Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 45

September 2021

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 45

Update 45, September 2021

The following changes have been incorporated in this Update:

[2-7100] Time

Pell v Hodges [2007] NSWCA 234 has been added at **[2-7110] Extension and abridgement** which held that while the discretion conferred by UCPR r 1.12 is not in terms fettered, a plaintiff seeking an extension of time must establish a proper or adequate reason for this being granted. Two new paragraphs have been added at **[2-7125] Time for filing appearance** and **[2-7130] Time for service of initiating process.**

[4-1900] Inferences

At **[4-1910] The rule in Jones v Dunke**l, the case of *Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61 has been added. It was noted in this case that while the rule in *Jones v Dunkel* permits an inference that evidence not called by a party would not have assisted the party, the failure to call evidence cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably.

[5-4000] Defamation

The commentary at **[5-4006] Defamation Amendment Act 2020** has been updated as a result of the commencement of the Act on 1 July 2021. The Uniform Civil Procedure (Amendment No 95) Rule 2020 also commenced on that date to take into account the commencement of the Stage 1 reforms.

[5-8000] Child care appeals from the Children's Court

[5-8030] The guiding principles and **[5-8060] Permanency planning** have both been updated to highlight the Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP) and the requirement under s 78A of the *Children and Young Persons (Care and Protection)* Act 1998 (Care Act) to ensure that any permanency plan for an Aboriginal or Torres Strait Islander child addresses how the plan has complied with the ATSICPP in s 13 of the Care Act. The case of *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 has also been added at **[5-8060]** in relation to the identification of an Aboriginal child for the purposes of the *Adoption Act* 2000. The commentary at **[5-8093] Guardianship orders** has been revised and updated. At **[5-8100] Costs orders**, the case of *Re: A Costs Appellant Carer (a pseudonym) v The Secretary, Department of Communities and Justice* [2021] NSWDC 197 has been included. Professor Megan Davis' Independent Review of Aboriginal Children in OOHC, "Family is culture", Review Report, 2019 has been added to **Further Reading**.

[7-0000] Damages

An article by Professor Joachim Dietrich, "Intentional conduct and the operation of the Civil Liability Acts: unanswered questions" (2020) 39(2) *University of Queensland Law Journal* 197 has been added to **Further Reading**.

[10-0300] Contempt generally

N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29 February 2020, Canberra, has been added at **Further Reading**.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 45

Please file the Summary and Filing Instructions behind the "Filing instructions" tab card at the back of the Bench Book.

Please discard previous filing instructions and summary sheets before filing these instructions and summary.

Tab Card	*Discard Old Pages*	*Insert New Pages*
Procedure generally		
	2251–2252	2251–2252
Evidence		
	4931–4933	4931–4933
Particular proceedings		
	5601–5608	5601–5608
	5901–5908	5901–5909
Personal injuries		
	6051–6052	6051–6052
Damages		
	7091–7092	7091–7092
Index		
	12001–12023	12001–12023

Time

[2-7100] Reckoning of time

The calculation of time for the purposes of the Rules, or for the purpose of any judgment or order of the court, or any document in any proceedings, is governed by Pt 1, Div 2, rr 1.11–1.13, which are applicable in all courts.

If time of one day or longer is to be reckoned by reference to a given day or event, the given day or the given event is not to be counted: r 1.11(2). So that if something is ordered to be done within three days of Monday, the Monday is not counted and the thing must be done by midnight on Thursday.

If the period in question, being a period of five days or less, would include a day or a part of a day on which the registry is closed, that day is to be excluded: r 1.11(3). Part 18 r 18.4, which generally requires a notice of motion to be served at least three days before the date fixed for the motion, means that if the motion is fixed for hearing on Wednesday, the motion must be served by the previous Thursday, the three days being Friday, Monday and Tuesday, the registry being closed on the Saturday and Sunday. If the registry is closed on the Monday (for example, for a public holiday) the notice of motion must be served by the previous Wednesday.

If the last day for doing a thing is a day on which the registry is closed, the thing may be done on the next day on which the registry is open: r 1.11(4).

The rules override the reckoning of time provisions contained in the *Interpretation Act* 1988, s 36.

[2-7110] Extension and abridgment

Subject to the UCPR, the court may, by order, extend or abridge any time fixed by the rules or by any judgment or order of the court. The court may extend time either before or after the time expires, even if the application for extension is made after the time has expired: r 1.12. The discretion conferred by UCPR r 1.12 is not in terms fettered, but a plaintiff seeking an extension of time must establish a proper or adequate reason for this being granted. Proof is required of a satisfactory explanation for the delay: *Pell v Hodges* [2007] NSWCA 234 at [30]. For further discussion of r 1.12, see *Lachlan v HP Mercantile Pty Ltd* [2015] NSWCA 130 at [22].

As to the extension of time for service of a Statement of Claim see *Arthur Anderson Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (In liq)* [2009] NSWCA 104.

For a detailed discussion of the application of ss 56–60 of the CPA to an application for extension of time, see *Richards v Cornford (No 3)* [2010] NSWCA 134.

If no time is fixed by the rules or by judgment or order of the court for the doing of any thing in or in connection with any proceedings, the court may by order, fix the time within which the thing is to be done: r 1.13.

[2-7120] Time during summer vacation

The former SCR Pt 2 r 5(1), which provided that time did not run from Christmas Day until the following 9 January has not been continued under the UCPR. The equivalent former DCR Pt 3 r 4 was repealed in 1991.

Accordingly, time continues to run.

[2-7125] Time for filing appearance

The time limited for a defendant to enter an appearance is whichever is the later of 28 days after service where proceedings have been commenced by statement of claim or such other time as the

court directs for the filing of a defence, or if the defendant makes an unsuccessful application to have the statement of claim set aside, 7 days after the refusal of the application: r 6.10. A defendant who files a defence in proceedings is taken to have entered an appearance in the proceedings: r 6.9.

[2-7130] Time for service of initiating process

In the case of proceedings in the Supreme Court, the Land and Environment Court, the Dust Diseases Tribunal or the Local Court, originating process is valid for service for 6 months after the date on which it is filed: r 6.2(4)(a).

In the case of proceedings in the District Court, the originating process is valid for one month after the date on which it is filed, unless it is a statement of claim seeking relief in relation only to a debt or other liquidated claim, or if the defendant (or at least one of the defendants) is to be served outside NSW, in which case it is valid for 6 months after the date on which it is filed: r 6.2(4).

Failure to serve originating process within the time limited by these rules does not prevent the plaintiff from commencing fresh proceedings by filing another originating process: r 6.2(5).

Legislation

- CPA, ss 56–60
- *Interpretation Act* 1988, s 36

Rules

- UCPR rr 1.11–1.13, 6.2, 6.9-6.10, 18.4

Further reading

B Cairns, *Australian civil procedure*, 12th edn, Lawbook Co, 2020 at [2.1110]–[2.1130], [2.1080]–[2.1100]

[The next page is 2301]

Other matters — the drawing of inferences

The judicial task often requires the drawing of inferences from material before the court. There are two rules of practice and procedural fairness that commonly arise for consideration in litigation. These are:

- the rule in *Browne v Dunn* (1893) 6 R 67
- the rule in *Jones v Dunkel* (1959) 101 CLR 298 at 320.

[4-1900] The rule in Browne v Dunn

Under this rule of practice, if a witness gives evidence that is inconsistent with what the opposing party wants to lead in evidence, the opposing party should raise the contention with that witness during cross-examination. In general terms, the rule prevents a party from putting forward a case without first giving opposing witnesses the opportunity of responding to it.

The rule is essentially one of professional practice based on the notion of procedural fairness. It will be satisfied, however, where the opposing party (and his witnesses) plainly know (eg, through notice having been given) the nature of the opposition case to be met: *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 16.

The rule in *Browne v Dunn* was emphasised by the NSW Court of Appeal in *State of NSW v Hunt* (2014) 86 NSWLR 226. The trial judge, in an action for malicious arrest, assault and battery, and misfeasance in public office, found for the plaintiff. The defendant was vicariously liable for the conduct of its employee, a police officer. The officer, according to the trial judge, had completely fabricated his evidence in a number of material particulars. However, this had not been put to the officer when he gave his evidence. The Court of Appeal emphasised, at [32], that two conditions needed to be satisfied before such a finding could be made: first, reasons must be given for concluding that the truth has not been told; secondly, the witness (or party) must have been given an opportunity to answer the criticism. See also *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [67].

The Court of Appeal's decision in *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132 is a timely reminder that the parties to litigation cannot by agreement (even though the court may have acquiesced) authorise a course which denies elementary procedural fairness to a witness.

The precise issue in the proceedings concerned the events at a property auction. The dispute related to whether the purchase price included GST. The "decisive evidence" according to the primary judge was the evidence of the auctioneer. Counsel for the unsuccessful appellant failed to cross-examine the auctioneer, relying on an agreement between the parties that rendered it unnecessary for this course to be taken. The Court of Appeal were by no means satisfied as to the content of this asserted agreement. However, it was satisfied that there had been an obligation placed on counsel to put to the witness "the nature of the case upon which it was proposed to rely". The court emphasised that the rule in *Browne v Dunn* was not only concerned with procedural fairness. In addition, it facilitated the court's ability to assess reliability and credibility of the witness.

In *Oneflare Pty Ltd v Chernih* [2017] NSWCA 195 the primary judge had rejected the truthfulness of the evidence given by the appellant's directors, and held for the respondent. The appellants argued that they had been denied procedural fairness. The Court of Appeal rejected this submission, emphasising that the crux of the rule in *Browne v Dunn* is that the witness must have been given "full notice beforehand that it is intended to impeach the credibility of the story he is telling". In the instant case, the affidavit evidence exchanged before the hearing, the parties' opening statements and the cross-examination of each of the directors made plain that the truthfulness of their evidence was under challenge.

In *Lardis v Lakis* [2018] NSWCA 113 the central issue was whether a transfer of property was a voidable alienation of property with intent to defraud creditors. The primary judge held it was, thus rejecting the evidence of the appellant's solicitor as to the date when instructions had been received to effect the transfer. The primary judge said: "taking the most generous view of [the solicitor's] evidence, I am satisfied he was mistaken about the times when he said … he received instructions". Counsel for the respondent had cross-examined the solicitor at trial but had not specifically suggested his evidence was a fabrication. Rather it was suggested that he had been mistaken on the timing issue. This led to a submission on appeal that the primary judge had erred by making an adverse credibility finding absent cross-examination directed to the credibility of witnesses evidence. Meagher JA (with whom Macfarlan JA agreed) held that the rule in *Browne v Dunn* had not been infringed. Without trespassing into the realm of credibility, there was ample evidence justifying the primary judge's rejection of the solicitor's evidence. White JA agreed that there was ample evidence to justify finding that the solicitor was mistaken. He thought, however, that "further findings that cast doubt on the [solicitor's] veracity … were not open … having regard to the limited scope of cross-examination". This conclusion did not affect the fate of the appeal.

The *Evidence Act* s 46 overlaps with the rule. It permits a witness to be recalled where there has been a failure to cross-examine on a contested matter: see, *MWJ v The Queen* (2005) 222 ALR 436.

[4-1910] The rule in Jones v Dunkel

This rule operates where there is an unexplained failure by a party to give evidence, to call witneses or to tender documents or other evidence. In appropriate circumstances, this may lead to an inference that the uncalled evidence would not have assisted the party. However, the rule is complex and unless the appropriate circumstances are present, the court will not be bound to draw the adverse inference. Moreover, where the inference is drawn, the rule cannot be used to fill gaps in the evidence or to convert conjecture into suspicion: "[t]he failure [to call a witness] cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably": *Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61 at [49]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64]. See J D Heydon AC, *Cross on Evidence*, 12th edn, 2019, LexisNexis, Sydney at [1215].

The rule has application to criminal proceedings but is very restricted in operation.

In *Mamo v Surace* (2014) 86 NSWLR 275, the NSW Court of Appeal considered once again the scope of duty of care imposed on the driver of a motor vehicle. In the instant case, the passenger in a car was injured when the vehicle collided with a cow owned by the defendant. The animal had wandered onto the road at night. The defendant was not called at the hearing, raising the argument on appeal that a *Jones v Dunkel* inference should have been raised, namely that his evidence would not have assisted his case. The Court of Appeal firmly rejected this argument. The defendant's statement had been in evidence and was substantially consistent with the plaintiff's evidence. There was, in fact, no other evidence that called for an answer on the defendant's part. There had been sufficient evidence at trial to enable the court below to determine the primary issue. The appeal was dismissed.

By contrast, a decision where the *Jones v Dunkel* inference assumed significance is the Court of Appeal decision in *RHG Mortgage Ltd v Ianni* [2015] NSWCA 56. At trial, the Iannis' essential case had been that they were misled by their son Joseph when they entered into a loan agreement and mortgage with the appellant. Their case was that he had told them their liability would not exceed $100,000. The advance, which was not for their benefit, was for an amount in excess of $900,000. The critical point in the appeal was that neither party had called Joseph Ianni to give evidence. The trial judge regarded this as essentially neutral in the circumstances and failed to draw an adverse inference.

The court reiterated that the circumstances for drawing a *Jones v Dunkel* inference are found where an uncalled witness is a person presumably able to put the true complexion on the facts relied

on by a party as the ground for any inference favourable to that party. The three conditions to be applied are: first, whether the uncalled witness would be expected to be called by one party rather than the other; secondly, whether his or her evidence would elucidate the matter; thirdly, whether his or her absence is unexplained.

The court held that, even though the respondent's case was that the Iannis had been misled by Joseph, the better view was that Joseph was the obvious witness who could have corroborated their evidence. He was a person who could reasonably be expected they would call. There was no satisfactory evidence as to his absence as a witness. A retrial was ordered.

In *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, the NSW Court of Appeal extended by analogy the *Jones v Dunkel* rule to the situation where a party fails to ask questions of a witness in chief. In particular, Handley JA suggested that a court should not draw inferences favourable to a party where questions were not asked in chief.

In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, the High Court gave a limited degree of approval to Handley JA's proposition. See also *Nominal Defendant v Rooskov* [2012] NSWCA 43 which emphasised that the rule does not require that an inference be drawn. It is simply available where the appropriate circumstances exist.

Legislation

- *Evidence Act* s 46

Further references

- J D Heydon AC, *Cross on Evidence*, 12th edn, 2019, LexisNexis, Sydney

[The next page is 4951]

Proceedings for defamation in NSW

[5-4000] Introduction

The topics covered by this section are:

- pleadings used in defamation actions
- common interlocutory applications, such as capacity arguments
- conduct of jury and judge-alone trials
- assessment of damages
- limitation issues (*Limitation Act* 1969, s 14B)
- costs, and
- a list of texts for further reading.

Defamation actions are perceived as "controversial" (P George, *Defamation Law in Australia*, 2nd ed, LexisNexis, Sydney, 2012 ("George") at [3.13]) because freedom of speech and protection of reputation are difficult to balance. Many of the complexities derive from the maintaining of this balance.

Although defamation actions are popularly believed to be actions by the famous or newsworthy against the media, analysis of damages awards (T K Tobin and M G Sexton, *Australian Defamation Law and Practice*, LexisNexis, Sydney, 1991 ("Tobin & Sexton") at [60,100]) shows that most publications are non-media newsletters, electronic publications such as emails (see Tobin & Sexton at [24,000]–[24,090]) or slanders, where the extent of publication is limited. The high cost and complexity of proceedings are important considerations (*Walter v Buckeridge (No 4)* [2011] WASC 313; *Lamont v Dwyer* [2008] ACTSC 125 at [116]) when case-managing defamation claims and hearing trials.

[5-4005] The legislative framework

Defamation actions in Australia are governed by substantially uniform Defamation Acts ("UDA") of each State and Territory. The relevant legislation in each of the other States and Territories is as follows: *Defamation Act* 2005 (Qld); *Defamation Act* 2005 (SA); *Defamation Act* 2005 (Tas); *Defamation Act* 2005 (Vic); *Defamation Act* 2005 (WA); *Civil Law (Wrongs) Amendment Act* 2006 (ACT) (amending the *Civil Law (Wrongs) Act* 2002 (ACT)) and the *Defamation Act* 2006 (NT) (collectively referred to as "the uniform legislation").

In NSW, the *Defamation Act* 2005 replaces the *Defamation Act* 1974, which applied to publications made before 1 January 2006. The principal differences between the repealed NSW legislation and the UDA are the changed role of the imputation (which is no longer the cause of action), the increased role of the jury (which now determines defences as well as imputations issues) and a cap on general damages. The UDA do not codify the law of defamation. Common law principles operate alongside the UDA.

A comparison table for the relevant sections of the UDA in all States and Territories of Australia is set out in Tobin & Sexton at [60,000]. This is followed by the text of the *Defamation Act* 2005 (at p 21,511ff), and extracts from the UCPR (Tobin & Sexton at [31,505]–[31,583]). This helpfully puts together the main legislative provisions for defamation actions.

Two other relevant statutes are the *Limitation Act* 1969 and the *Broadcasting Services Act* 1992 (Cth). Different, and restrictive, limitation provisions apply to defamation actions.

Limitation Act 1969, s 14B provides that an action for defamation is not maintainable if brought after the end of a limitation period of one year running from "the date of the publication of the matter complained of". There is no "single publication rule" in Australia, and this provision should not be read to mean the first date of the publication, which creates problems where the matter complained of is an electronic publication, as a separate cause of action accrues each time defamatory matter is published. "Publication" occurs each time the matter is read, heard or seen. The limitation period can be extended in limited circumstances: *Limitation Act* 1969, s 56A; however, the effect of s 56A has similarly been complicated by the impact of online publication on the multiple publication rule.

[5-4006] Defamation Amendment Act 2020

The changes clearly necessary to defamation law resulting from online publication problems led to increasing calls for reform. The rising number of claims where the publications are online is, however, only one of the issues requiring reform; the principal issues in the reform debate related to judicial interpretation of the uniform legislation in relation to defences and damages.

Following a statutory review of the Australian uniform defamation legislation, the *Defamation Amendment Act* 2020 (NSW) was assented to on 11 August 2020. The Act commenced on 1 July 2021 (LW 25/6/2021). The Uniform Civil Procedure (Amendment No 95) Rule 2020 also commenced on that date to take into account the commencement of the Stage 1 reforms (LW 22/12/2020).

A memorandum as to the principal changes made by the Act appears at Appendix 1.

The Second Reading Speech and the text of the legislation may be found here: https://parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3769.

[5-4007] Publications made on the internet

The most significant changes to defamation law over the past decades arise from the impact of electronic publication upon traditional principles of law developed for printed publications, often with a limited extent of publication. By comparison, publications on the internet are not only instantaneous and worldwide but are continuous in nature, in that a new cause of action is created each time the publication is accessed or downloaded: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575. All areas of defamation law are affected, including limitation issues, defences and damages assessments.

There are defences falling outside the uniform legislation for internet service providers ("ISPs") as well as the defence of innocent dissemination (outlined in more detail below). *Broadcasting Services Act* 1992, Sch 5, cl 91 provides a defence for ISPs (M Collins, *Law of Defamation and the Internet*, 3rd ed, Oxford University Press, 2010 ("Collins") at [16.144]). Pursuant to the *Broadcasting Services Act*, "ordinary electronic mail" and "information that is transmitted in the form of a broadcasting service" are excluded from the definition of "internet content": Sch 5 cl 3; Tobin & Sexton at [24,060].

Broadcasting Services Act 1992, Sch 5, cl 91 provides a defence for internet service providers ("ISPs") and internet content hosts (Collins at [16.144]). "Ordinary electronic mail" and "information that is transmitted in the form of a broadcasting service" are excluded from the definition of "internet content": *Broadcasting Services Act* sch 5 cl 3; Tobin & Sexton [24,060]. The law relating to internet publication is changing rapidly; in *Tamiz v Google Inc* [2012] EWHC 449 (QB), Eady J considered an ISP was not liable even after notification that its service was being used for the communication of defamatory matter, principally because of the sheer volume of internet

publication. See also *Bunt v Tilley* [2006] 3 All ER 336; *Metropolitan International Schools Ltd t/as Skills Train and/or Train2Game v Designtechnica Corp t/as Digital Trends* [2011] 1 WLR 1743; *Karam v Fairfax New Zealand Limited* [2012] NZHC 887.

In *Google Inc v Duffy* [2017] SASFC 130 the Full Court of the Supreme Court of South Australia affirmed the decision of the first instance judge (Blue J) that an ISP was liable for publication of both search results and web articles in its capacity as a secondary/subordinate publisher of defamatory material (the Full Court also upheld the trial judge's assessment of damages at $100,000). Google's search was liable in this context because it facilitated the reading of the matters complained of in a substantial, proximate and indeed essential way, not unlike placing a "post-it" note on a printed publication (at [173]) and by reason of the instantaneous nature of the publication: at [181].

While the leading Australian case remains *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, consideration of principles relating to electronic publication is likely to be a rapidly changing area of the law: see K Gould, "Hyperlinking and defamatory publication: a question of 'trying to fit a square archaic peg into the hexagonal hole of modernity'?" (2012) 36 *Aust Bar Rev* 137; see also M Paltiel, "Navigating cyberspace — Australian precedent regarding internet liability" (2013) 16(2) *INTLB* 26.

In *Trkulja v Google LLC* (2018) 263 CLR 149, the High Court of Australia set aside the summary dismissal of claims for defamation arising out of the publication by the defendant of "snippets". This complex decision has been the subject of considerable academic debate (see K Barnett, "Trkulja v Google LLC", *High Court Blog*, The University of Melbourne, 3 July 2018).

[5-4010] The pleadings

Defamation cases are conducted in the Supreme Court in accordance with Practice Note No SC CL 4 — Defamation List (commenced 5 September 2014), a similar form of which is in use in the District Court (DC Practice Note No 6 — Defamation List (commenced 9 February 2015)). The practice note regulates the speedy and efficient disposal of interlocutory applications and emphasises the importance of proportionality. Defamation proceedings may also be commenced in the Federal Court of Australia where there is a cause of action in the ACT: *Crosby v Kelly* (2012) 203 FCR 451. A jury trial may not be sought in such trials as the regulations for civil trials in the Federal Court of Australia do not contain provisions for jury trial: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61.

In addition, as hearings in the Federal Court are conducted under the docket system, interlocutory issues will generally be left to the trial, including imputation arguments, as occurred in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33; see *Goodfellow v Fairfax Media Publications Pty Limited* [2017] FCA 1152 at [25]–[28]. This can have significant costs consequences for a party who fails on a threshold issue such as the capacity of the imputations: *Hockey v Fairfax Media Publications Pty Limited (No 2)* [2015] FCA 750 at [103]–[124].

The pleadings in defamation action (which do not require verification: UCPR r 14.22) consist of the statement of claim, the defence (and cross-claim if applicable) and, depending upon the defences pleaded, a Reply particularising issues such as malice.

The statement of claim

This pleading must contain full particulars of the matter complained of and its context, the imputations pleaded to arise (whether in their natural and ordinary meaning or by true innuendo), details of publication (including particulars of identification if the plaintiff is not named) and republication, as well as any claim for special damages and aggravated compensatory damages: Tobin & Sexton at [25,015]–[25,115]. Punitive damages are not available: *Defamation Act* 2005, s 37. A claim for interest should be pleaded (Tobin & Sexton at [25,120]) but, if omitted, may still be claimed.

Generally speaking, liability for publication is construed broadly: *Webb v Bloch* (1928) 41 CLR 331. The plaintiff may bring proceedings not only against the author of the publication but any other person who has authorised or otherwise participated in the publication — such as the proprietor of a newspaper, the source of the information or the person who repeats the libel — and the choice of whom to sue is a matter for the plaintiff: Tobin & Sexton [5260]–[5265].

The tort of defamation is based upon the communication of defamatory meaning, and not simply upon the words spoken (or written). In *Monson v Tussaud's Ltd* [1894] 1 QB 671 the plaintiff brought proceedings for defamation after the Madame Tussaud museum placed a wax statue of him carrying a gun in a section devoted to famous murders. In fact a verdict of "not proven" had been given in Mr Monson's trial for murder (the jury, however, only awarded a farthing in damages). Even photographs can, in some circumstances, convey a defamatory meaning: *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

There must be a plea of publication to a third party and, if the plaintiff is not named, particulars of identification should be provided, with verification if considered necessary: *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188; *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [14]–[22].

Where the publication was made on the internet, the element of publication requires proof that the article was downloaded from the web server: *Dow-Jones and Co Inc v Gutnick* (2002) 210 CLR 575 at [25]–[28], [44]. The plaintiff must therefore set out for each matter complained of that it was downloaded and seen by at least one person, as well as the State or Territory in which that person downloaded the material and, if the plaintiff was not named, particulars of how the person downloading the matter complained of identified the plaintiff.

The precise words said to have been written or spoken must also be pleaded; it is not enough to identify their substance: *Collins v Jones* [1955] 1 QB 564. Where the matter complained of is not defamatory on its face, the plaintiff must plead those extrinsic facts said to give rise to the defamatory imputation, and set out how persons knowing these would have understood the publication to refer to the plaintiff: Tobin & Sexton [3360]–[3370].

Where a plaintiff brings proceedings against a defendant for a republication of the defendant's words made by a third party, in circumstances where the republication is asserted to be the natural and probable consequence of the defendant's publication, this should be pleaded and particularised. The pleading should state whether the republication is relied upon as a cause of action pleaded against the defendant, or as a matter going only to damages: Tobin & Sexton at [5295]–[5395].

Damage to reputation in defamation actions is presumed. It is not necessary to allege or prove injury to reputation: *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 150 per Windeyer J; *Bristow v Adams* [2012] NSWCA 166. The plaintiff nevertheless should include a claim for aggravated compensatory damages in the relief sought. This should include any claim for special damages and/or aggravated compensatory damages, together with particulars of the facts and matters relied upon: UCPR r 15.31.

General damages, under the UDA, are capped: s 35. A plaintiff has also always been entitled to claim general damages for loss of business (as opposed to special damages): *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225; Tobin & Sexton at [25,110]. The relationship between an *Andrews* claim and the cap on damages has not yet been judicially considered. Any claim for special damage should be particularised: Tobin & Sexton [25,105].

Where a claim for aggravated damages is made out, the claim for general damages, no matter how small, falls away, and the claim for damages may then exceed the cap: *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154. This has resulted in a significant increase in the quantum of damages: *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201; *Nine Network Australia Pty Ltd v Wagner* [2020] QCA 221.

Claims for damages for defamation attract interest, generally from the date of defamation until the verdict: *John Fairfax & Sons v Kelly* (1987) 8 NSWLR 131. Although interest may be awarded even if a claim for interest is not pleaded (*Murphy v Murphy* [1963] VR 610), it is preferable for it to be pleaded.

The defence

The defence sets out whether the publication, identification and imputations are admitted, the defences pleaded to the publication and matters relevant to damages, such as a plea of mitigation of damages.

Where the matter complained of is restricted to publication in Australia, defences under the Act and the common law of Australia must be pleaded. Where the matter complained of is pleaded to have been published outside Australia (for example, publications in other jurisdictions, via the internet), defences in the jurisdiction where the publication is heard, read or downloaded will apply: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

In Australia, defences fall into three main categories: justification, fair comment and privilege (absolute or qualified): "Speaking generally, a defamatory publication is actionable only when it is not excused, protected or justified by law", M McHugh, "What is an Actionable Defamation?", *Aspects of the Law of Defamation in New South Wales*, J Gibson (ed), Law Society of NSW, 1990, p xxxi. Both statutory and common law defences may be pleaded, as the entitlement to rely upon common law defences, such as the "*Hore-Lacey*" defence (*David Syme & Co Ltd v Hore-Lacey* (2000) 1 VR 667; see *Besser v Kermode* (2011) 81 NSWLR 157 at [58] and [75]) has been retained: ss 6(2) and 24. This provision means that common law decisions on issues such as publication, defamatory meaning, and damages are also largely applicable (note, however, that the distinction between libel and slander at common law has been abolished: *Defamation Act*, s 7).

The requirements for pleading and particularisation of statutory defences are set out in UCPR rr 14.31 and 15.21. The specific requirements in relation to each of these defences, and the relevant section of the *Defamation Act* for each such defence, are as follows:

1. **Justification (s 25):** UCPR rr 14.32 and 15.22. The most common problems with this defence arise from last-minute particulars, or an application to plead it just before the trial: *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648; Tobin & Sexton at [25,175]. The particulars of this defence, other than in clear situations where it is fully set out in the publication, should be set out with precision, and may include material not referred to in the matter complained of, including events subsequent to the publication: Tobin & Sexton at [25,180]–[25,190].
2. **Contextual truth (s 26):** UCPR rr 14.33 and 15.23. The scope of this defence has been reduced by *Besser v Kermode*, above. See Tobin & Sexton at [25,145]–[25,160]. There are differing views as to whether a plaintiff may "plead back" the contextual imputations: *Hall v TCN Channel Nine Pty Ltd* [2014] NSWSC 1604. This decision was one of a series of judgments expressing conflicting views on the defence, notably the correct way to apply it at trial: *Phillips v Robab Pty Ltd* [2014] NSWSC 1520. The pleadings and particulars are described in Tobin & Sexton at [25,165]–[25,170].
3. **Absolute privilege (s 27):** UCPR rr 14.34 and 15.24. This defence is commonly dealt with as a summary judgment application.
4. **Publication of public and official documents (s 28):** UCPR rr 14.35 and 15.25.
5. **Fair report of proceedings of public concern (s 29):** UCPR rr 14.36 and 15.26.
6. **Qualified privilege (s 30):** UCPR rr 14.37 and 15.27. The requirements for particulars of this defence are set out in Tobin & Sexton at [25,215]–[25,220]. If this defence is pleaded, the plaintiff should usually file a reply, in order to put in issue whether the publication was "reasonable" in all the circumstances within the meaning of ss 30(1)(c) and 30(3). Note that this defence differs from the common law defence, which is described in further detail below.

7. **Honest opinion (s 31):** UCPR rr 14.38 and 15.28. This statutory defence is, with some modifications, adapted from the common law defence of fair comment, but it is still possible to rely upon the common law defence. There are three forms of honest opinion defence: s 31(1)–(3). If this defence is pleaded, the plaintiff should usually file a Reply, in order to put in issue the matters in s 31(4). The defence has rarely been successful, but see *O'Brien v Australian Broadcasting Corp* [2016] NSWSC 1289.

8. **Innocent dissemination (s 32):** UCPR rr 14.39 and 15.29. This defence, once little used, is of significance for internet publications. In addition to s 32, an ISP may rely upon *Broadcasting Services Act* 1992 (Cth), Sch 5 cl 91: Tobin & Sexton [24,035]; Collins at [3.08], [16.133]–[16.144]. The common law defence of innocent dissemination also survives.

9. **Triviality (s 33):** UCPR rr 14.40 and 15.30. This defence (that the circumstances of publication were such that the plaintiff was not likely to suffer harm) is unique to Australian law, and is modelled on *Defamation Act* 1974, s 13.

No specific provision has been made in the UCPR for the procedure of offer of amends, statutory defences (for absolute or qualified privilege) under other legislation, or for common law pleadings such as the *Lange* defence: *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

The nature of offer of amends, statutory defences of good faith and the common law defences may briefly be summarised as follows:

1. **Offer of amends:** *Defamation Act* Pt 3, Div 1. This provides for service of a "concerns notice" (s 14(2)) followed by a procedure for the making of an offer to make amends (s 15) which may be withdrawn (s 16) or accepted (s 17). Where there is a failure to accept a reasonable offer to make amends "a court" (s 18(2)) must determine whether the offer was made as soon as practicable and was reasonable, having regard to the circumstances set out in s 18(2). The provisions of the *Defamation Act* are unclear as to whether determination of these issues is a matter for the jury or for a judge sitting alone: *Hunt v Radio 2SM Pty Ltd (No 2)* (2010) 10 DCLR (NSW) 240. The defence is not limited to small publications, and substantial damages may be awarded. In *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 McCallum J held that an offer of amends of $50,000 and an apology were insufficient where the imputations were gravely serious claims that a teacher had sexual relations with underage students; the award of $350,000 is the highest sum awarded under the uniform legislation. The workability of this defence was considered in *Mohareb v Booth* [2020] NSWCA 49 at [11]–[13], where the NSWCCA confirmed the correctness of observations by Payne JA in *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570 at [92] that the mere service of a statement of claim (despite containing no words to indicate it was intended as a Concerns Notice) and the failure to serve an offer to make amends in response to service of proceedings within the 28-day statutory period would prevent reliance upon the defence at trial: see *Goldberg v Voigt* [2020] NSWDC 174.

2. **Statutory defences containing a good faith provision:** An example of a statutory provision offering a defence for a publication made in good faith is *Health Care Complaints Act* 1993 (NSW), s 96.

3. **Common law justification (*David Syme & Co Ltd v Hore-Lacey* (2000) 1 VR 667):** Although earlier decisions of the NSW Court of Appeal held that this defence was not available for publications in other States and Territories where the action was brought in NSW, the Court of Appeal has now held that it is available: *Besser v Kermode*. The availability of the common law defence (*Hore-Lacy* nuance imputations) has been doubted in NSW: *Bateman v Fairfax Media Publications Pty Ltd (No 2)* [2014] NSWSC 1380; but cf *Setka v Abbott* [2014] VSCA 287.

4. **Comment at common law:** The pleadings and particulars for the common law defence of comment are similar to those of the statutory defence. Given the greater flexibility of the statutory defence, this defence is unlikely to be often encountered.

5. **Qualified privilege at common law:** This is the most commonly pleaded defence, and the particulars necessary to establish it differ from the statutory defence. It is not possible, in this overview, to deal with the elements of the defence in detail. The general principles are set out in Tobin & Sexton at [14,010]–[14,065]. Attempts by the media to rely upon this defence have been unsuccessful: Tobin & Sexton at [14,070] and *Lloyd-Jones v Allen* [2012] NSWCA 230. Qualified privilege at common law was described as a limited defence in *Bennette v Cohen* [2009] NSWCA 60 at [139]–[143]. However, the High Court has since reviewed and clarified elements of reciprocity and interest in *Papaconstuntinos v Holmes a Court* (2012) 87 ALJR 110, and rejected the asserted requirement, in cases such as *Bennette*, for "pressing need" (at [51]) for the publication to have been made. The High Court explained the operation of the defence where the publication was made in response to an attack (see also *Harbour Radio Pty Ltd v Trad* (2011) 245 CLR 257).

6. **The *Lange* defence:** The right of freedom of speech implied in the Constitution, and its impact upon defamation law, in relation to publications in the media concerning "government and political matters", is explained in *Lange v Australian Broadcasting Corp* (1997) 180 CLR 520. The decision has been criticised as limited (see R Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd edn, Thomson Reuters, at [27-58] n155), and its impact on defamation law since 1997 has been slight. It is not possible to deal with the complexities of this defence in this overview of defamation law. Briefly stated, the decision imposes a more stringent test of reasonableness in place of the common law qualified privilege requirement for malice. The defence has, for most practical purposes, been superseded by the s 30 defence. For a detailed analysis, see P Applegarth, "Distorting the Law of Defamation" (2011) 30(1) *University of Queensland Law Journal* 99-117.

   The availability of a defence of qualified privilege at common law for statements made in election campaigns is limited to pending elections: *Marshall v Megna* [2013] NSWCA 30. There is no independent third category of qualified privilege falling outside the ambit of "election cases" and the *Lange* defence in respect of which the requirement of reasonableness is dispensed with: *Marshall* at [120] per Beazley JA; see also Tobin & Sexton at [14,025].

7. **Consent:** This rarely used defence, which requires the defendant to prove the plaintiff consented to the publication being made, has been successful in two actions in Australia: *Austen v Ansett Transport Industries (Operations) Pty Ltd* [1993] FCA 403; *Dudzinski v Kellow* (1999) 47 IPR 333; [1999] FCA 390; *Dudzinski v Kellow* [1999] FCA 1264; cf *Frew v John Fairfax Publications Pty Ltd* [2004] VSC 311. See R Brown, above, Ch 11.

Summary judgment applications may be brought by the defendant in certain limited circumstances:

- if the plaintiff is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act*, s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, or in relation to statements made concerning court proceedings (*Cumberland v Clark* (1996) 39 NSWLR 514 at 518–521) or in parliament (*Della Bosca v Arena* [1999] NSWSC 1057);
- where the proceedings may be struck out as an abuse of process; for example, where other proceedings have been brought for the same publication: *Bracks v Smyth-Kirk* (2009) 263 ALR 522. Leave to commence proceedings under s 23 may be granted retrospectively: *Carey v Australian Broadcasting Corp* (2012) 84 NSWLR 90; or
- where issues of proportionality (*Bleyer v Google Inc* (2014) 88 NSWLR 670) or lack of serious harm (*Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858) arise. This is a controversial area of the law, as these doctrines have yet to receive appellate confirmation.

Summary judgment applications brought on the basis that the claim is trivial, successful in the UK, have also been brought in NSW: *Barach v University of NSW* [2011] NSWSC 431; *Bristow*

v Adams [2012] NSWCA 166 at [41] as well as in other jurisdictions: *Lazarus v Azize* [2015] ACTSC 344; *Asmar v Fontana* [2018] VSC 382. However, in *Bleyer v Google Inc* (2014) 88 NSWLR 670, McCallum J permanently stayed proceedings pursuant to UCPR r 12.7 and CPA s 67 where the publication was limited, the defences strong and enforcement in the United States unlikely. Additionally, pleadings which are clearly hopeless may be dismissed summarily: *McGrane v Channel Seven Brisbane Pty Ltd* [2012] QSC 133; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850 at [28]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [101]–[103]; *Trkilja v Dobrijevic (No 2)* [2014] VSC 594.

The reply

If a plaintiff intends to meet any defamation defence either by alleging malice or by relying upon any other matter that would defeat the defence, this must be pleaded in a reply containing the particulars set out in UCPR rr 15.1 and 15.31, these being the facts, matters and circumstances relied upon by the plaintiff to establish the allegations or matters of defeasance: see Tobin & Sexton at [18,001]–[18,060] and [25,225]. The onus of proof lies upon the defendant to establish matters relevant to the defences, such as qualified privilege, but once these elements have been established, the burden of establishing malice lies on the plaintiff, not upon the defendant: *Dillon v Cush* [2010] NSWCA 165 at [63]–[67].

Other pleadings

- **Claims for indemnity between defendants or against third parties:** Defendants may bring claims under the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) for contribution or indemnity against each other or against a third party.
- **Cross claims:** Claims for defamation have been brought as a cross-claim to a claim for misleading and deceptive conduct (*Madden v Seafolly Pty Ltd* [2014] FCAFC 30) and infringement of copyright (*Boyapati v Rockefeller Management Corp* (2008) 77 IPR 251 as well as to a claim for defamation (*Greinert v Booker* [2018] NSWSC 1194).
- **Discovery and interrogatories:** The principal difference between discovery and interrogatories in defamation action is that more than 30 interrogatories may be administered: *Lewis v Page* (unrep, 19/7/89, NSWSC). This allows for a number of commonly used interrogatories to be administered as to the defences, see [5-4040] below.

[5-4020] Applications to amend or to strike out pleadings and other pre-trial issues

Applications to amend or strike out portions of the pleadings in defamation actions occur most commonly at two stages. The first is at the commencement of the litigation. Applications for rulings at this stage usually consist of challenges to the form and capacity of the plaintiff's imputations and, after the defence has been filed, if contextual truth is pleaded, an application by the plaintiff either to strike out or to plead back contextual imputations: *McMahon v John Fairfax Publications Pty Ltd (No 3)* [2012] NSWSC 196. Applications by plaintiffs to plead back contextual imputations are now often refused: *Waterhouse v The Age Co Ltd* [2012] NSWSC 9. Applications to strike out proceedings commenced after the one-year limitation period are generally brought at the commencement of the proceedings.

Applications for amendment are also often brought shortly before the trial: *Lee v Keddie* [2011] NSWCA 2; *McMahon v John Fairfax Publications Pty Ltd* [2011] NSWSC 485. They may also be brought during (*TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682 at 695; *Ainsworth v Burden* [2005] NSWCA 174 at [51]), or even after the trial: *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [52]ff. Where the result of amendment would be to adjourn or delay the trial, these applications are often refused: *Lee v Keddie*.

In New South Wales, defamation actions are managed in a specialist list where interlocutory motions are dealt with as part of case management.

Child care appeals from the Children's Court

[5-8000] The nature of care appeals

A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1) of the *Children and Young Persons (Care and Protection) Act* 1998 (the "Care Act"). However, if the decision is made by the President of the Children's Court, the appeal must be made to the Supreme Court.

Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Ch 5 and 6 of the Care Act (ss 43–109X): s 91(4). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

The provisions of the Care Act (Ch 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

Applications are sometimes made to the Supreme Court in its *parens patriae* jurisdiction by parties who are dissatisfied with decisions of the Children's Court or the District Court in relation to children. Parties are discouraged from attempting to bypass the statutory appeal mechanism from decisions of the Children's Court. Exceptional circumstances are required to be demonstrated for the Supreme Court to interfere with orders that have been made by judicial officers exercising specialist jurisdiction such as those in the Children's Court: *Re M (No 4) — BM v Director General, Department of Family and Community Services* [2013] NSWCA 97 at [21]-[23].

[5-8010] The Care Act

The Care Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department of Family and Community Services's powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the Children's Court, or the District Court (exercising Children's Court jurisdiction on appeal).[1]

The Care Act contains a small number of key concepts. They include:

- the need for care and protection
- removal of children
- parental responsibility
- permanency planning
  - involving restoration
  - involving out-of-home care
  - involving guardianship
  - involving adoption
- contact.

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[1]The Hon J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008 (the "Wood Report") Recommendation 11.2.

[5-8020] The conduct of care appeals

A care appeal proceeds by way of a new hearing and fresh evidence, or evidence in addition to, or in substitution for, the evidence on which the order was made by the Children's Court: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).

The proceedings are to be conducted in closed court (s 104B), and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1). This prohibition extends to the publication or broadcasting of the name of the child or young person who is or has been under the parental responsibility of the Minister or in out-of-home care: s 105(1A). The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

There are exceptions, such as where a "young person" (ie a person aged 16 or 17: s 3) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3), or to the publication by the Coroners Court of its findings in an inquest concerning their suspected death: s 105(3)(a1).

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media: *AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd* (2008) 6 DCLR(NSW) 329.

Care proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1). They are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2). The court is both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured court setting and statutory context: *Re "Emily" v Children's Court of NSW* [2006] NSWSC 1009.

The court is not bound by the rules of evidence, unless it so determines (s 93(3)), but see *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 per Meagher JA at [79].

The standard of proof is on the balance of probabilities: s 93(4). The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

The provisions of the United Nation's *Convention on the Rights of the Child* 1989 ("UNCROC") are capable of being relevant to the exercise of discretions under the Care Act: *Re Tracey* (2011) 80 NSWLR 261; *Re Kerry (No 2)* (2012) 47 Fam LR 212.

However, in the decisions of *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 and *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88, failure to raise a specific point of differentiation between the Care Act and the UNCROC did not constitute error.

[5-8030] The guiding principles

The objects of the Care Act are as set out in s 8.

The Care Act is to be administered under the principle that the safety, welfare, and well-being of the child are paramount (the paramount concern): s 9(1). This principle is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

It is now well settled law that the proper test to be applied is that of "unacceptable risk to the child": *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 per Judge Marien at [61].

Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This test of whether there is an "unacceptable risk" of harm to the child is the sine qua non for the application of the Act: see *M v M* (1988) 166 CLR 69 at [25]. If ever in doubt, return to this principle for guidance.

Secondary to the paramount concern, the Care Act sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 11, 12 and 13. Reference should be made to the full text of these principles, which require, in summary, that:

- children are given an opportunity to express their view freely, and their wishes appropriately taken into account
- account is taken of culture, disability, language, religion and sexuality
- action taken is the least intrusive intervention in the life of the children and their family
- the name, identity, language, cultural and religious ties of children are preserved as far as possible
- any out-of-home care arrangements are to be made in a timely manner
- relationships with people significant to the children are to be preserved, unless contrary to their best interests.

Aboriginal and Torres Strait Islander principles

There are special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11 and 12. A hierarchy for out-of-home placement of an Aboriginal or Torres Strait Islander child is established: s 13.

A permanency plan for an Aboriginal or Torres Strait Islander child must address how the plan has complied with the placement principles in s 13 of the Care Act : s 78A(3). (See generally *Re Kerry (No 2)*, above; *Department of Family and Community Services (NSW) re Ingrid* [2012] NSWChC 19.)

[5-8040] The need for care and protection

The basis for making a care order under the Care Act is a finding that the child is in need of care and protection: s 71. This is known as the "establishment" phase and is the trigger for the main operative provisions, such as removal (s 34), allocation of parental responsibility (s 79), and permanency planning: s 83.

"Care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". But the Care Act does specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

If the Director-General forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

Removal may be sought by seeking orders from the court (s 34(2)(d)), by the obtaining of a warrant (s 233), or, where appropriate, by effecting an emergency removal: s 34(2)(c). See also ss 43 and 44.

[5-8050] Parental responsibility

"Parental responsibility" means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3.

The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility: s 79(1).

[5-8053] Parent responsibility contracts

The system in relation to parent responsibility contracts ("PRCs") was altered with the introduction of the Care Act reforms in October 2014. A significant reform under s 38E is that breach of a PRC does not give rise to a presumption that a child is in need of care and protection. Additionally, the applicability of PRCs now extends to expectant parents: s 38A(1)(b).

[5-8056] Parent capacity orders

The reforms introduced a new jurisdiction for the Children's Court, the parent capacity order ("PCO"). A PCO can be used as a stand-alone provision, during proceedings or as a result of a breach of a prohibition order: s 91B. The threshold test set out in s 91E for the making of a PCO is lower than the threshold test for a care application: s 72. An application for a PCO can also be referred to a dispute resolution conference ("DRC"): s 91D.

In order to make a PCO there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child or young person at risk of significant harm. Secondly, the court must be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service: s 91E.

The Children's Court can make a PCO by consent: s 91F. This function may be exercised by a Children's Registrar in relation to an application made the Secretary: s 91B(a).

[5-8060] Permanency planning

After "establishment" the process moves towards "final orders". Prior to the making of final orders, the Director-General is required to undertake permanency planning for the child. The court must not make a final care order unless it expressly finds that permanency planning has been appropriately and adequately addressed. "Permanency planning" means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.

As part of the permanency planning, the Director-General is required to assess whether there is a realistic possibility of restoration of a child to the parent(s): s 83(1). There is no statutory definition of the phrase "realistic possibility of restoration": *Department of Family and Human Services (NSW) re Amanda and Tony* [2012] NSWChC 13 at [29]–[32] and *DFaCS (NSW) re Oscar* [2013] NSWChC 1 at [29]–[34].

The court is to decide whether to accept that assessment: s 83(5). If the court does not accept the assessment of the Director-General, it may direct the Director-General to prepare a different permanency plan: s 83(6).

Before the court can make a final order approving a permanency plan involving restoration, within a reasonable period (which must not exceed 24 months: s 83(8A)), it must expressly find that there is a realistic possibility of restoration, having regard to two matters: the circumstances of the child; and secondly, any evidence that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child. It follows that when deciding whether to accept the assessment of the Director-General, the court must have regard to both those considerations: s 83(5).

"V V" v District Court of New South Wales [2013] NSWCA 469 is significant as it relates to two key legal principles. Specifically, the interpretation given to "circumstances of the child" under s 83(1)(a) and the need to provide reasons under s 79(3).

First, Barrett JA held that "circumstances of the child" under s 83(1)(a) should be given a wide interpretation. Barrett JA states at [68]:

> There is simply no valid basis for a construction that restricts the meaning of a child's "circumstances" and excludes from the concept of "circumstances" any aspects of the situation in which a child is placed, the setting in which he or she is living and the influences bearing upon his or her wellbeing. The term is a broad one that must, in the context, be construed broadly to encompass the whole of the child's situation.

Second, Barrett JA makes clear that judicial officers are required to consider the principles under s 79(3) and that their decision and reasons may be examined to determine whether they have done so: [84]–[85].

The reforms to the Care Act introduced a hierarchy of permanency planning principles to guide decision making, entitled the "permanent placement principles": s 10A. The intent behind these reforms was to change the focus of case planning to long-term options that would be more likely to offer the child and carers greater certainty and stability.

Permanent placement refers to a long-term placement following the removal of a child or young person from the care of a parent or parents that provides a safe, nurturing, stable and secure environment for the child of young person: s 10A(1).

The permanent placement principles provide that the first preference is for the child or young person to be restored to the care of his/her parent or parents so as to preserve the family relationship: s 10A(3)(a).

If restoration is not practicable or in the best interests of the child or young person, the second preference is to order guardianship to a relative, kin or other suitable person: s 10A(3)(b).

If neither of these options is practicable or in the best interests of the child or young person, the next preference is for the child to be adopted (excepting in the case of an Aboriginal or Torres Strait Islander child or young person): s 10A(3)(c).

Under s 78A(3) of the Care Act, a permanency plan for an Aboriginal or Torres Strait Islander child submitted to the Children's Court must address how the plan has complied with the placement principles in s 13 of the Care Act. Pursuant to s 83(7), the Children's Court must not make a final care order unless it expressly finds that "permanency planning for the child or young person has been appropriately and adequately addressed" and that prior to approving a permanency plan involving restoration, there is a realistic possibility of restoration within a reasonable period, having regard to the circumstances of the child or young person, and the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

In cases where restoration, guardianship and adoption are not practicable or in the best interests of the child or young person, the last preference is for the child to be placed under the parental responsibility of the Minister: s 10A(3)(d).

Where restoration, guardianship and parental responsibility to the Minister are not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person, the Aboriginal or Torres Strait Islander child or young person is to be adopted: s 10A(3)(e). *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 states the principles for the identification of an Aboriginal child for the purposes of the *Adoption Act*.

[5-8070] Final orders

There are two types of final orders. The first involves restoration to the persons (usually the parents) who enjoyed parental responsibility prior to removal. The second involves out-of-home care, which means residential care and control provided by others at a place other than the usual home: s 135.

Where the Director-General assesses that there is a realistic possibility of restoration within 24 months, a permanency plan involving restoration is submitted to the court: s 83(2). If the court expressly finds that the plan appropriately and adequately addresses permanency planning and that there is a realistic possibility of restoration, it can proceed to make final orders in accordance with the plan.

Where the Director-General assesses that there is not a realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Director-General may consider whether adoption is the preferred option: s 83(4).

Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the child are paramount. It is now well settled law that the proper test to be applied is that of "unacceptable risk" of harm to the child: *M v M*, above, at [25]. Whether there is an "unacceptable risk" is to be assessed from the accumulation of factors proved: *Johnson v Page*, above.

The permanency plan need not provide details as to the exact placement, but must provide sufficient detail to enable the court to have a reasonably clear understanding of the plan: s 83(7A). The care plan must make provision for certain specified matters: s 78.

[5-8080] Contact

Importantly, the care plan involving removal must also include provision for appropriate and adequate arrangements for contact: s 78(2). In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance: s 86. As presently enacted, s 86 empowers the court to make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.

The reforms have confined the court's power to make contact orders where there is no realistic possibility of restoration. Accordingly, where restoration is not planned, the maximum period that may be specified in a contact order is 12 months: s 86(6). These reforms highlight the clear legislative and policy shift toward including contact arrangements in a care plan rather than in a court order.

The amendments create new processes for varying contact orders and making applications for contact orders following the conclusion of the initial proceedings: ss 86(1A); 86(1B); 86(1C); 86(1E) and 86(1F).

[5-8090] Variation of final orders

Applications for rescission or variation of care orders require the applicant to obtain leave, which will only be granted if there has been "significant change in any relevant circumstances" since the original order: s 90(2). The Care Act sets out a number of matters that the court must take into account before granting leave: s 90(2A). The primary considerations concern the views of the child or young person, the stability of present care arrangements, and, if the court considers that present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in his or her best interests: s 90(2B). Additional considerations are set out in s 90(2C).

A refusal of leave is an "order" for the purposes of s 91(1) of the Care Act: *S v Department of Community Services* [2002] NSWCA 151 at [53]. A refusal (or the granting) of leave may, therefore, be the subject of a statutory appeal to the District Court.

Once leave is granted, the Care Act goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

For a detailed discussion of s 90 applications, see *In the matter of Campbell* [2011] NSWSC 761 and *Kestle v Department of Family and Community Services* [2012] NSWChC 2.

Special provisions are set out in the *Children and Young Persons (Care and Protection) Regulation* 2012 in relation to the leave requirement in s 90 as it relates to guardianship orders: cl 5.

In *Re Mary* [2014] NSWChC 7, Blewitt ChM considered whether the decision of Rein J in *Re Timothy* [2010] NSWSC 524 was conclusive. Specifically, Blewitt ChM considered whether the Children's Court could amend an interim order without the need for an application to be made under s 90 of the Care Act. Blewitt ChM concluded that interim orders can be amended without the need for a s 90 application; it is not an essential requirement.

[5-8091] Variation of interim care orders

Section 90AA of the *Care Act* enables a party to care proceedings before the Children's Court to make an application to vary an interim care order during the proceedings (instead of having to seek leave to make an application under s 90). Section 90 does not apply to an application to vary an interim order.

[5-8093] Guardianship orders

Section 79A of the Act governs guardianship orders. The court may make an order allocating to a suitable person all aspects of parental responsibility for a child or young person who is in statutory or supported out-of-home care, or who it finds is in need of care and protection until the child or young person reaches 18 years of age: s 79A(2).

The court must be satisfied of each of the following (s 79A(3)):

- there is no realistic possibility of restoration of the child to the parents, and
- that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
- if the child or young person is an Aboriginal or Torres Strait Islander (ATSI) child or young person — permanent placement of the child or young person under the guardianship order is in accordance with the ATSICPP that apply to placement of such a child or young person in statutory out-of-home care under s 13, and
- if the child or young person is 12 or more years of age and capable of giving consent — the consent of the child or young person is given in the form and manner prescribed by the regulations.

Parental responsibility may be allocated jointly to more than one person under a guardianship order: s 79A(4).

A guardianship order cannot be made if it would be inconsistent with any Supreme Court order with respect to the child made under its custody and guardianship of children jurisdiction, or a guardianship order made by the Guardianship Tribunal: s 79A(5).

Unless varied or revoked under s 90, a guardianship order remains in force until the child reaches age 18: s 79A(6).

The court's power to order suitability reports or to undertake a progress review applies only to orders allocating parental responsibility under s 79, and not to orders allocating parental responsibility by guardianship order under s 79A: s 82(1).

[5-8096] Changes to supervision and prohibition orders

The maximum period of supervision has changed and the court may now specify a maximum period of supervision that is longer than 12 months (but does not exceed 24 months): s 76(3A).

The reforms have also impacted upon orders prohibition action (prohibition orders): s 90A. The changes include an extension to the class of persons subject to a prohibition order. The persons subject to a prohibition order can now include "any person who is not a party to the care proceedings" in addition to a parent of a child or young person: s 90A(1).

[5-8100] Costs orders

The Care Act gives the Children's Court a limited power to make an order for an award of costs. The Care Act provides that the Children's Court, and therefore the District Court, can only make an order for costs in care proceedings where there are exceptional circumstances: s 88. These must be seen as being case dependent in the context of the statutory scheme for child protection: *Re: A Costs Appellant Carer (a pseudonym) v The Secretary, Department of Communities and Justice* [2021] NSWDC 197 at [90].

The costs power does not extend to the making of an order against a non-party: *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

[5-8110] The Children's Court clinic

The Children's Court clinic is established under Pt 3A of the *Children's Court Act* 1987, and is given various functions designed to provide the court with independent, expert, objective, and specialist advice and guidance.

The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: Care Act s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54. In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

A clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, would not otherwise have the benefit of.

[5-8120] Alternative dispute resolution in care matters

The Children's Court has alternative dispute resolution processes. The dispute resolution conference ("DRC") model has now become an integral aspect of Children's Court proceedings. This includes Aboriginal care circles, which aim to encourage more culturally appropriate decision making for Aboriginal children and families involved in care and protection cases in the Children's Court, and external mediation.

Conferences are regularly conducted at the court by legally qualified Children's Registrars and are also trained mediators and adopt an advisory, not a determinative role: see s 65 of the Care Act.

Section 37(1A) requires the Secretary to offer the family of a child or young person alternative dispute resolution processes before seeking care orders from the Children's Court if the Secretary determines the child or young person is at risk of significant harm. However, the Secretary is not required to offer DRC if, in their opinion, that participation would not be appropriate due to exceptional circumstances (s 37(1B)), or if there are criminal proceedings or a police investigation and, considering advice by the Commissioner of Police, is of the opinion that it is not appropriate: s 37(1C).

The District Court, when conducting a care appeal, has all the functions and powers of the Children's Court, the District Court may refer an appeal at any time to a DRC.

Legislation

- *Children and Young Persons (Care and Protection) Act* 1998
- *Children's Court Act* 1987
- *Convention on the Rights of the Child* 1989 (UNCROC)

Rules and Practice Notes

- *Children and Young Persons (Care and Protection) Regulation* 2012
- Children's Court Rule 2000
- Children's Court Practice Notes 2, 3, 4, 5, 6 and 9
- Practice Note DC (Civil) No 5

Further references

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- Children's Court CaseLaw, at https://caselaw.nsw.gov.au/browse-court / 54a634063004de94513d827a?type=CIVIL, accessed 18 August 2021.
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- Judicial Commission of NSW, *Children's Court of NSW Resource Handbook*, 2013, at <https://jirs.judcom.nsw.gov.au/benchbks/children/index.html> accessed 18 August 2021.
- The Hon J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, and other resources at https://www.findandconnect.gov.au /ref/nsw/ biogs/NE01715b.htm, accessed 18 August 2021.
- His Hon M Marien SC, *Care Proceedings and Appeals to the District Court*, Judicial Commission of NSW, District Court of NSW Annual Conference, April 2011, NSW. (This conference paper is available to judicial officers on the conference paper database through JIRS.)

[The next page is 5951]

The legal framework for the compensation of personal injury in NSW

Acknowledgement: the following material is based on an extract from the NSW Law Reform Commission, Report 131 Compensation to relatives, Sydney, 2011, updated by his Honour Judge Scotting of the District Court of NSW. The material is reproduced with permission.

Note: The figures in this chapter are current as at 1 February 2018.

Note: This chapter may be modified by the *Personal Injury Commission Act* 2020 (No 18), assented to 11 August 2020. The Personal Injury Commission was established on 1 March 2021 (s 6(1)). The legal instruments that govern the Commission's operations are now live on the Personal Injury Commission website.

[6-1000] Introduction

It is useful to note the framework that is in place in NSW for the compensation of those who acquire dust diseases, including asbestos related diseases. In this section we note the jurisdiction of the DDT and the broad heads of damages that may be awarded at common law, as well as the workers' compensation benefits that are available to dust diseases victims.

By way of comparison, we also note the substance of the legislative schemes that are in place in NSW that provide for the receipt of compensation, or for the recovery of common law damages, by non-dust disease claimants. An appreciation of these schemes is relevant to the equity implications of any reform that the terms of reference require us to take into account.

The discussion in this chapter is limited to liability under the laws of NSW. Consequently, it does not consider the availability of compensation, either statutory benefits or common law damages, to those who are subject to the laws of another jurisdiction. The main example of such a category of plaintiff would be workers who were injured while working in NSW, but who were employed by the Commonwealth. Commonwealth employees are provided for by a statutory compensation scheme established under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth).[1]

Workers' compensation—no fault schemes

[6-1005] Workers' compensation—no fault schemes [introduction]

Where a person is injured or killed in the course of his or her work in NSW, that person and his or her dependants can claim compensation under the relevantly applicable workers' compensation scheme, which will be funded through statutory contributions.[2]

[6-1010] General workers

In 2012 and 2015 workers' compensation reforms modified weekly payments arrangements for all new and existing workers' compensation claims, except for claims by:

- police officers, paramedics and fire fighters;
- workers injured while working in or around a coal mine;

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[1] *Safety, Rehabilitation and Compensation Act* 1988 (Cth) provides for statutory compensation benefits for Commonwealth employees (and in some cases their dependants) who are injured or killed in the course of their employment (see s 14). The Act restricts the recovery of common law damages from the Commonwealth or a Commonwealth authority where an employee is injured (s 44(1)), although if the employee has a right to recover damages for non-economic loss at common law, he or she can elect to pursue common law damages, rather than receiving statutory compensation for his or her non-economic loss (s 45). No restrictions are placed on dependency actions against the Commonwealth in regards to the death of a person who dies from an injury suffered in the course of his or her employment (s 44(3)).

[2] See for example, *Workers Compensation Act* 1987 (NSW) s 154D; *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 6.

- bush fire fighter and emergency services volunteers (Rural Fire Service, Surf Life Savers, SES Volunteers); and
- people with a dust diseases claim under the *Workers Compensation (Dust Diseases) Act* 1942 (exempted workers).

The current scheme provides for the following weekly payments:

- for workers with no current work capacity, payments of up to 95% of their pre-injury average weekly earnings for the first 13 weeks, payments of up to 80% of their pre-injury average weekly earnings for weeks 14 and thereafter;
- for workers with current work capacity, payments of up to 95% of their pre-injury average weekly earnings for the first 13 weeks, comprised of their actual earnings and payments from the insurer (the first entitlement period);
- for workers who have returned to work for at least 15 hours per week from weeks 14 to 130 are entitled to up to 95% of their pre-injury average weekly earnings (the second entitlement period). Those who have capacity to work but are working less than 15 hours per week are entitled to payments of up to 80% of their pre-injury average weekly earnings for weeks for the second entitlement period;
- for workers who are able to work and are not working at least 15 hours per week after 130 weeks, the entitlement to weekly payments ceases, unless the worker has a permanent impairment of more than 20%;
- after the second entitlement period (130 weeks) workers' entitlements to weekly benefits continue if they have no capacity to work or they have achieved an actual return to employment for at least 15 hours per week earning at least $183 per week;
- workers must apply to the insurer for the payment of weekly benefits after 130 weeks;[3]
- benefits are limited to a maximum of five (5) years except for workers with a permanent impairment of more than 20%, who are eligible to receive weekly payments until reaching Commonwealth retirement age, subject to ongoing work capacity assessments;
- workers with highest needs (more than 30% permanent impairment) are entitled to a minimum weekly payment of $814.00 per week. If the worker with highest needs is entitled to a lesser payment, the insurer is required to make payments up to the minimum amount. The amount is to be indexed in April and October of each year;
- are capped at the maximum amount of $2101.70.

The entitlement to weekly payments of exempted workers are determined by reference to the pre-2012 scheme.

The pre-2012 scheme provides for:

- indexed maximum weekly payments where a worker is rendered unable to work as a result of a workplace injury at the rate of the worker's current weekly wage to a maximum of $2101.70 for the first 26 weeks,[4] and thereafter at the rate of up to 90% of the worker's current weekly wage per week to a maximum of $494.30, depending on the level of the worker's disability, as well as additions for a dependant spouse or children.[5]
- the *Workers Compensation Act* 1987 provides the following benefits for workers and exempted workers:
  - the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[6]

[3] *Workers Compensation Act* 1987 (NSW) s 38(3A).
[4] *Workers Compensation Act* 1987 (NSW) s 35.
[5] *Workers Compensation Act* 1987 (NSW) s 37.
[6] *Workers Compensation Act* 1987 (NSW) s 60.

These principles were referred to in *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, where it was stated that damages may be awarded for personal injury, in a claim alleging trespass to land, if the injury was a natural and probable consequence of the trespass.

Injury

The issue of whether the intended injury must be physical so that it did not extend to psychological injury has been disposed of by the principle that the wrongdoer intends the harm that is the natural and probable consequence of the conduct.

In *TCN Channel Nine Pty Ltd v Anning*, above, however, the Court of Appeal rejected the claim in the absence of evidence that the mental trauma claimed by the plaintiff amounted to a recognised psychiatric disorder. Humiliation, injured feelings and affront to dignity resulting from trespass, the court said, were compensable through the means of aggravated damages.

A different approach was taken in *Houda v State of New South Wales* [2005] NSWSC 1053, where the plaintiff recovered damages in claims for malicious prosecution, wrongful imprisonment, wrongful arrest and assault, all conduct that found to have been intentional with intent to cause injury. The defendant argued that the claimed injuries of deprivation of liberty, humiliation, damage to reputation, emotional upset and trauma were not injuries within the scope of s 3B(1)(a) because they were not physical injuries. Cooper AJ held that the section extended to all forms of injury, including those of the class that resulted from the actions of the defendant's police officers.

Onus

The issue of where the onus lies to establish the elements of s 3B(1)(a) was dealt with comprehensively by Leeming JA in *White v Johnston*. He approached the issue from two perspectives.

He said the onus was at all times on the plaintiff to prove that consent was vitiated by fraud because:

- in general principle, a party who asserts must prove
- there would be inherent injustice in requiring a defendant to disprove a fraud, and
- if the plaintiff produced evidence that provided a basis for a finding a fraud, the evidentiary onus shifted to the defendant.

After examining competing views he rejected the argument that the onus of proof was on a defendant who pleaded consent to a claim of assault and battery or trespass to the person. His major reason for doing so was to provide coherence between the criminal and civil law. He noted that a prosecutor bears the onus of negating consent in sexual assault cases and said at [128]:

> It does not strike me as jarringly wrong for a civil plaintiff to be obliged to discharge the same burden (albeit, only to the civil standard) in order to establish a tortious assault and battery.

Vicarious liability

The decision in *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354 established the extent to which an employer might be held liable for the intentional torts of an employee. The Court of Appeal held that an employer was vicariously liable in damages, including exemplary damages, where the intentional tort was committed:

- in the intended or ostensible pursuit of the employer's interest
- in the intended performance of a contract of employment, or
- in the apparent execution of ostensible authority.

Basten JA pointed out that liability of an employer was derivative in form from that of the employee and was not substantially different from the liability of the employee. He said the employer could not escape liability under the general law by demonstrating that it did not have the intention of its employee.

Legislation

- *Civil Liability Act* 2002, Pts 2A, 6, ss 3B, 5B, 5R, 5T, 7B(rep), 7F(rep), 12, 12(2), 13(1), 14, 15, 15(1), (2), (3), (5), 15A, 15B, (2)(b), (2)(d), (5), (6), (7), (8), (9), (10), (11), 15C, 16, (1), (3), 17, 21, 26X, 26C, 34, 48, 49, 50, 71(1)
- *Compensation to Relatives Act* 1897, s 3(3)
- *District Court Act* 1973, Pt 3, Div 3, 4(rep), s 58(4)(rep)
- *Fatal Accidents Act* 1959 (WA)
- *Law Reform (Miscellaneous Provisions) Act* 1965
- *Motor Accidents Act* 1974
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- *Motor Accidents Compensation Act* 1999, ss 3, 7A, 7B(1), 7F, 83, 125, (2), 126, 127, (1)(d), 130, 130A(rep), 134, 131–135, 136, 138, 140, 141B, 141C, 142, 143, 144, 146
- *Motor Accidents (Lifetime Care and Support) Act* 2006
- *Workers Compensation Act* 1987, ss 151H, 151I, 151IA, 151AD, 151J, 151L, 151N, 151O 151Q, 151R, 151Z, (1)(d), (2), (2)(a), (b), (d)
- *Workplace Injury Management and Workers Compensation Act* 1998, Pt 7, s 322(1)
- *Social Security Act* 1991
- *Supreme Court Act* 1970, Pt 5, Div 2(rep), s 76E(4)(rep)
- *Victims Compensation Act* 1996 (rep, now *Victims Rights and Support Act* 2013)

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[The next page is 7501]

Index

[References are to paragraph numbers]

D

E

M

N

T

U

[The next page is 13001]