

Litigate well - prepare early

Effective litigation practitioners prepare well and prepare early. A recent judgement in the Supreme Court of Victoria reinforced this message when an application for adjournment of a trial date was met with an indemnity cost order against the solicitors seeking the adjournment.

In *Kinghorn v City of Kingston* [2019] VSC 240 the plaintiff, through her litigation guardian, sued the local council that operated the maternal child health centre she attended, for failing to detect abnormal growth in her head as a result of a cystic brain tumour. It was alleged the delay in detecting the brain tumour resulted in significant and permanent brain damage to the plaintiff.

Due to various extensions to the interlocutory timetable, mediation was not held until 19 months after the proceeding was issued, and approximately three months before the trial date. After the mediation the plaintiff sought an adjournment of the trial date on the basis that various issues raised at the mediation needed to be urgently addressed by several expert reports. The reports needed to specifically address liability issues such as the liability of the maternal health centre, the effect of the delayed diagnosis and subsequent operation on the plaintiff's disabilities, correcting errors in earlier reports and the plaintiff's prospects of employment.



The judicial registrar found that while there were circumstances where unforeseen matters do arise at mediation that need to be subsequently addressed, the issues raised here did not fall in to that category. The matters that needed to be addressed in the application were matters that were 'squarely in issue from the outset of the case based on the pleadings'. She found the plaintiff's case was underprepared and there was little prospect of fully prosecuting the case if it did not settle at mediation.

After balancing all the factors, she granted the adjournment and ordered the plaintiff's solicitors pay the costs of the adjournment on an indemnity basis. She made this order to make it clear that practitioners will face significant consequences if they fail to adequately prepare for trial.

If you are acting in litigation it is important to understand the cause of action and what evidence is needed to prove every element of it. It is crucial to also prepare your case thoroughly as early as possible without reliance on the possibility it will settle at mediation, especially when a court date is looming.