must be retained by Practitioners, and made available to the Court if required. Those original documents should be retained by the Practitioner at least until the matter and any possible appeal is finalised.

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6 *County Court Civil Procedure Rules* 2008, order 27.03(11)(b)

Reserve List

13 Civil Reserve List Allocation

13.1 All cases listed for trial but which are not allocated to a particular Judge on the day of trial, will be placed in the Common Law Division Reserve List, generally overseen by the Judicial Registrar of the Division.

13.2 Reserve List cases are called over in the following order:

(a) matters marked with priority in the general trial diary;

(b) matters involving interstate witnesses or sick plaintiffs or which urgently need to get on for other reasons; and

(c) any other matters in order of long damages trials, and then oldest to newest in relation to date of issue of the proceeding.

13.3 At the callover, counsel in each case may be asked:

(a) what the nature and proposed duration of the proceeding is, as well as the number of witnesses to be called;

(b) whether the matter is ready to proceed; and

(c) whether the parties wish to have discussions aimed at resolving the case or narrowing the issues. If they do, the proceeding can be stood down to allow these discussions to take place.

Rule 42A subpoenaed material inspections

13.4 Any subpoena which seeks production to the Court of materials or documents should identify precisely what documents or materials are sought to be produced, having regard to the pleadings and the real issues in dispute in the proceeding. Subpoenas which seek a very broad or generic range of materials, or which are 'fishing expeditions', are likely to be set aside, with any consequent order as to costs.

13.5 It is expected that the parties will have inspected any documents subpoenaed pursuant to Rule 42A prior to the trial date. The commencement of a trial should not

be delayed to allow this to occur. Any documents subpoenaed to the Court pursuant to Rule 42 may not be inspected unless the Registrar permits it or leave is granted by the Court.[7] The process for making an application for 42A subpoenaed material inspections can be found on the County Court website.

13.6 Subject to an indication otherwise by the Reserve List Judge or Judicial Registrar, parties should remain in the vicinity of the Court for approximately one hour to determine whether a Judge is available. Counsel and their instructors may then return to their chambers providing they leave a contact telephone number with the Judge's or Judicial Registrar's associate.

13.7 The parties should advise the associate if their matter settles. The associate to the Reserve List Judge or Judicial Registrar will contact the parties if a Judge becomes available to hear their matter. If a Judge has not become available by 3.00pm, or earlier at the discretion of the Judge or Judicial Registrar, matters will be marked 'not reached' and re-fixed, usually with priority and at the earliest available date. Every effort will be made to have the proceeding or application refixed within three months, depending on the state of the lists, and with priority.

13.8 If a proceeding is marked 'not reached' in the Civil Reserve List and refixed for trial at a later date, the trial fee already paid will stand as the trial fee for the new date.

The Common Law Registry

14 Management of the Division

14.1 The Common Law Registry manages the Administrative Mention and Directions Hearing systems in consultation with the Judge in charge of the Division, the Judges who manage the Lists and the Judicial Registrar, for all Lists in the Division, apart from the WorkCover List and the Confiscation List.

7 *County Court Civil Procedure Rules* 2008, rule 42.09

14.2 The Common Law Registry manages and processes requests for orders, applications, adjournments and Directions Hearings. Orders made are published on Court Connect.

15 All correspondence to the Common Law Registry

15.1 All correspondence in respect of proceedings in the Division (apart from the WorkCover List,[8] the Confiscation List[9] and Self-Represented Litigants[10]) is to be directed to the Common Law Registry, not to the Judge's associate.

Correspondence to conform to Guidelines

15.2 Correspondence to the Common Law Registry must conform to the guidelines published on the Common Law webpage. All correspondence received by the Court is logged by the Common Law Registry on Court Connect.

15.3 The Common Law Registry only receives correspondence by email to commonlaw.registry@countycourt.vic.gov.au

16 Contact the Common Law Registry

16.1 Contact details:

(a) Central telephone line: (03) 8636 6515

(b) Email: commonlaw.registry@countycourt.vic.gov.au

Administrative Mentions

17 The Administrative Mention process

17.1 The filing of an Appearance will trigger the listing of an Administrative Mention in most Lists.[11] An Administrative Mention is a date by which parties are to send consent orders or a request for a Directions Hearing to the Court. An Administrative Mention Notice will be sent by the Court to the parties.

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8 Correspondence relating to proceedings in the WorkCover List is to be directed to: **workcoverlist@countycourt.vic.gov.au**

9 Correspondence relating to proceedings in the Confiscation List is to be directed to: **confiscationlist@countycourt.vic.gov.au**

10 Refer to the Common Law Division – Self Represented Litigation Practice Note for contact details

11 In all Lists but the Confiscation List and the Serious Injury List

17.2 No appearance is required on the date listed on the Administrative Mention Notice.

17.3 The Administrative Mention Notice requires the plaintiff (or his/her legal representative), after consultation with the defendant(s) (or his/her/its/their legal representative), to submit, by the Administrative Mention date (seven weeks after filing of a Notice of Appearance), draft consent orders to the Court for the timetabling of the proceeding, to hearing. Parties should submit orders in the form of the standard orders available on the County Court website. The consent orders must be signed by all parties on the record.

18 Where parties are not ready to proceed

18.1 If the parties are not ready to proceed by the Administrative Mention date, they should submit consent orders to the Common Law Registry indicating why the matter is not ready, and requesting that the case be listed for further Administrative Mention.

18.2 More than three applications to adjourn the administrative mention in a proceeding without a substantial explanation may result in the proceeding being listed for a Directions Hearing.

19 Where parties cannot agree upon consent orders

19.1 Where a plaintiff has sought but has not received a written or verbal response from the defendant(s) to his/her draft consent orders, the plaintiff may request that the matter be listed for a Directions Hearing. This should be done by email to the Common Law Registry.

19.2 Where the defendant(s) neither opposes nor consents, but does not wish to be heard on the matter, the defendant(s) should indicate this to the plaintiff and the Court, so that orders setting the proceeding down for trial can be made without further delay.

20 Failure to respond to an Administrative Mention Notice

20.1 Failure to respond to an Administrative Mention Notice will result in the listing of a subsequent Administrative Mention. Failure to respond to this subsequent Administrative Mention will result in the proceeding being struck out.

Timetabling Orders

21 Standard timetabling orders

21.1 Standard timetabling orders for damages trials, and for applications under section 93 of the *Transport Accident Act* 1986, section 134AB and section 135 of the *Accident Compensation Act* 1985 and section 335 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 can be found on the Common Law Division page on the County Court website.

21.2 In addition to providing a trial date for the trial and granting leave for interrogatories and discovery, the standard timetabling orders in damages proceedings include orders for payment of fees (setting down for trial fee and, where applicable, jury fees), vacation of the trial date and mediation. The standard timetabling orders in serious injury applications however are different, and do not contain orders for mediation, discovery or interrogatories.

22 Hearing fee

22.1 The setting down for trial fee is payable four to six weeks after the trial date is allocated. If the setting down for trial fee is not paid, the trial will be vacated and a Directions Hearing date will be allocated.

22.2 A plaintiff may apply to Registry for waiver of the setting down for trial fee on the grounds of financial hardship. It should be noted these fees are required and set by the relevant Government department and not by the Court. The trial Judge has no power to waive these fees. That may only be done by a Registrar or Deputy Registrar.

22.3 Application forms for waiver of the fee are available at the Registry. Applications should be made in sufficient time to allow them to be processed before the due date for payment.

22.4 Daily hearing fees are payable before the commencement of each day's hearing. Again, these are set by the relevant Government department and not the Court. The fee may be paid at the Registry counter or through the eFiling process. The current fee can be found on the County Court website.[12]

23 Trial dates

23.1 Due to changes in listing practices, an increased number of trials will be listed from 2017. Practitioners should expect to be provided with trial dates that are earlier than in previous years. The Court will allocate the first available trial date following receipt of the agreed timetable.

24 Requesting a particular date or a priority listing

24.1 Parties seeking a 'not before date' for trial should nominate a 'not before date' in the timetabling orders and provide detailed reasons for seeking a later date.

Witness ill, overseas or interstate

24.2 Practitioners must advise the Common Law Registry, whether before or after allocation of the trial date, of any particular circumstances which has or will arise so as to ensure that the proceeding is given priority on the date. Such circumstances may include significant health issues of a party, or presence of an interstate or overseas witness. Once notified, the Common Law Registry will allocate the matter to be heard with priority if that is possible.

25 Change in length of trial estimate

25.1 Parties are to notify the Common Law Registry if there is a change to the estimated length of the serious injury application or trial.

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12 The fees charged by the Court to Practitioners are, as at July 2018, the subject of review by the Department of Justice. It is anticipated there will be changes to the fees and the time by which they are to be paid, before the end of 2018.

26 Resolution of a proceeding

26.1 If a proceeding, including a serious injury application, is resolved, the Common Law Registry must be notified at the earliest possible time. The Judge in charge of the Division or the trial Judge to whom a matter is allocated may require a practitioner to attend to explain why the resolution of a proceeding was not notified to Common Law Registry in a timely manner.

27 Applications to vacate a trial date

27.1 Applications to vacate a trial date should be made in writing to the Common Law Registry. An explanation as to why the trial date should be vacated, must be provided. The application should be made at the earliest opportunity, and, only in exceptional circumstances, less than 28 days prior to the trial date.

Explanation required

27.2 Where the application is made within 28 days prior to the trial date, an affidavit in support must be provided, irrespective of whether the request is by consent. This must be sent as an attachment to the email request to vacate the trial date.

27.3 Applications by consent must be signed by all parties to the proceeding.

27.4 Where it is not consented to, the party seeking to vacate the trial date must request a Directions Hearing on notice.

28 Mediation

28.1 Mediation in damages cases will be ordered to occur generally about two months prior to trial. This section of the Practice Note relating to mediation applies to all lists in the Common Law Division except the Family Property Division which has its own guidelines.

28.2 Mediations should facilitate the "just, efficient, timely and cost-effective resolution of the real issues in dispute".[13]

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13 *Civil Procedure Act* 2010, s7(2)(c)(ii)

The Court's mediation procedures

28.3 Where the standard mediation order is made, the parties are to abide by the following procedures:

(a) The parties are to reach agreement on the date, time and location of the mediation and by whom it is to be conducted. If the parties are unable to reach agreement on these matters after making reasonable attempts to resolve any issues, the parties may request a Directions Hearing.

(b) Where there is a dispute as to who will conduct the mediation, the parties will each be asked to provide the Court with the names and availability of two preferred mediators.

(c) The parties are to take all necessary steps to ensure that mediation commences on the agreed or appointed date and time. It is expected that by the time of the mediation, the pleadings will be closed and all medical and other expert reports, witness statements and other material which is required to be served prior to trial, will have been provided to the other appropriate party(ies).

(d) The plaintiff is responsible for delivering a copy of all pleadings to the mediator.

(e) Persons with proper authority to settle the dispute and determine the terms of any settlement, and lawyers who have the ultimate responsibility to advise the parties in relation to the dispute and its settlement, must attend the mediation, or, in the case of insurers, be available to confer by telephone.

(f) Persons attending the mediation are to do so with a commitment to negotiating in good faith to resolve the dispute.

28.4 All discussions at mediation or a pre-mediation conference are confidential.

28.5 Where a proceeding has settled at or after a mediation, the plaintiff must to notify the Court within fourteen (14) days by filing an order headed "Mediation Result Order" which contains the particulars set out in the Standard Mediation Result Order in Schedule 1.

28.6 Failure to comply with the requirements of paragraph 28.5 may result in the plaintiff's practitioner being required to attend before the Judicial Registrar of the Division to explain why notification has not been provided.

28.7 If the dispute does not resolve at mediation, the cost of mediation shall be costs in the cause.

28.8 If it is necessary to adjourn a mediation, the parties are expected to file consent orders with the Common Law Registry adjusting the Court timetable.

Mediations in multiple defendant cases

28.9 Where there are:

(a) two or more defendants; or

(b) one or more defendants and one or more third party;

in a proceeding, within ten (10) days prior to the date fixed for the mediation, practitioners for those parties shall attend a conference ("the pre-mediation conference") for the purpose of addressing the issue of the contribution of their respective clients towards resolution of the plaintiff's claim. There is no requirement for the pre-mediation conference to be conducted by a mediator or facilitator. An insurer for any of the parties shall be present at the pre-mediation conference or available to confer by telephone. The purpose of the pre-mediation conference is to ensure time is not wasted at the mediation while the defendants and, if applicable, any third party, confer as to contribution.

28.10 If any of the defendants or third parties do not comply with the requirements of paragraph 28.9, any party shall be at liberty to apply to the Common Law Registry for a Directions Hearing before the Judicial Registrar of the Division to explain such non-compliance. In the event the Judicial Registrar is of the view paragraph 28.9 has not been complied with, the offending party(ies) should expect sanctions, including as to costs, in accordance with the relevant provisions of the *Civil Procedure Act* 2010.

Further mediation

28.11 The Judge in charge of the Division, the Judicial Registrar or the trial Judge may order further mediation at or just prior to or during the course of a trial in accordance with section 47A of the *County Court Act* 1958 (Vic) and Rule 50.07 of the Rules. At the commencement of a trial, Counsel for the parties should expect the trial Judge to ask whether resolution of the proceeding would be assisted by a further mediation. A Judicial Registrar of the Division may be available within the Court precincts to conduct a mediation.

29 Discovery and Interrogatories

29.1 In damages cases, leave to interrogate and to discover are also generally provided by the standard timetabling orders.

Interrogatories

29.2 The number of interrogatories served in proceedings in the Lists within the Division are to be limited to 30 (including sub-parts).

29.3 In motor vehicle and industrial accident cases, interrogatories should be confined to questions of liability.

Discovery

29.4 The parties should pay close attention to the *County Court Civil Procedure Rules* 2008 and the provisions of the *Civil Procedure Act* 2010 as to the obligations to discover and produce documents.

29.5 In particular, parties should consider their obligations under section 26 of the *Civil Procedure Act* which requires parties to disclose those documents which are critical to the resolution of the dispute.

30 Related proceedings

Listed together or consecutively

30.1 Wherever possible, it is desirable that proceedings concerning common questions of fact or law arising out of the same incident or injury be heard and determined together.

Parties should request that proceedings be listed together when a trial date is being sought.[14] Separate setting down for trial fees and jury fees (where applicable) will be payable in each proceeding.

Consolidation of Proceedings

30.2 Where parties seek consolidation of proceedings, they should consider which pleadings are to stand as the pleadings in the consolidated proceeding, or whether new pleadings should be filed. The parties should also identify the parties in the consolidated proceeding, and which proceeding number (of the two proceedings being consolidated) the consolidated proceeding will bear. Once an order for consolidation is made, one of the proceedings will be struck out, and thereafter only one setting down for trial fee and one jury fee (where applicable) will be payable.

Interlocutory applications

31 Court Appearances

31.1 Law graduates who are not yet admitted to practice may appear at Directions Hearings but must seek leave of the Court.

31.2 All persons appearing at Directions Hearings must be fully briefed on all relevant aspects of the matter so as to be in a position to assist the Court.

31.3 Parties are required to appear at Directions Hearings unless otherwise advised by the Court, including matters in which minutes of proposed consent orders have been submitted. Advice that a Directions Hearing has been vacated in response to a request may be noted on Court Connect.

32 Summons and Directions Hearings

32.1 The Court expects that parties will comply with the Rules and attempt to resolve any interlocutory issues without judicial intervention prior to requesting that a matter be listed for Directions Hearing.

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14 Sample list together orders are available on the County Court website

32.2 Unless otherwise provided in this Practice Note, interlocutory disputes in a Division matter are to be commenced by summons or by written application to the Common Law Registry.

32.3 Unless otherwise provided in this Practice Note, all interlocutory matters in the Division are heard by a Judge or Judicial Registrar in a Directions Hearing. In the General List, Directions Hearings may be listed on any weekday. Other Lists within the Common Law Division have Directions Hearings on other days and reference should be made to List-specific Practice Notes.

Summons

32.4 Where the Rules require the issue of a summons, the summons is to eFiled, together with any necessary affidavits in support. Practitioners are to obtain a date and time of hearing from the Common Law Registry their summons. The Common Law Registry can be contacted by phone on (03) 8636 6515.

Directions Hearings

32.5 For applications not requiring a summons, such as interlocutory applications made under liberty to apply provisions, disputes regarding timetabling orders and other like matters, the application is to be commenced by email to the Common Law Registry.

32.6 Where the dispute concerns matters other than non-compliance with Court orders, consideration should be given as to whether an affidavit in support is appropriate and/or necessary, particularly where there is a factual dispute.

Urgent applications

32.7 If the application is urgent, the Common Law Registry should be notified at the time the application is lodged. The Common Law Division Judicial Registrar (or alternatively the Judge in charge of the Division) will then be notified, and suitable arrangements for the hearing of the matter will be made.

Application to vacate Summons or Directions Hearing

32.8 If the parties resolve the interlocutory issue before 3.00pm on the eve of the Directions Hearing, they are to notify the Common Law Registry or the associate to the Common Law Division Judicial Registrar, either in writing or by telephone, preferably attaching consent orders

33 Objections Hearings

33.1 On the day of the Objections Hearing, the party taking the objection to the inspection of subpoenaed records should approach the associate to either the Judge or to the Judicial Registrar listed to hear the application, to obtain an order from the Judge or Judicial Registrar releasing the subpoenaed documents for inspection by the objecting party for the purpose of:

(a) tagging any individual documents which are objected to and to be raised with the Judge or Judicial Registrar during the hearing of the objection; and

(b) facilitating discussions with other parties.

33.2 As objections are often upheld in respect to some documents and not others, the parties will generally bear their own costs of Objections Hearings.

33.3 If the parties resolve the issue before 3.00pm on the eve of the Directions Hearing, they are to notify the Common Law Registry or the associate to the Common Law Division Judicial Registrar, either in writing or by telephone, preferably attaching consent orders.

Suppression and Pseudonym orders

34 Suppression orders in related proceedings

34.1 Where a proceeding may be affected by a suppression or pseudonym order made in another related proceeding, the Court must be notified. For example if a suppression or pseudonym order is made in a criminal proceeding or in respect of a proceeding in the Confiscation List, and then subsequently, a civil proceeding is brought involving

some or all of the same parties, or concerning similar issues, the Court must be notified when the Writ or Originating Motion is issued.

35 Application for Suppression or Pseudonym (or like) Orders

35.1 Judge O'Neill manages applications for Suppression or Pseudonym (or like) orders.

35.2 Any application seeking a Suppression Order under the provisions of the *Open Courts Act* 2013 or a Pseudonym Order, either before or after the issue of a Writ or Originating Motion, shall be by summons.

35.3 Any party seeking a Suppression or Pseudonym (or like) Order shall:

(a) contact the associate to Judge O'Neill who will allocate a date and a Judge for the hearing of the Summons; and

(b) provide by email to that associate a copy of the Summons, supported by an affidavit setting out the basis upon which and the reasons for which the application is made.

35.4 It will not be necessary to file the summons or other material with the Common Law Registry utilising the Court's CITEC eFiling system, or in person.

35.5 If the party seeking the Order alleges that his or her physical or psychological health will be adversely affected in the event of publicity of the identity of that party, there should be provided to the associate a medical report from an appropriate treating or consultant practitioner in support.

35.6 The summons and any supporting affidavits or other material shall be served upon all parties or proposed parties to the proceeding, unless Judge O'Neill otherwise directs.

35.7 The party making the application should be aware that if the order sought is a Suppression Order under the *Open Courts Act* 2013, section 11 requires the Court to give notice of the application to relevant news media organisations.

Applications to file a Notice of Ceasing to Act

36 Where leave to cease to act is required

36.1 Rule 20.03(3) of the Rules provides that leave of the Court is required where a practitioner intends to file a notice of ceasing to act in the following circumstances:

(a) where the address of the party in the notice is outside Victoria;

(b) after a proceeding has been set down for trial. This includes circumstances where a trial date may have been vacated and no current listing for trial exists; and

(c) within twenty-eight (28) days after a proceeding has been finally determined subject only to an appeal, if any, to the Court of Appeal.

36.2 Further, Rule 34A.25 provides that a practitioner should not file a notice of ceasing to act without the leave of the Court where the proceeding is listed for an adjourned Directions Hearing, or where notice of a further Directions Hearing has been received.

37 Guidelines for applications to file a Notice of Ceasing to Act

37.1 Applications to file a notice of ceasing to act should be directed to the Common Law Registry and must include:

(a) a covering letter, which contains the following:

(i) a statement that the practitioner is seeking leave to file a notice of ceasing to act;

(ii) confirmation that an affidavit in support is attached;

(iii) confirmation that the affidavit of service is attached to the application; and

(iv) confirmation that the firm has made arrangements with the plaintiff to provide the party with sufficient materials from their file to enable the party to conduct the proceeding in person;

(b) an affidavit in support, which must address:

(i) the client's knowledge of the trial date;

(ii) the client's intentions regarding the trial and whether they will be engaging legal representation;

(iii) the other side's knowledge of the intention to file a notice of ceasing to act;

(iv) the other side's position as to maintaining the trial date;

(v) any factors which may affect the reliability of the last known address for service of the party stated in the proposed notice of ceasing to act;

(vi) the client's phone number and email address; and

(vii) the reasons, comprehensively set out, for the application to cease to act;

(c) an affidavit of service, which must**:**

(i) exhibit a copy of the correspondence from the practitioner to the client, advising the client of the practitioner's intention to file a notice of ceasing to act;

(ii) exhibit a copy of the signed notice of ceasing to act; and

(iii) clearly address the mode of service in compliance with the Rules.

37.2 If the Judge or Judicial Registrar grants leave to file a notice of ceasing to act:

(a) an order will be made placing the affidavit in support in a sealed envelope marked 'not to be opened unless by Order of Court, alternatively marked as confidential on the Court's iManage file system, not to be read or accessed save by Order of Court;

(b) an order will be made advising that the exhibited notice of ceasing to act is deemed filed;

(c) the practitioner coming off the record will be ordered to serve a copy of the order made on their client; and

(d) the proceeding may be listed for a Directions Hearing for the benefit of the unrepresented party.

37.3 The Judge or Judicial Registrar who deals with this application may determine it 'on the papers' or may require all parties to appear in open court. This will generally depend upon the proximity of the trial date.

37.4 If this application is made within eight weeks of the trial date, the application will be listed for a Directions Hearing.

Applications for approval of compromise by a person under disability[15]

38 General

38.1 Applications for approval of compromise of claim by a person under a disability are managed by Judge K L Bourke. Practitioners should refer to the checklist on the County Court website.

38.2 Rule 15.08 requires the Court, when considering an application to approve a compromise of a claim by a person under a disability, to be satisfied that the compromise is to the benefit of that person.

38.3 The question to be decided by the Court is whether the sum offered by the defendant is such that the person under the disability is at risk of obtaining a result less favourable than that which is offered in settlement, should the proceeding go to trial.

38.4 It is for the Court, not the parties, to make that determination.

39 Application for approval shall be without notice to any other party[16]

39.1 It may be that in filing an application under Rule 15.08, the plaintiff makes known to the Court matters which have the potential to impact adversely upon the issue of liability which have not been made known to the defendant.

39.2 For that reason, an application under Rule 15.08 is made ex parte and the material in support of the application is not to be served upon the defendant.

15 *County Court Civil Procedure Rules* 2008
16 *County Court Civil Procedure Rules* 2008, order 15.08

40 Application for approval of compromise

40.1 In order to allow the Court to determine whether a compromise ought be approved, it is essential that any application for an approval be supported by the applicant exhibiting all the evidence relevant to both liability and quantum.

40.2 The affidavits complying with Rule 15.08(2) must be filed in support of any application.

40.3 The affidavit to be filed by the practitioner for the person under the disability must:

(a) Identify with sufficient clarity the nature of the injury the subject of a compromise by reference to medical reports which are to be annexed to the affidavit. If the injury involves disfigurement, up-to-date photographs which clearly display the disfigurement should be provided.

(b) Identify with precision the terms of the proposed compromise. If the compromise involves the right to retain any payment or benefit received by the plaintiff, the amount the subject of the right of retention must be set out.

(c) If the compromise involves an obligation to refund monies or benefits received, precise amounts to be refunded must be disclosed.

(d) Exhibit all relevant material as to liability and quantum, together with an advice from Counsel as to the merit of the compromise.

(e) Annex 3 copies of the Draft Orders which are sought from the Court which comply with the provisions of Rule 15.08(6).

40.4 Unless the Court otherwise orders:

(a) No application for the approval of a compromise will be considered in the absence of an advice from Counsel in support of the compromise.

(b) No application for the approval of a compromise will be considered should the proposed compromise involve the resolution of the proceeding on the basis of:

(i) an offer made inclusive of legal costs; or

(ii) an offer in which the payment of legal costs in favour of the person under a disability have been the subject of agreement.

(c) Should an issue arise as to a delay in applying for the approval of a compromise, the adequacy of the compromise will be dealt with by the Judge of the Court to which it is referred, and any issue which arises as to the effect which the delay should have upon the compromise will be referred by that Judge for determination by the Senior Master of the Supreme Court.

(d) Upon the approval of the compromise, an order will be made that the monies the subject of the compromise be invested by the Senior Master of the Supreme Court.

(e) Should an order be sought that the funds the subject of the compromise be managed by an entity other than the Senior Master:

(i) an affidavit together with relevant exhibits; and

(ii) a written submission in support of the position;

are to be filed at the time at which the compromise is submitted for approval.

Confidential Communications - Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act* 1958

41 General

41.1 Section 32C of the *Evidence (Miscellaneous Provisions) Act* 1958 (the **EMP Act**) provides that the Court must grant leave before a confidential communication is compelled for production or adduced as evidence. Circumstances in which this may arise include, but are not limited to where:

(a) a party issues a subpoena to compel production of a document containing a confidential communication;[17]

[17] Defined in s32B of the EMP Act as "… *a communication, whether oral or written, made in confidence by a person against whom a sexual offence has, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred*".

(b) a document is produced that may disclose a confidential communication; and/or

(c) evidence is adduced that may disclose a confidential communication or may disclose the contents of the document recording a confidential communication.

41.2 Practitioners are expected to be aware of the relevant provisions of Division 2A of the EMP Act and the circumstances under which a court must grant leave in relation to confidential communications.

Personal Injury – Sexual Assault

41.3 This part of the Practice Note has particular application to civil proceedings in which a plaintiff alleges he or she has been the victim of sexual assault, and seeks damages as a consequence. The Statement of Claim should provide that the proceeding is brought in "the Common Law Division - General List - Personal Injury – Sexual Assault". Plaintiffs are required in CITEC to select the "Cause of Action" "PIS – Personal Injury-Sexual Assault" when filing the writ.

42 Applications for leave to issue a subpoena to produce documents which may contain a confidential communication

42.1 This section of the Practice Note concerns subpoenas which are sought to be issued pursuant to Order 42A of the Rules, directed to a person or institution which is not a party to the proceeding, to produce any document to the Registrar which may contain a confidential communication.

42.2 A practitioner who intends to issue such a subpoena must:

(a) first obtain a date for the hearing of the application from the Common Law Registry, then file with the Court (utilising the Court's CITEC filing system):

(i) an Application to issue a subpoena or to produce or adduce evidence as to a Confidential Communication in accordance with Schedule 2 of this Practice Note;

(ii) a draft of the proposed subpoena; and

(iii) a brief outline of submissions in support of the application for leave to issue the subpoena;

(b) once the application has been issued by the Court, and a date fixed for hearing, serve upon:

(i) each party to the proceeding; and

(ii) the person or institution to whom the subpoena is proposed to be directed, a copy of the application, the draft subpoena and the outline of submissions at least fourteen (14) days prior to the date fixed for the hearing of the application.[18]

42.3 The hearing of the application for leave will be conducted by a Judge or Judicial Registrar sitting in the Common Law Division. At the hearing, the Judge or Judicial Registrar may hear from any party or the person or entity to whom it is proposed the subpoena be directed as to whether leave ought be granted, taking into account the matters set forth in sections 32C – 32F of the EMP Act.

42.4 If leave is granted in accordance with the relevant provisions, the Judge or Judicial Registrar will order leave be granted for the subpoena to be issued for the production of documents returnable before the Registrar.

42.5 The same process shall apply in relation to an application to issue a subpoena to produce documents at the hearing of an interlocutory or other application, or at trial, save that the application shall be returnable before the trial Judge at the hearing of the interlocutory or other application, or trial, and shall be served upon the same parties referred to in 42.2(b) above, at least fourteen (14) days prior to the date of hearing of the interlocutory or other application or trial.[19]

43 Applications for leave to adduce evidence of, or produce documents which may contain confidential communications at an interlocutory or other application or at trial

43.1 If a party seeks at the hearing of an interlocutory or other application, or at trial, to adduce evidence of a confidential communication or to produce a document which may record a confidential communication, that party **must**:

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18 Or such other period of notice as the Court orders: Section 32C(3) of the EMP Act

19 Or such other period of notice as the Court orders: Section 32C(3) of the EMP Act

(a) file with the Court (utilising the Court's CITEC filing system):

(i) an Application to issue a subpoena or to produce or adduce evidence as to a confidential communication in accordance with Schedule 2 of this Practice Note;

(ii) a brief outline of the evidence it is proposed to adduce or the document which may record a confidential communication; and

(iii) a brief outline of submissions in support of the application;

(b) once the application has been filed with the Court, serve upon:

(i) all other parties to the proceeding; and

(ii) the witness who is proposed to adduce evidence or produce documents recording a confidential communication

the application, the outline of the evidence or the documents, and the outline of submissions, at least fourteen (14) days prior to the date of the application or trial.

43.2 The trial Judge, in his or her discretion may grant leave to hear any such application notwithstanding that the relevant documents have not been served fourteen (14) days prior to the application or trial.

43.3 The trial Judge shall hear and determine the application in accordance with sections 32D – 32F of the EMP Act, and make any appropriate order.

Applications to take Evidence by Deposition (*De Bene Esse* Applications)

44 General

44.1 This direction applies to an application to take evidence by way of:

(a) a *De Bene Esse* hearing;

(b) by deposition or order for witness examination; and[20]

[20] *County Court Civil Procedure Rules* 2008, order 41

(c) by order for the issue of a commission for the examination of the person.[21]

44.2 The following provisions apply to these applications:

(a) section 4 of the EMP Act for witnesses in Victoria;

(b) sections 9B and 9H of the EMP Act for witnesses outside of the Victoria (but within Australia) and overseas; and

(c) order 41 of the Rules.

44.3 The Common Law Registry is to be notified by telephone or email whenever an application to take evidence by deposition is made.

45 Application

45.1 Any application to take evidence pursuant to this part is to be commenced by summons and is to be supported by the filing of:

(a) an affidavit which addresses, but is not limited to, the following matters:

(i) whether it is in the interests of justice to make the order having regard to whether the person will be able to give evidence material to any issue to be tried in the proceeding;

(ii) whether, having regard to the interests of other parties to the proceeding, justice will be better served by granting or refusing the order; and

(b) all relevant material to be relied upon in the application, together with any medical evidence which is relied upon by the party making the application.

45.2 Upon the filing and service of the summons and the material referred to in paragraph 45.1, in the absence of the consent of each party upon whom the application has been served, the Judge in Charge of the List in which the proceeding has been commenced:

(a) will fix a date for the determination of the application; and

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21 *Evidence (Miscellaneous Provisions) Act* 1958, s4

(b) may give such directions as to the timing of the application and the manner in which the application should proceed as are deemed appropriate.

45.3 Upon the filing and service of the application and the material referred to in paragraph 45.1, the Judge in charge of the List in which the proceeding has been commenced will consider the application and either:

(a) approve the request and make orders in chambers; or

(b) require further submissions; and:

(i) will fix a date for the determination of the application; and

(ii) may give such directions as to the timing of the application and the manner in which the application should proceed as are deemed appropriate.

45.4 Any order made in a proceeding commenced in the County Court pursuant to the provisions of Rule 41.01 for a witness in Victoria shall be made subject to the making of an order by the Supreme Court confirming that order.

45.5 The process for the obtaining an order by the Supreme Court is as follows:

(a) The associate of the Judge of the County Court who has made the order will forward the order and the material upon which the order was made to the associate of the Head of the equivalent Division in the Supreme Court to that in which the order was made;

(b) the Head of the relevant Division in the Supreme Court will determine whether:

(i) it is appropriate that an order be made upon the papers confirming the order of the County Court: or alternatively

(ii) the parties should be heard further upon the application.

45.6 Should it be deemed necessary for the parties be heard further upon the application, the associate of the Justice who is to determine the application will contact the parties to fix a time and date for that hearing.

45.7 Upon the making of the order by the Supreme Court, the matter will be referred back to the County Court for further directions as are necessary to facilitate the hearing.

Police tort claims

46 Specific timing of Administrative Mentions for police tort claims

46.1 Practitioners for plaintiffs issuing police tort claims[22] are required in CITEC to select the "Cause of Action" - "PTC Police Tort Claims" when filing an originating process where the proceeding involves an allegation that a police tort[23] has been committed.

46.2 Section 77 of the *Victorian Police Act* 2013 provides that the time for the service of a defence in a police tort claim is sixty (60) days, and thus the administrative mention date for such claims will be approximately 120 days after the filing of a notice of appearance.

Use of Technology

47 Use of technology in the County Court

47.1 The Court embraces the use of technology in proceedings and in its wider operations. Some of the ways in which the Court uses technology includes through the filing of documents in the Courts CITEC document filing system, the use of digital Court files utilising the Court's iManage file system, the service and provision of eCourtbooks, videolinks in respect of evidence from locations outside the courtroom and the use of skeletal digital applications in jury trials.

47.2 Given the dynamic and constantly evolving nature of technology, it is not practical to set out and update all technology-related information in this Practice Note. The Court aims to be flexible and adaptable to these changes to better meet the needs of the parties, practitioners and the requirements of each case.

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22 *Victoria Police Act* 2013, Divisions 8

23 As defined in s72 and 73 of the *Victorian Police Act* 2013

47.3 The Court encourages practitioners to develop and use new technologies to ensure the just timely and cost-effective resolution of proceedings. The Court expects parties and practitioners to consider and discuss, as early as practicable in the preparation and conduct of proceedings, how the use of technology may lead to increased efficiency and cost effectiveness.

47.4 The Court will approach suggestions from the parties about the use of technology in proceedings with an open mind, having regard to the needs of the parties and the nature of each case.

47.5 All documents to be filed with the Court shall be eFiled utilising the Court's CITEC filing system, save when leave is granted by the Common Law Registry to the contrary.

47.6 In proceedings where leave has been granted for discovery, it is expected practitioners will cooperate and utilise electronic discovery wherever possible

47.7 In a civil jury trial where Counsel is of the view medical evidence would be better understood by a jury, the evidence of a medical practitioner may be given with the aid of a digital skeletal application. The leave of the Trial Judge should be sought. The Court has available such applications. Enquiries may be made of the Trial Judge or the Judge in charge of the Division for the provision of such digital applications.

eCourtbooks

48 Paper free courts

48.1 It is the expectation of the Division that by the end of 2018, Court Books in all proceedings will be in electronic format ("eCourtbooks"). It is the intention of the Division for the Court to, as far as is practicable, become 'paper free' by the end of 2018. It is anticipated that in the future it will be compulsory to provide an eCourtbook with a hyperlinked index. eCourtbooks must have Optical Character Recognition (OCR) applied. An eCourtbook with a hyperlinked index is preferable.

48.2 From 1 August 2018 an eCourtbook in addition to a hard copy Court Book must always be provided.

48.3 This requirement does not replace the obligation to provide hard copy Court Books.

49 Provision of eCourtbooks

49.1 Once a matter has been allocated to a Judge, the eCourtbooks are to be provided directly to that Judge's Chamber's inbox[24] by email by 5.00pm on the day prior to trial, unless requested earlier.

49.2 Where an eCourtbook is less than 20MB in size, it is to be provided to the Judge's Chamber's inbox by email as an attachment.

49.3 Where an eCourtbook is equal to or greater than 20MB in size, it is to be provided to the Judge's Chambers by either:

(a) using secure file sharing transmitted by email to the Judge's Chambers, or

(b) providing a clean USB flash drive or CD or DVD on which the eCourtbook is saved, to the Judge's Chambers.

49.4 All such eCourtbooks must be OCR'd.

50 eCourtbooks for cases in the Reserve List

50.1 If the matter is listed in the Reserve List, practitioners are required to provide eCourtbooks by 5.00pm on the day prior to trial, unless requested earlier, by email to civilreservelist@countycourt.vic.gov.au.

50.2 Where an eCourtbook is 20MB or larger and is to be provided on a USB flash drive or CD or DVD, the associate of the Judicial Registrar for the Common Law Division must be notified of this by 5.00pm on the day prior to trial. The USB flash drive or CD or DVD is to be provided to the associate of the Judicial Registrar for the Common Law Division by 9.30am on the trial date.

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24 Judicial contacts

51 eCourtbook Format

51.1 The eCourtbook and index must be provided in a text searchable .PDF format which is enhanced using OCR.

Index

51.2 An index must be provided.

51.3 It is preferable that the eCourtbook contain a Court Book index, with the documents referred to in the index hyperlinked to the individual document page. If a document contains enclosures or the document itself has an index, the enclosures or sub-index must also be hyperlinked. The index must also be provided as a separate document.

Pagination

51.4 The pagination of the eCourtbook must correspond to the pagination of the hardcopy Court Books. This means that when the eCourtbook is viewed electronically, the pagination which appears in the taskbar of the program used to view the eCourtbook, accords with the hardcopy Court book pagination.

51.5 One blank page must be inserted directly following the index. The page must contain words to the effect of "THIS PAGE IS INTENTIONALLY LEFT BLANK". It must also be paginated. This page allows for the index to expand where required during the running of a matter without impacting the pagination which follows.

51.6 Subset pagination, such as 1A, 1a or 1.1 **is not** permitted.

Adding Documents

51.7 Where documents need to be added to an eCourtbook, they must be added by inserting additional documents at the end of the eCourtbook and updating the index (including any hyperlinks) accordingly.

51.8 The pagination of the additional documents must follow from the final page of the original eCourtbook. For example if the filed eCourtbook ends at page 100, additional documents will be paginated from page 101.

Deleting Documents

51.9 If any documents or pages in the eCourtbook are required to be removed during the running of a trial, practitioners should redact that entire document or page (rather than deleting the actual page). This will maintain correct pagination, including in the taskbar of the program used to view the eCourtbook.

51.10 Where a page has been redacted, each page should be labelled "Redacted Page" or "Deleted Page".

Electronic evidence in the courtroom

52 In Court Technology

52.1 Often in common law proceedings the parties seek to play to the Court, and then tender into evidence, surveillance footage, usually in DVD format.

52.2 Unless otherwise directed by a Judge, electronic evidence may only be played if it is contained on a:

(a) DVD; or

(b) CD.

Playback of a DVD or CD

52.3 A DVD or CD may be played in Court in one of two ways:

(a) Option A: Court-controlled

The practitioner can provide the disc to the Court (via the tipstaff or associate) to play back the electronic evidence through the DVD players, or computer, installed in each court.

(b) Option B: Practitioner-controlled

The practitioner can play the disc from their own device (PC, Mac et cetera) which can be plugged into the bar table and displayed on a monitor in the courtroom.

53 Types of devices that can be practitioner-controlled from the Bar Table

53.1 All County Court courtrooms are equipped with the capacity to play evidence from the bar table from Windows or Apple Mac devices.[25]

Windows-based laptop

53.2 All courtrooms are equipped with a male VGA video lead and a male 3.5-millimetre analogue stereo audio lead to enable media to be played from a Windows-based laptop.

Apple Mac Devices

53.3 A limited number of adaptors are available for late model Apple devices to enable them to be played from the bar table, being:

(a) Apple iPad (4th generation, from October 2012);

(b) Apple iPhone (5 or 6 from September 2013); and

(c) Apple MacBook computers with thunderbolt or mini display port (from April 2010).

53.4 Where a practitioner requires an Apple device adapter, they must reserve it by contacting the Tipstaff Coordinator's Office on (03) 8636 6485 or on 0417 537 162.

Any other device

53.5 Any other devices will require the party presenting the evidence to provide a suitable adaptor to enable connectivity to a male VGA lead and male 3.5-millimetre analogue stereo audio lead.

Physical Media

53.6 Where a disc is sought to be played, the following format must be adhered to in order to ensure the evidence can be played on the Court's DVD players, both in Court and in the jury room.

53.7 The physical media, or type of discs, supported by the Court's DVD players are:

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[25] Device to be provided by practitioner or party

(a) CD-R;

(b) CD+R;

(c) CD-RW;

(d) DVD-R;

(e) DVD+R; and

(f) DVD+RW.

54 File Formats

Audio Files

54.1 The only playable format for audio files on a disc is:

- Compact Disc Digital Audio (CD-DA) Red Book.

Video files

54.2 The only playable format for video files is:

- DVD Video - ISO9660.

Digital Images

54.3 The only digital images standards supported are:

- DVD Video - ISO9660.

55 County Court Media Test Court

55.1 The County Court's Media Test Court was set up in 2016 and is available for all practitioners to test audio visual material for compatibility prior to it being played in Court. The Media Test Court is available between 4.15pm and 4.45pm each day in Court 2-10 and a tipstaff will be present to assist with media playback.

55.2 Practitioners are strongly encouraged to utilise the Media Test Court to ensure that costly and avoidable delays through incompatible media do not occur.

55.3 Practitioners and Counsel are encouraged to download a digital skeleton application available via the Internet to assist with the presentation of evidence in Court, in particular in jury trials.

Serious Injury Applications

56 General

56.1 This section of the Practice Note relates specifically to the conduct of serious injury applications.

56.2 The Common Law Registry has the same functions in relation to serious injury applications as it has in relation to damages cases.

57 Automatic Listing of Trial

57.1 Upon filing of the Notice of Appearance, the Court will automatically produce the timetabling orders. These orders will be published on Court Connect approximately one week from the filing of the Notice of Appearance.

57.2 The parties will have liberty to apply where a variation of the standard form of order is required. This should be sought after the Court has published the timetabling orders for the matter.

58 Documents to be Filed and Served

58.1 Affidavits in support of or in opposition to any serious injury application, including affidavits:

(a) of the plaintiff and of other proposed witnesses in support of the plaintiff's claim;

(b) of the defendant or representatives of the defendant; and

(c) exhibiting medical, hospital, vocational or like reports

are **not** to be filed.

58.2 Affidavits by or on behalf of the plaintiff, and affidavits by or on behalf of the defendant should be served on the opposing party, and in compliance with the Rules and the

Accident Compensation Act 1985, the *Workplace Injury Rehabilitation and Compensation Act* 2013 or the *Transport Accident Act* 1986. Medical, hospital, vocational and like reports should also be served on the opposing party in accordance with the Rules and in compliance with these *Acts*, but without the requirement for those reports to be exhibited to any affidavit. These affidavits or reports are not to be filed with the Civil Registry.

58.3 Any affidavit in support of or in opposition to any serious injury application, and any medical, hospital, vocational or like report should be included in the Court Book (or eCourt Book) as required by this Practice Note.

59 Timetabling orders in relation to Serious Injury Applications

59.1 To promote a culture of best practice and early settlement amongst all litigants, the standard timetabling orders permit one round of exchange of medical and financial material. This emphasises the need for parties to be ready for trial at the time the Originating Motion is filed. The standard timetabling orders can be found on the County Court website.

60 Applications for Referral of Medical Questions to a Medical Panel

60.1 Practitioners seeking to refer medical questions to a Medical Panel pursuant to section 274 of the *Workplace Injury Rehabilitation and Compensation Act* 2013, in applications for leave to bring proceedings for damages at common law pursuant to s335(2)(d) of the *Workplace Injury Rehabilitation and Compensation Act* 2013 or s134AB(16)(b) of the *Accident Compensation Act* 1985 (generally "serious injury applications"), should refer to PNCLD 2 - 2017 Referral of medical questions to a Medical Panel available on the County Court website.

60.2 Where, however, a serious injury application has already been allocated to a particular Judge for hearing, any application for referral of a medical question to the Medical Panel is to be made before that trial Judge.

61 Subpoenas

61.1 The inspection of clinical notes of medical practitioners should be completed pursuant to the Order 42A procedure and must not delay the commencement of the hearing of an application.

62 Court Books

62.1 Standard orders in serious injury applications include provisions concerning the form and content of Court Books filed by the parties. This part of the Practice Note should be read subject to those provisions relating to the filing of eCourtbooks.

62.2 Each Court Book should contain the following documents plus an index. (Page numbers should start with the first document and not include the index):

(a) affidavits of the plaintiff and lay witnesses;

(b) reports and (where applicable) extracts of relevant (and only relevant) clinical notes of treating medical and other practitioners;

(c) medico-legal reports;

(d) vocational consultants' reports;

(e) where applicable, a summary of the plaintiff's taxation returns; and

(f) any other relevant documents.

62.3 Court Books should not contain:

(a) more than one copy of a document;

(b) taxation returns;

(c) affidavits exhibiting documents;

(d) exhibit slips;

(e) bundles of medical certificates;

(f) large volumes of clinical notes. Instead, the index may refer to the existence of subpoenaed documents, the extracts of which may be tendered at the hearing;

(g) subpoenas;

(h) notices to produce;

(i) notice of appearance; or

(j) material relating to ultimate liability, or other documents relating to trial issues.

62.4 Wherever possible, the parties should agree on the contents of the Court Book so that one joint Court Book is filed (and eFiled). Where this occurs, the joint Court Book should contain copies of all relevant medical records. The Court Book(s) should be as modest in size as possible.

63 Facts and Issues to be Determined

63.1 There is no longer a requirement for the parties to provide a Facts and Issues Statement.

63.2 There is no longer a requirement for the parties to provide a Statement of Calculation of Economic Loss, although each party is expected to provide to the trial Judge, their calculation of the plaintiff's loss of earning capacity, including his or her gross income from personal exertion as required by section 134AB(38)(f)(i) and (ii) of the *Accident Compensation Act* 1985; alternatively section 325(2)(f)(i) and (ii) of the *Workplace Injury Rehabilitation and Compensation Act* 2013.

63.3 The parties should provide to the trial Judge a chronology, if the matter has a long or complex history or where it is considered a chronology would assist the Judge in hearing and determining the application.

64 Medical and like Reports to be Included in the Court Book and Admitted into Evidence at the Hearing

64.1 It should be noted that when including medical reports in a Court Book, those reports which provide the most assistance to the Court are those from treating practitioners and from practitioners who have examined the plaintiff on more than one occasion, particularly those prepared within a short time prior to the hearing of the application. Reports from practitioners that are outdated, irrelevant to the real medical issues, do

not make reference to relevant radiological investigations or are from practitioners who report on matters outside their area of specialty, are of little assistance, and may not be admitted into evidence.

64.2 Those parts of reports of vocational assessors which become, in effect, medical opinions, will not be admitted into evidence.

64.3 It is a matter for the parties to obtain those medical and like reports they deem appropriate in support or defence of the application. However, the only medical and like reports to form part of the Court Books and to be admitted into evidence, save with leave of the trial Judge, will be the following:

(a) reports of the plaintiff's treating practitioners;

(b) reports of practitioners who have treated the plaintiff in relation to relevant past injuries or conditions;

(c) reports from two consultant practitioners in each of the specialties which relate to the claimed injury or condition. For example if the plaintiff claims a disc injury in the lumbar spine, then each party may utilise two orthopaedic specialists, or an orthopaedic specialist and a neurosurgeon, or an orthopaedic specialist and a rheumatologist or general surgeon (with appropriate expertise). Occupational physicians stand in no different category to other physical injury specialists;

(d) in mental or behavioural disturbance or disorder applications, the reports of two psychiatrists or a psychiatrist and a psychologist; and

(e) if one party seeks to rely on the report(s) of the other party's practitioner, then that will constitute one of that party's consultant practitioners.

64.4 There will be many circumstances where leave of the Court will be granted to admit the reports of practitioners other than those referred to above, including for example where a practitioner is no longer available to give an update report, or the injury or condition has developed or changed such that it is appropriate to obtain the opinion of a practitioner in another specialty, for example where a physical injury develops into a Complex Regional Pain Syndrome.

64.5 It is not appropriate for the practitioners for the plaintiff to suggest to the plaintiff that they attend for treatment, or refer the plaintiff for treatment by a practitioner for the dominant purpose of utilising a report of that practitioner in the application.

65 Conduct of hearings

Opening

65.1 Generally, at the commencement of the application, counsel for each party will be invited to briefly open their respective case and state the real matters in issue. The openings, save with leave of the trial Judge, should be no more than 20 minutes.

Evidence-in-chief

65.2 In the course of evidence-in-chief, the plaintiff will be permitted to give brief evidence as to the consequences of injury from the date of the last affidavit to the date of the hearing, and as to any other matters in respect of which leave is given by the trial Judge. In granting leave, the Judge will consider whether any additional evidence would change the nature of the application to be met by the defendant and whether the defendant would thereby be prejudiced in the conduct of the application.

Cross-examination

65.3 No witness, other than the plaintiff, will be permitted to be cross-examined, save with the leave of the trial Judge. If a party seeks to cross-examine a witness, that party should seek the leave of the Judge at the outset of the application and give concise reasons. Explanations such as “to challenge the opinion” of a medical witness, or to “explore matters” with a lay witness will not result in the grant of leave. If there is concern by counsel not to disclose details of the matters to be cross-examined upon in giving an explanation as to why a witness should be called to be cross-examined, then the trial Judge may make an order for witnesses to remain out of Court.

65.4 Cross-examination of a witness (including the plaintiff) shall be restricted to two hours, save with the leave of the trial Judge. In cases of particular complexity or where there is a long history of injuries, or where there is otherwise good reason, leave will be granted.

Closing submissions

65.5 Each counsel's closing submissions will be, save for leave being granted by the trial Judge, restricted to 30 minutes**.** Generally, there is no requirement for written submissions, save that in a complex case, the Judge may require written submissions.

Anticipated length of application

65.6 It is expected that applications for serious injury where the trial Judge has not given leave for cross-examination of witnesses other than the plaintiff will be completed within a day. It is recognised that in matters involving some complexity, this will not always be practicable and exceptions to this expectation will often arise.

66 Court's power to order and direct pre-trial procedures

66.1 The *Civil Procedure Act* provides that in addition to any other power a court may have, a court may make any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures.[26]

Further requirements in relation to applications for Serious Injury Certificate under Section 93 of the Transport Accident Act 1986

66.2 Consistent with the Overarching Purpose and Obligations of the *Civil Procedure Act* 2010, it is the expectation of the Court that the parties in all TAC serious injury applications will have endeavoured to facilitate resolution of the application in accordance with the voluntary alternative dispute resolution processes in the TAC Transport Accident Act Common Law Protocols – 1 July 2016 ("the TAC protocols").

66.3 Unless otherwise ordered by the Judge in charge of the Common Law Division or a Judicial Registrar of the Common Law Division, pursuant to section 48(2)(c) of the *Civil Procedure Act* 2010, the Court hereby directs all parties to serious injury applications under the *Transport Accident Act* 1986 to undertake the pre-hearing alternative dispute processes under the protocols.

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[26] *Civil Procedure Act* 2010, s48(1)

66.4 In the event a party fails or refuses to enter these processes, then that party will be required to attend before a Judicial Registrar or the Judge in charge of the Common Law Division, and give an explanation for that failure or refusal.

66.5 The parties are reminded of the extensive powers of the Court pursuant to section 51 of the *Civil Procedure Act* 2010, including the power to dismiss or strike out a proceeding and as to costs.

The Serious Injury Expedited List

67 Early listing of Serious Injury Applications

67.1 As from 18 January 2016, a Serious Injury Expedited List came into operation. The purpose of the List is to enable serious injury applications which have been through the preliminary application process with one or other of the Authorities (TAC or WorkCover/WorkSafe), to be listed before the Court at the earliest possible time and to reduce legal costs and expenses.

67.2 Entry into the Serious Injury Expedited List will occur after the issue of the Originating Motion, together with a request to enter the List. Subject to the availability of hearing dates, a date will be allocated that will be not less than 21 days and not more than 49 days from the date of filing by the defendant of the Notice of Appearance and Certificate of Readiness.

67.3 Entry into this List will be available to any serious injury application where both parties have certified to the Court that full disclosure in accordance with the pre-litigation provisions in the relevant legislation governing the application has occurred, and that the proceeding is ready for trial.

67.4 Following entry into the Serious Injury Expedited List, neither party will be permitted to serve or rely upon any further material, including medical and like reports nor affidavits, save with the leave of the trial Judge.

67.5 Neither party is to serve any subpoenas for the production of documents to the Registrar (Order 42A of the Rules), nor any subpoena which is returnable at trial (Order 42 of the Rules).

67.6 It is a condition that any serious injury application admitted into, and to be heard in, the Serious Injury Expedited List will be heard with the plaintiff as the only witness to be cross-examined. Only in exceptional circumstances will leave be granted for any other witness to be cross-examined.

67.7 Should there be some significant change (such as the medical condition of the plaintiff) between the date of entry into the Serious Injury Expedited List and the expedited trial date, application may be made to the Common Law Registry; alternatively, to the associate to the Judicial Registrar, or to the associate of the Judge in charge of the Division, to withdraw the matter from the List, and it will be relisted for hearing at the next available serious injury listing date. Where consent orders are submitted, orders will be made to that effect. If the application is contested, the nature of the application and the reason it is opposed should be referred to the associate to the Judicial Registrar or the Judge in charge of the Common Law Division and orders will either be made 'on the papers', or the matter will be listed for a Directions Hearing.

67.8 No timetabling orders will be made in relation to matters entering the Serious Injury Expedited List. The Court will list the matter for trial and advise the parties of the hearing date. The setting down for hearing fee is to be paid no later than seven (7) days before the hearing date.

67.9 Otherwise the general provisions of this Practice Note affecting all serious injury applications, the Rules and the *Civil Procedure Act* 2010 apply to proceedings in the Serious Injury Expedited List.

Contacting the Court

All enquiries as to the operation of this Practice Note should be directed to the Common Law Registry or to the associate to the Judge in charge of the Common Law Division.

Contacts

Current contact details can be found on the contact page of the County Court website.

Judge in charge of the Common Law Division – Judge Misso[27]

Associates to Judge Misso:

Nathan Taylor (03) 8636 6621

Sarah Guthrie (03) 8636 6477

email: judgemisso.chambers@countycourt.vic.gov.au

Senior Administrator Common Law Division

Kate Alberico (03) 863 66314

email: commlawadmin@countycourt.vic.gov.au

WorkCover List

Associate to Judge Wischusen:

Sam Mason-Smith (03) 8636 6660

email: judgewischusen.chambers@countycourt.vic.gov.au

[27] Judge O'Neill retires as the Judge in charge of the Common Law Division from 13 August 2018

Medical List

Associates to Judge Saccardo:

Marissa Tripodi (03) 8636 6480

Jason Allen (03) 8636 6053

email: judgesaccardo.chambers@countycourt.vic.gov.au

Family Property List

Associate to Judge Kings:

Rabia Virk (03) 8636 6651

email: judgekings.chambers@countycourt.vic.gov.au

Application for Suppression or Pseudonym (or like) Orders

Associate to Judge O'Neill:

Sarah Ward (03) 8636 6686

email: judgeo'neill.chambers@countycourt.vic.gov.au

Judicial Registrar

Associate to Judicial Registrar Gurry:

Dinah Amrad (03) 8636 66671

email: jrgurry.chambers@countycourt.vic.gov.au

Common Law Registry

Central telephone line:

(03) 8636 6515

email: commonlaw.registry@countycourt.vic.gov.au

SCHEDULE 1

Standard Mediation Result Order

(1) This matter was mediated by (Mediator) on (date) and was settled as the result of the Mediation.

(2) The (specify type of hearing) of (*date*) is:

*no longer required and should be vacated; or

*to be vacated and re-fixed for an Administrative Mention on (date) to allow time for the parties to finalise orders dismissing the proceeding.

SCHEDULE 2

Application to Issue a Subpoena or to Produce or Adduce Evidence as to a Confidential Communication

IN THE COUNTY COURT

OF VICTORIA

AT

CI- -

BETWEEN:

---------- Plaintiff

-and-

---------- Defendant

APPLICATION TO ISSUE A SUBPOENA OR TO PRODUCE OR ADDUCE EVIDENCE AS TO A CONFIDENTIAL COMMUNICATION

Date of Document:	Practitioners Code:
Filed on behalf of:	Telephone:
Prepared by:	DX:
	Ref:
	Email:

TAKE NOTICE:

Pursuant to s32C of the *Evidence (Miscellaneous Provisions) Act* 1958 (the **EMP Act**) intends to make application on 2018/alternatively at the hearing of an application in or at trial of this proceeding on 2018, at am in the County Court, 250 William Street Melbourne to seek leave:

(a) to issue a subpoena for the production of documents which may contain confidential communications (as defined in s32B of the EMP Act)

(b) to produce a document which may contain a confidential communication

(c) to adduce evidence of a confidential communication or as to a document which may record a confidential communication

The nature of the confidential communication sought to be produced/adduced is:

If you wish, you may make oral or written submissions on this issue to be heard or read by a Judge or Judicial Registrar of the Court on the day fixed for hearing above.

The matters to be taken into account to determine whether leave should be granted are as set forth in s32D - F of the EMP Act.

Attached to this Application is a copy of the proposed subpoena and an outline of the submissions/evidence as to the relevant issues

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Applicant

NOTE:

This notice, duly completed must be served upon:

- Each other party to the proceeding
- The proposed recipient of the subpoena
- The witness it is proposed to call to give evidence
- The protected confider

as may be relevant.