

Statements and statements of assumptions



By David Hirsch

The preparation of a client's statement often separates the diligent and careful solicitor from the lazy and careless one. A sloppy statement can lead to both disaster and embarrassment. The purpose of this article is to help you to avoid both.

The client's statement is crucial because it presents the client's recollection of events and is likely to form the basis of examination-in-chief.¹ The worst thing that a solicitor can do is to ask the client to prepare their own statement and then give this to their expert, as it will have to be disclosed as part of the expert's briefing material.²

The danger is that the client generally does not know what is relevant and what is not. Statements prepared at home are typically made before any hospital records have been obtained. The client will inevitably include irrelevancies and hearsay and, more often than not, errors and inconsistencies. When the home-made statement becomes the subject of cross-examination, the client is set for a fall and the solicitor will want to crawl under a table (to hide from the barrister).

When taking initial instructions, there is nothing wrong in asking clients to write down the relevant events as they see them. But this must be followed up with an in-depth interview, assisted by any primary medical records. You should also have a theory of the case in mind to know what information is relevant and what is not. Unless you are well-versed in medical litigation, it is wise to prepare the client's statement in conference with an experienced barrister. Remember that statements from potential witnesses need to be taken alone; it is the witness's own recollection that is important, not

the compilation of recollections often created after memories have been 'workshopped' in a group setting.³

A client's statement is a work in progress and should be supplemented and fine-tuned as more information becomes available. It is remarkable how new information can prompt recollections of things previously forgotten or thought to be unimportant.

It is never wise to send a client's signed statement to an expert. Instead, you should prepare a statement of assumptions. A statement of assumptions is not evidence, but rather a version of events that the party aims to prove in court. If the facts asserted in the assumptions are proven, the expert's opinion has considerable weight. If not, the opinion may lose its force, but the client will not be caught out giving evidence in court that is contrary to a signed statement.

There is, however, a real risk in preparing a statement of assumptions and then not being able to make good the facts asserted in it.

In a recent case, a doctor gave evidence that was inconsistent with a statement of assumptions. He had agreed in cross-examination that he was intimately involved in the defence of his claim and consulted regularly with his solicitors. He agreed that the version of events given to his experts was going to be important and so the utmost care was needed in giving those instructions. When it was put to him that his evidence was inconsistent with the statement of assumptions prepared by his solicitors, his barrister was on his feet telling the judge that whatever the doctor told his solicitors was privileged and the statement of assumptions did not necessarily reflect his instructions.

The judge was suitably unimpressed. The defence looked foolish. It became

clear that the 'perfect' version of events that prompted the 'perfect' expert report was far from true and correct.

Even though a statement of assumptions is not evidence, it is a very important indicator of what the party's case is going to be at trial. The very first thing that a solicitor must do after being served with an expert report is to obtain any statement of assumptions provided to the expert. You will know immediately where the other side is coming from and what areas of your own case need to be reviewed and clarified.

One lesson to be learned from all of this is that you should have a solid understanding of the facts of your case early on, and prepare a statement from a client only with the benefit of as many records as possible and a clear theory of the case in mind. Only then should you brief an expert with a version of events in a statement of assumptions. And only when you have the benefit of the opponent's version of events should you prepare a final, signed statement for use at trial. ■

Notes: **1** In NSW, where parties are obliged to prepare signed witness statements to replace or supplement examination-in-chief, the importance of a properly prepared statement cannot be overemphasised. See UCPR Practice Note 7. **2** In jurisdictions where all expert reports have to be served whether they are to be relied on or not, the problem is even greater because a poorly prepared statement will come into the hands of the opposition in any event. **3** This problem often arises in birth trauma cases where parents almost invariably have different recollections of events in hospital but both would be expected to give evidence at trial.

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