

MARSHALLING EVIDENCE USING THE CIRCLES METHOD

By Graeme Blank

The traditional approach to case preparation and analysis focuses exclusively upon the facts that litigators 'know' very early, stifling our ability to imagine other possibilities, other information and other approaches. This article considers an alternative to the linear approach – the Circles Method.

Preparing for trial requires attention to detail, both as to matters of fact and issues of law. It requires experience to identify all the likely issues and sources of fact at

the start of that preparation.

Less-experienced litigators can make mistakes that can be costly and tiresome to fix. If, for example, issues are identified after discovery, it may be difficult to revisit the discovery process

and obtain those documents that, earlier, the litigator failed to identify as necessary.

A common problem is the failure by a litigator to properly consider from the outset the case that might be brought

by an opponent, which means that relevant and probative material is not sought during preparation nor presented at trial. The result is that witnesses' evidence is less reliable than it could otherwise have been, and so proving the case becomes more difficult, if not impossible.

Traditional case analysis and preparation uses a linear approach in which topics and tasks are listed and information is placed under each heading either as information either already gathered or to be obtained. The solicitor looks at the case, makes assumptions about what is involved and gathers information to prove that case. As ideas occur later, or as some assumptions are proved to be incomplete or ill-founded, more information must be gathered to fill that void. The information must somehow also be included in the list of information, often on pages that are already full of information. In many cases, there is no actual written plan of the entire case. The material that is likely to be relevant is simply gathered together and sent to counsel to appear, and possibly also to advise. It is only after the litigator receives counsel's advice on evidence, or perhaps an

expert's report that raises other issues, that the gaps become apparent.

THE CIRCLES METHOD

An alternative approach is the 'Circles Method'. This Method provides a three-step process by which the solicitor can prepare a comprehensive overview of the case. That overview analyses what is necessary to prove or disprove the case, removes assumptions, and considers the likely evidence that the opposing party may adduce. The Circles Method also provides the information necessary to complete pleadings, identify issues for discovery, witness statements and draft interrogatories or schedules for subpoenas. By breaking down the case to its individual facts, the Circles Method also provides an effective vehicle for examination in chief and cross-examination (although outside the scope of this article, see short examples at the conclusion).

The Circles Method is non-linear and is loosely based upon the idea of brainstorming or mind-mapping. Concepts are linked together in a visual, rather than linear, way. This has two advantages: it frees up the mind to associate ideas, and it allows a

larger body of information to be displayed at one time, with an easy way of adding or rearranging information. As ideas occur later, or information becomes available (for example, from discovery), they can simply be added to the matrix without rearranging lists.

This process is best done on large sheets of paper or a whiteboard. Some people find that using several colours, or different shapes, for different levels of information is helpful. Software is also available.¹

HOW DOES THE CIRCLES METHOD WORK?

The **FIRST STEP** is to identify the central elements. This will usually be the legal elements of the cause of action. The process works equally well for other applications and for considering each aspect of a particular witness's evidence. The **SECOND STEP** is to break each element down into its possible parts. Each of those possibilities may also need to be broken down further. The **THIRD STEP** is to consider the actual facts in the case and add them to the relevant circles of possibility.

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An example

The easiest way to demonstrate this process is by using an example: a simplified workplace accident claim. Due to space restrictions, only part of the claim will be analysed, but the process would be repeated for all aspects of the claim.

Let us assume that your assistant received a call from a new client seeking an appointment. The new client told your assistant that he had been injured when there was an accident at his workplace involving an excavator. This is sufficient to complete much of steps 1 and 2. The new client, Josh Mercer, provides the following information at interview:

'I am 28 years old. I was working as a construction worker for Close Scrapes Pty Ltd, an earthmoving and excavation business. On 28 October 2004 while working on site in tandem with an operator of a Kodecca XT20 excavator, the operator lifted the bucket to such a height that it was no longer supported by a steel bar which ran horizontally across the boom. Unfortunately the backup safety device (a chain connecting the bucket to the boom) also failed. The chain snapped causing the bucket to fall and roll onto my leg crushing it. I am now an amputee from above the left knee. The excavator operator had only been at the company for two weeks and apparently had only limited experience. I was never told that I should not stand in front of an excavator while it was being operated. I completed school to year 10 level (with average grades).'

Although many jurisdictions now have pre-litigation requirements (for example, disclosure and mandatory settlement conferences), for the purposes of this article only the elements of the action are considered. (The Circles Method is useful for preparing those other steps, but they are not included here.)

The **FIRST STEP** is to identify the elements of the cause of action. Legislation and case law have determined what elements constitute the defendant's duty of care. As a workplace accident case, those elements, or central circles, are:



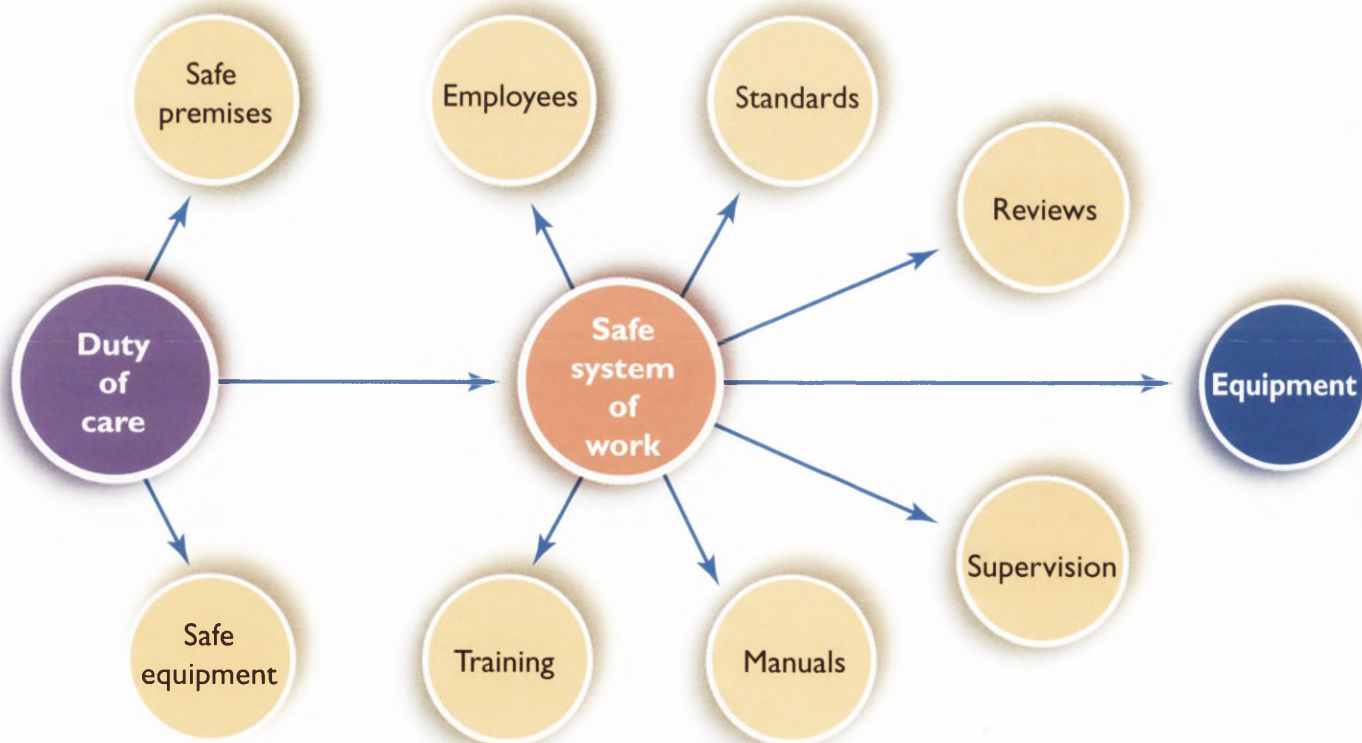
The **SECOND STEP** is to identify the possible ways in which each of those central elements could occur. This is based upon both common sense and experience. It may also have a legislative and case law component. For example, the components of damages include income, medical expenses and pain and suffering.

These are largely factual. Whether the plaintiff has suffered, for example, depression or post-traumatic stress disorder will require examination of the relevant DSM-IV TR criteria as well. Each of the possibilities is represented by another circle connected to its central circle by a line – like a wheel linked by spokes to the hub.

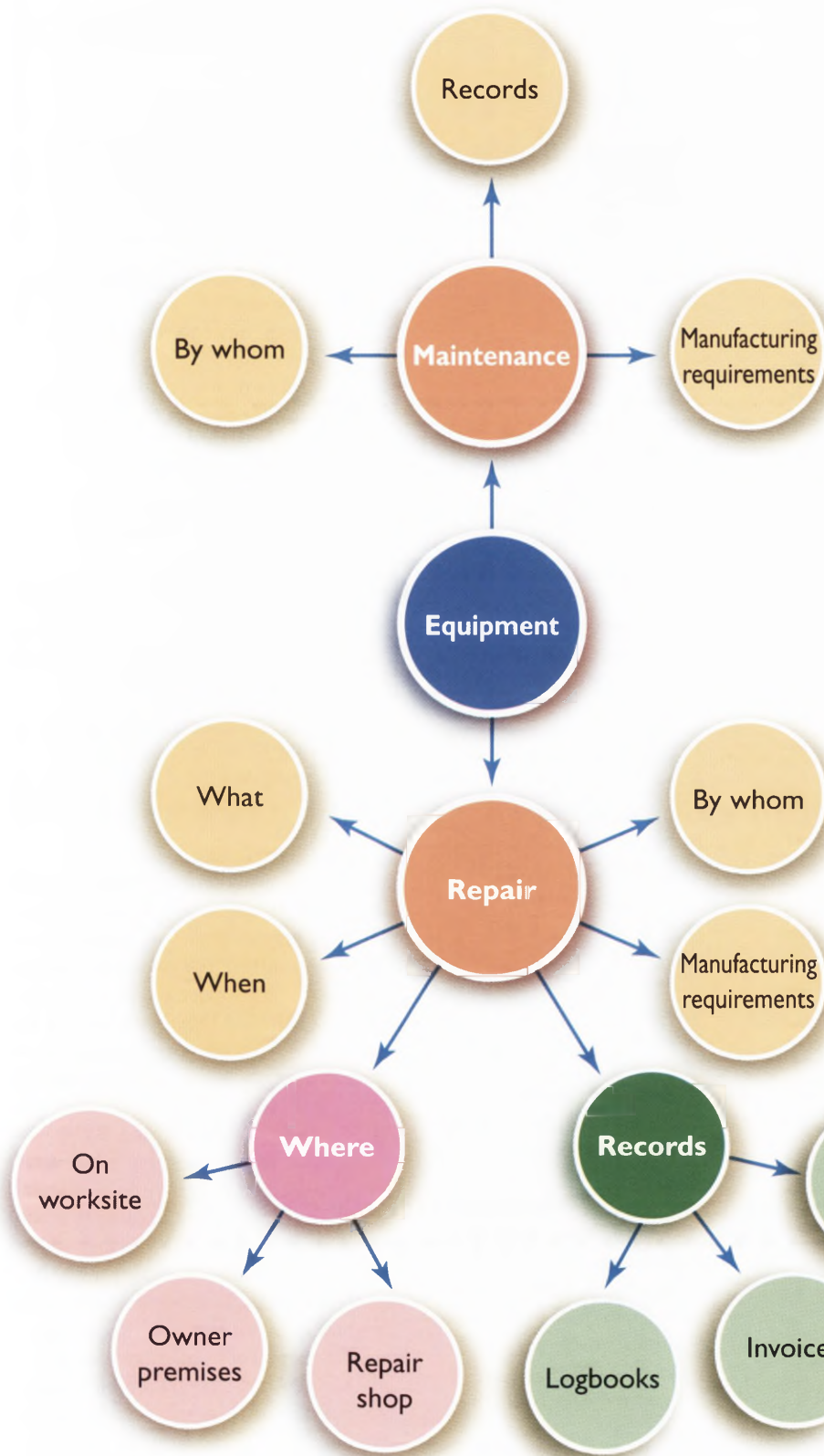
Some of these possibilities may themselves have a number of elements. These sub-elements are a further set of circles – another wheel radiating from a hub. For example, medical expenses would be included within 'damage'. Medical expenses would itself include 'past' and 'future' categories, and within those are all of the types of expenses that might be incurred, together with the details of the provider, dates and cost. This process, although time-consuming, is critical for completeness. Further, if prepared properly, it provides a simple template for the next claimant who requests an appointment.

During this early 'conceptual' stage it is crucial to avoid considering in any detail the actual facts of the claim. One only considers the facts at a sufficiently broad level to know that this is a case involving a workplace accident, an excavator and a crush injury.

To illustrate the Circles Method, this article only develops the circle concerning the defendant's duty of care. That duty includes, among other possibilities, the duty to provide a safe system of work.



This may not be a complete list, but it is clear that as new main topics or subtopics that relate to the system of work become apparent, they may be simply and easily added. Each of these circles is subdivided. Focusing upon the equipment only, some circles of possibility are:



Completing this process for each element needed to prove the claim creates a comprehensive overview of the necessary information. All preparation to this point can be completed even before meeting the plaintiff. And this analysis provides a detailed overview of the issues and questions to ask.

While completing this process, some elements may be relevant to more than one 'wheel'. It is a personal decision where that information best fits. Some rearranging may be necessary before the overall analysis has a logic that suits the user. For each instance of maintenance or repair, the series of relevant circles is repeated so that each instance of service or repair is properly examined.

Once completed to this stage, the matrix can be used to identify the sources of evidence. For example, 'subpoena' may be linked to circles about records of maintaining and repairing equipment.

The **THIRD STEP** arises once each possibility has been broken down into its component elements. At this point, the actual facts of the case (or application) are now considered and incorporated. Each available fact (whether potentially positive or negative to your case) is attached to the relevant outermost circles, usually in a different colour or shape so that the real fact may be easily distinguished from the theoretical possibilities. At interview, it is important not to ask the client to simply fill in the chart – essentially leading the client to the answers – but it is a useful checklist for working with the client to ensure that the information-gathering process is as

comprehensive as possible, without requiring a number of repeat appointments.

Once all the available evidence has been attached, the gaps in the evidence become clear. Further, the relative strengths of each aspect become apparent. Some aspects of the claim will be supported by favourable evidence; other aspects will appear more adverse. Some >>

matters may be irrelevant in this instance, but at least they were considered. It is now possible to consider that evidence and determine what should be highlighted and which aspects should be minimised or distinguished.

It may be possible to fill some or all of the gaps. Discovery, interrogatories, subpoenas and witness examination are some of the most common ways in which the additional necessary evidence may be obtained. In some claims, the gap cannot be filled. Each gap remains a hole in the case – possibly to be enlarged by careful cross-examination at trial. The three-step process has, however, ensured that any gap is apparent, reducing its potential impact.

GATHERING EVIDENCE

This matrix helps the solicitor to obtain a comprehensive statement from Josh Mercer and potential witnesses. It also has other benefits. Looking at the diagrams, the elements needed for effective pleadings have been identified. For example:

... 4. The defendant breached its duty to provide a safe system of work.

Particulars

- (a) Failure to maintain the Kodecca XT 20 excavator (the equipment)
- (b) Failure to repair the equipment
- (c) Failure to adequately train its employees how to operate the equipment
- (d) Failure to adequately train its employees how to work in a road crew while the equipment is being operated.
- (e) Failure to properly supervise its staff operating the equipment.

An important aspect of gathering evidence is discovery. This analysis will identify the categories of documents your client will have. It will also identify the types of documents your opponent should have. Importantly in jurisdictions in which the parties are limited to a smaller range of documents on discovery, the Circles Method assists you to prioritise which categories of

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documents will be most necessary and relevant. When the opponent's list of documents is delivered, it may be cross-checked against the matrix and it will be easy to see if particular documents have not been included.

This analysis also assists the preparation of interrogatories by breaking down the questions into the necessary component parts. For example:

In relation to each occasion of repair to the Kodecca XT 20 excavator ('the equipment'):

- 1. Was the repair work conducted by an employee, independent contractor or other, stating which.
- 2. What, if any, records are kept by the defendant of the repair work.
- 3. What, if any, information did the defendant obtain from the manufacturer relating to:
 - (a) Maintaining the equipment;
 - (b) Repairing the equipment;
 - (c) Defects in the equipment;
 - (d) Requirements for using the equipment.
- 4. What, if any, information did the defendant obtain from any other source, stating that source, relating to:
 - (a) Maintaining the equipment;
 - (b) Repairing the equipment;
 - (c) Defects in the equipment;
 - (d) Requirements for using the equipment.

etc

Further, the diagram also helps to identify and draft the schedule to a subpoena or notice for non-party production:



To: Kodecca Machine Repairs Pty Ltd

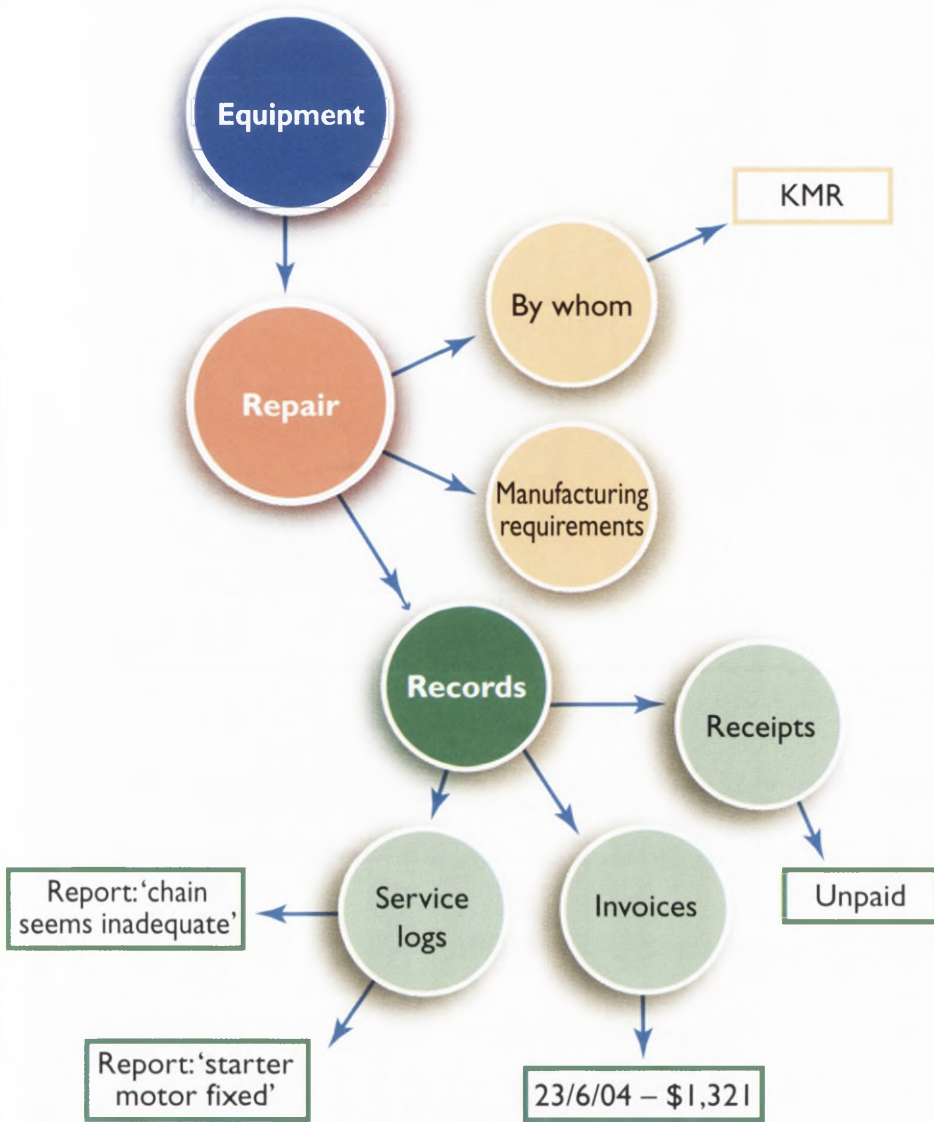
Schedule

Please produce any:

- 1. Invoices, copies of receipts and quotations.
- 2. Service logs and records of work done.
- 3. Records of any correspondence or telephone calls from Close Scrapes Pty Ltd.
- 4. Manuals, notices or other information from the manufacturer relating to:
 - (a) Maintenance,
 - (b) Repairs,
 - (c) Defects,
 - (d) Variations.

For the Kodecca XT20 excavator owned by Close Scrapes Pty Ltd for the period 1 January 2004 to 1 January 2005.

Once this evidence is obtained, whether from documents, real evidence or answers to questions, it is added to the outer ring of circles at its most relevant location. For example, let us assume that a subpoena was issued to Kodecca Machine Repairs (KMR) in the terms set out above. In response, KMR produces an invoice and an internal service log entry. The invoice is for \$1,321 and is dated 23 June 2004. The service entry states that KMR was asked to fix a problem with the starter motor and that the bucket was not moving freely. The entry further states that the motor was fixed and the axle for the bucket was cleaned and re-greased so that it was running freely. Finally, there is a brief entry that "I advised Jim that the chain attached to the bucket didn't seem adequate for that bucket". Those facts are included (here shown as boxes) in the matrix.



We can also link this service log to our circles about the defendant's notice of the problem. Thus the information is immediately sorted and placed in a relevant and structured location on our preparation matrix. It therefore raises a further line of inquiry on that aspect of the matrix – to be answered either through administering interrogatories, a notice to admit facts or from later cross-examination. However, the fact that the account remains unpaid also raises questions for further inquiry – was the report and invoice seen by management? What, if any, follow-up has occurred? If the chains remained in place either there was no follow-up or the chains were satisfactory. These further issues are simply added as further circles requiring answers.

Once the entire evidence-gathering process is complete, one can easily

identify the matters that lack evidence or information. If after receiving the documents produced under subpoena, the plaintiff still has no information about the manufacturer's requirements for the grade of chain, further investigations can be conducted.

Although there is no scope in this article to properly canvass the application of this process for examination-in-chief and cross-examination, the Circles Method helps prepare for witness examination. In examination-in-chief, the advocate is not permitted to 'lead' the evidence from the witness. The 'fact' circle is the witness's evidence. The more central circle identifies the question:

Q: What records does Close Scrapes Pty Ltd keep about the equipment?

A: Log books, invoices and receipts.

The Circles Method works equally well in cross-examination – the question focuses upon the outer ring of facts, fact rather than on the possibilities at the next level up. Commonly in cross-examination an advocate will 'close the gates' to force the witness to give a particular answer. The 'wheel' of circles is the set of 'gates' that must be closed to prevent the witness escaping. A simple example of some cross-examination might be:

- Q:** You arranged for the equipment to be repaired on 23 June 2004, didn't you? **A:** **Yes**
- Q:** There was a problem with the starter motor? **Yes**
- Q:** You received a report from the repairer? **Yes**
- Q:** You read that report, didn't you?.. **Yes**
- Q:** That report stated that the chain did not appear adequate for the bucket, didn't it? **Yes**
- Q:** That was the same chain that broke on 28 October 2004, wasn't it? **Yes**

SUMMARY

The Circles Method was originally developed as a method for teaching students how to prepare for cross-examination. It has evolved into a powerful tool for case analysis and preparation used by both novice and experienced litigators. With a little practice, it can be a valuable tool in the litigator's armoury to map out and prepare for litigation in a manner that is comprehensive, easy to follow and simple to teach any practitioner, irrespective of experience. ■

Note: 1 Eg, Inspiration (available at www.inspiration.com) and Mind Manager (available at www.mindjet.com).

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