Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 46

December 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 46

Update 46, December 2021

The following changes have been incorporated in this Update:

[1-0000] Disqualification for bias

Charisteas v Charisteas [2021] HCA 29 has been added at **[1-0020] Apprehended bias** as an example of inappropriate contact or communication with a court which might reasonably be considered to compromise judicial impartiality.

[1-0900] Interpreters

It is noted at **[1-0930] Implementation** that Practice Note SC Gen 21 — Interpreters in Civil Proceedings commenced operation and applies to all civil proceedings commenced after its commencement and to any existing proceedings which the court directs should be subject to the Practice Note, in whole or in part.

[2-0200] Adjournment

A new paragraph **[2-0267] Adjournment of motions on a procedural question** has been added. The case of *Zong v Lin* [2021] NSWCA 209 has been added, as an example where an application for adjournment on an appeal for interlocutory relief was denied as being inconsistent with the statutory framework in ss 56–60 of the *Civil Procedure Act* 2005 to adjourn motions without sufficient reason.

[2-4600] Persons under legal incapacity

Choi v NSW Ombudsman (2021) 104 NSWLR 505 has been added at **[2-4630] Tutors/Guardians ad litem**, which discusses the valid appointment of a guardian ad litem under s 45(4) and (6) of the *Civil and Administrative Tribunal Act* 2013.

[4-1500] Privilege

A new paragraph has been added at **[4-1588] Privilege in respect of self-incrimination**. This discusses the effect of s 128A *Evidence Act* and the recent decision of *Deputy Commissioner of Taxation v Shi* [2021] HCA 22, where the majority of the High Court found there was an unchallenged finding that the information in the privilege affidavit may tend to prove that the respondent had committed an offence under an Australian law. The question for the court under s 128A(6) was whether it is satisfied the interests of justice require that the privilege affidavit be disclosed. In the circumstances of this case, a failure to object on the grounds of foreign law meant that the question raised by s 128A(6)(b) did not arise.

[5-0200] Appeals except to the Court of Appeal

The case of *Huang v Nazaran* [2021] NSWCA 243 has been added at **[5-0240] Appeals from the Local Court**. In that case, it was found that s 70(1)(b) of the *Local Court Act* 2007 confers a right of appeal to the District Court which is to be made in accordance with Pt 3 of the *Crimes (Appeal and Review) Act* 2001 "in the same way as such an … appeal may be made in relation to a conviction arising from a court attendance notice" dealt with under Pt 2 of Ch 4 of the *Criminal Procedure Act* 1986.

[5-7000] Intentional torts

At **[5-7130] Proceedings initiated by the defendant — Who is the prosecutor?** the case of *Stanizzo v Fregnan* [2021] NSWCA 195 has been added. In that case the court noted that neither providing a statement in corroboration of events nor providing a witness statement (of itself) is playing an active role in the conduct of proceedings. Significantly more than that is required. The case of *Rock v Henderson* [2021] NSWCA 155 has been added, where it was noted that ADVO proceedings can be the subject of a claim for malicious prosecution.

Rock v Henderson has also been added at **[5-7190] Damages including legal costs**, where the plaintiff claimed by way of damages for malicious prosecution, his legal costs for defending ADVO proceedings, lost earnings attributable to the time he was required to attend court, to instruct his lawyers and to review documents, damages for "hurt feelings, distress and mounting anger" and exemplary damages.

[6-1000] The legal framework for the compensation of personal injury in NSW

The figures in this chapter have been updated and are current to 1 October 2021.

[10-0300] Contempt generally

The case of *He v Sun* [2021] NSWCA 95 has been added at **[10-0300] Civil and criminal contempt**, as an example of "contumacious disregard of orders" as well as discussing the underlying rationale of sentencing for both civil and criminal contempt. The case *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 has also been added with respect to the power to suspend a sentence for contempt.

At **[10-0320] Test for contempt**, the case of *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 has been added in relation to the substantial risk of serious interference to prejudice proceedings. *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 has been added at **[10-0410] Scandalising contempt**.

New commentary has been added at **[10-0420] Misconduct in relation to pending proceedings**, including the case of *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, where the court noted the distinction to be drawn between a contempt arising from conduct that interferes with the administration of justice in a particular case and interference with the administration of justice generally. In relation to recent judicial consideration in relation to the Construction of orders, the case *City of Canada Bay v Frangieh* [2020] NSWLEC 81 has been added to **[10-0470]**.

New commentary regarding breach of suppression orders has been added at **[10-0480] Breach of orders and undertakings**, which includes the cases of *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 and *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 46

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Disqualification for bias

[1-0000] Introduction

Bias may involve actual or apprehended bias.

[1-0010] Actual bias

A judge affected by actual bias would be unable to comply with the Judicial Oath, and would be disqualified from sitting. In such a case, the question for determination is whether there is bias in fact. See *Collier v Country Women's Association of NSW* [2018] NSWCA 36 at [27]–[46] for a summary of the relevant principles.

[1-0020] Apprehended bias

The test for determining whether a judge should disqualify himself or herself by reason of apprehended bias is objective: "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 and *Charisteas v Charisteas* [2021] HCA 29; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 255 CLR 135.

The application of the test requires two steps: first, "it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits: *Ebner* at [8]. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed: *Ebner* at [8]; *Charisteas* at [11].

See also *Chamoun v District Court of NSW* [2018] NSWCA 187 per Gleeson JA at [39] (citing *Tarrant v R* [2018] NSWCCA 21) for discussion as to the four discrete elements required for the "double might" test.

An intermediate appellate court dealing with allegations of apprehended bias should address the issue of bias first as the necessary result, if bias is established, is a retrial: *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [2]–[3]; [117].

As to the former association of the judge with legal representatives and litigants, see *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43. As to the relevance of non-disclosure to issues of apprehended bias, see *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (in liq)* [2011] NSWCA 176. As to a party being a member of the trial court, see *Rouvinetis v Knoll* [2013] NSWCA 24.

As to inappropriate contact or communication between the judge and a party's barrister during proceedings and while judgment was reserved which might reasonably be considered to compromise judicial impartiality, see *Charisteas v Charisteas* at [12], [15], [21]–[22].

[1-0030] Procedure

Present authority supports the proposition that an application for disqualification can be made without the filing of a formal motion (*Barton v Walker* [1979] 2 NSWLR 740; *Bainton v Rajski* (1992) 29 NSWLR 539), although there have been instances where a motion has been presented.

Such authority also supports the view that such an application should be determined by the judge whose disqualification is sought, and should not involve a contest on the facts: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 436; and *Wentworth v Graham* [2003] NSWCA 240.

As to the approach to be adopted where there are disputed issues of fact, see *CUR24 v DPP* (2012) 83 NSWLR 385. In that case, it was held that where there is plausible evidence as to an out of court statement or other conduct of a judicial officer, the relevant principles do not require a court exercising appellate or supervisory jurisdiction to first resolve, by making findings of fact, any dispute about what was said or done before applying the fair-minded bystander test. Rather, the objective assessment called for by the test should take account of the dispute and whether the evidence, if accepted, is sufficient to give rise to a reasonable apprehension of bias: at [41], [52]. A judge asked to disqualify himself or herself may need to apply the fair-minded observer test in respect of the evidence, in other words, unless the hypothetical observer would reject the evidence as entirely implausible the judge should consider whether, if accepted, it had the relevant quality to raise a reasonable apprehension of bias: [22], [38], [44]. The denial of a judge alleged to have made a relevant statement cannot settle the question which depends upon the view of a fair-minded observer: [22].

A refusal by a judge to accede to an application for disqualification can be relied upon as a ground of appeal in relation to the substantive judgment. However, the conventional view has formerly been that no appeal lies from the rejection of a refusal application as such although a litigant could usually find an interlocutory order upon which to base an appeal: *Barton v Walker* and *Barakat v Goritsas* [2012] NSWCA 8 at [10].

Following strongly expressed obiter dicta in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [74]–[86] and the decision of the Court of Appeal in *Barakat v Goritsas (No 2)* [2012] NSWCA 36 that is no longer the position. Further, "it will frequently be appropriate to grant leave to appeal, assuming the challenge is not patently untenable and where a long and costly trial would be avoided if the decision below were incorrect": *Barakat v Goritsas (No 2)* at [64].

Failure to seek such leave may found an issue of waiver: *Michael Wilson & Partners Ltd v Nicholls* at [74]–[86].

In respect of refusal by judicial officers of the District Court and Local Court the discretionary remedy of an order in the nature of prohibition may be available.

Generally an application should be made as soon as reasonably practicable after the party seeking disqualification becomes aware of the relevant facts. Otherwise the right to do so may be waived: *Vakauta v Kelly* (1989) 167 CLR 568; *Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWCA 260 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 per Basten JA at [23]–[34].

Where there are matters that might properly arise for consideration, which are known to the judge, it is desirable that they be drawn to the attention of the parties, even if it is believed that they are aware of them: *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 and *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168 at [105]–[107].

In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, the High Court recognised that there are exceptions for necessity, or where there are special circumstances, or where there is consent. For a discussion on the exceptions, see *Australian National Industries Limited v Spedley Securities Ltd (in liq)*, above.

An indication by a party that it wishes a judge to disqualify himself or herself is not of itself a proper ground for the judge to recuse: *Fitzgerald v Director of Public Prosecutions* (1991) 24 NSWLR 45.

Judges are required to discharge their professional duties unless disqualified by law. They should not accede too readily to applications for disqualification, otherwise litigants may succeed in

effectively influencing the choice of judge in their own cause: see *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 352; *Attorney General of New South Wales v Lucy Klewer* [2003] NSWCA 295; *Ebner v Official Trustee*, above, at [19]–[23]; and *Raybos Australia Pty Limited v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272.

Where a legal representative does object to the conduct of a judge, or contends actual or apprehended bias on the part of the judge, there is an obligation to endeavour to have those objections and contentions noted and recorded.

Inter alia, this may assist in a correction of an attitude which has possibly gone too far; at the least it will make the complaint easier for resolution if the matter goes to appeal: *Goktas v GIO of NSW* (1993) 31 NSWLR 684.

[1-0040] Circumstances arising outside the hearing calling for consideration

(a) The fact that a judge was a customer of a bank which is a party to litigation is normally not a ground for disqualification unless the judge has some special connection with the bank or is in a position of obligation toward, or animus against, the bank: *Dovade Pty Ltd v Westpac Banking Corporation*, above.

(b) The fact that the judge, or a close family member, holds shares in a litigant party is normally not a ground for disqualification, unless the value or income stream of the shares could be affected by the outcome of the litigation: *Dovade Pty Ltd v Westpac Banking Corporation* and see *Ebner v Official Trustee*, above.

(c) The fact that the judge has a direct pecuniary interest in the proceedings will however lead to automatic disqualification: *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 10 ER 301 and *Dovade Pty Ltd v Westpac Banking Corporation*.

(d) The fact that the trial judge has expressed views in previous decisions, or in extra-judicial publications in relation to the kind of litigation before the court, which may have questioned an existing line of authority is not normally a reason for disqualification unless those views were expressed with such trenchancy, or in such unqualified terms, as to suggest that the judge could not hear the case with an "open mind": *Timmins v Gormley* [2000] 1 All ER 65, *Newcastle City Council v Lindsay* [2004] NSWCA 198 and *Gaudie v Local Court of New South Wales* [2013] NSWSC 1425 at [175] ff.

(e) The fact that the judge has made findings in related proceedings which are critical of the recollection, credit and behaviour of those who are also parties to a case in which the same issues of fact and credit would arise for determination, will normally be a ground for disqualification: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)*, above, and *Livesey v NSW Bar Association* (1983) 151 CLR 288. Express acknowledgment by a judge who is asked to try an issue that he or she has previously determined that different evidence may be led at the later trial may be insufficient to remove the impression that the judge's previous views might influence the determination of the same issue in the later trial: see *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 where a judge was disqualified after making relevantly unqualified findings of serious fraud against a party. For a case where a series of undisclosed ex parte hearings did not support a finding of apprehended bias, see *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427.

(f) The fact that the judge is related to a party, or to one of the party's legal representatives, at least where that legal representative is actually involved in the litigation, will normally be a ground for disqualification. However, where association with somebody with an interest in the litigation is relied upon there must be shown to be a logical connection between the matter complained of and the feared deviation from impartial decision making: *Smits v Roach* (2006) 227 CLR 423.

(g) The fact that a prior complaint has been made to the Independent Commission Against Corruption, or to some other body such as the Judicial Commission or the Bar Association, in

relation to the judge, has also arisen for consideration: *Briscoe-Hough v AVS Australian Venue Security Services Pty Ltd* [2005] NSWCA 51; see also *Attorney General of NSW v Klewer*, above.

(h) The fact that the judge knows a party or witness may be a ground for disqualification, depending upon the degree and the circumstances of the acquaintanceship and association.

(i) The fact that the judge has acted in a professional capacity in another matter or matters for a party will not normally be a ground for disqualification: *Re Polites; Ex p Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 and *Australian National Industries v Spedley Securities Ltd (in liq)*, above.

(j) The statement of findings at an interlocutory stage in terms of finality, for example, in relation to the admissibility of evidence where those findings are related to the ultimate issue in the case, will normally give rise to disqualification: *Kwan v Kang* [2003] NSWCA 336.

(k) An association may give rise to a reasonable apprehension of bias without there being a connection between the association and one of the issues in dispute: *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300.

(l) For an example of a claim of a reasonable apprehension of bias founded upon remarks made by a judge in a social setting, see *CUR24 v DPP* (2012) 83 NSWLR 385.

[1-0050] Circumstances arising during the hearing

(a) The conduct of the trial judge involving adverse observations, in relation to one party's case, or in relation to witnesses called by that party, especially where adverse findings are also made against that party or witnesses without proper substantiation, may lead to disqualification, see *Mistral International Pty Ltd v Polstead Pty Ltd* [2002] NSWCA 321 and *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407, see also *Vakauta v Kelly*, above, where remarks made by the trial judge critical of evidence given by the defendant's medical witnesses, in previous cases, which were effectively revived by what was said in the reserved judgment, arose for consideration.

It does not, however, follow that trial judges must sit in stony silence, without exposing their views, at risk of being accused of bias. Genuine engagement and debate about critical issues is permissible: *Re Keely; Ex p Ansett Transport Industries (Operations) Pty Ltd* (1990) 64 ALJR 495 and *Barbosa v Di Meglio* [1999] NSWCA 307. However, undue interference by a judge, for example, in questioning parties or witnesses, or in taking up the arguments of one party, may cross the line, as can expressions of opinion as to the likely outcome of the case prior to the conclusion of the evidence and submissions. For guidelines concerning the extent to which judicial intervention is or is not permissible, see *Galea v Galea* (1990) 19 NSWLR 263 at 281–282 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen*, above.

(b) The fact that the judge has had communication with a party, a witness or a legal representative, at or about the time of the hearing, in the absence of, and without the consent or approval of the other party, can also lead to disqualification: *Re JRL Ex p CJL*, above. See also *Royal Guardian Mortgage Management Pty Ltd v Nguyen*.

An increasingly common potential source of difficulty is the use of email to communicate with a judge's chambers. A useful set of guidelines was given in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (In liq) (No 2)* [2013] NSWSC 1971:

> [21] There should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties to those proceedings. Particularly in relation to written communications, given the ubiquity and speed of emails, the precise terms of any proposed communication with a judge's chambers should be provided to the other parties for their consent.

There are four exceptions to this:

1. trivial matters of practice, procedure or administration (eg the start time or location of a matter, or whether the judge is robing)
2. ex parte matters
3. where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (eg for the filing of material physically or electronically with a judge's associate), and
4. exceptional circumstances.

[22] There are three other matters. First, any communication with a judge's chambers which falls into any of the categories set out in sub-paragraphs [21] (2), (3) and (4) above should expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent. Second, where consent has been obtained, that fact should also be referred to in the communication. Third, all written communications with a judge's chambers in relation to proceedings should always be copied to the other parties.

It is desirable for judges to have developed a clear policy with their own staff as to when emails or any other written communications received from or on behalf of litigants are shown to the judge. It is not appropriate for that decision to be left to staff without guidance from the judge: *Stanizzo v Bardane* [2014] NSWSC 689 at [73]–[80]. See also M Groves, "Emailing judges and their staff" (2013) 37 *Aust Bar Rev* 69.

(c) The fact that a judge has decided an issue in a particular way and is likely to decide it in the same way when it arises again, does not necessarily give rise to apprehended bias: *Fitzgerald v Director of Public Prosecutions*, above, but see also *Kwan v Kang*, above.

(d) Complained of conduct should be considered in the context of the trial as a whole and the possibility of the dissipation of effect or express withdrawal of material taken into account: *Jae Kyung Lee v Bob Chae-Sang Cha*, above, at [32]. *Jae Kyung Lee v Bob Chae-Sang Cha* contains a useful discussion of disqualification for apprehended bias.

[1-0060] Immunity from suit

No action lies against a judge for damages in consequence of bias, in respect of acts done in the performance of judicial duties: *Gallo v Dawson* (1988) 63 ALJR 121 and *Yeldham v Rajski* (1989) 18 NSWLR 48. The Registrar has the same protection and immunity by reason of s 44C of the *Judicial Officers Act* 1986 (NSW).

Further references

- J Sackar, "Disqualification of judges for bias", at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf, accessed 16 May 2018.

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Interpreters

[1-0900] Introduction

Over 300 languages are spoken in Australian households, and one fifth of Australians speak a language other than English at home according to the 2016 Census.[1] This means judicial officers will encounter litigants and witnesses who will require the assistance of an interpreter both in the preparation of evidence such as affidavits and to give their evidence in court. In this context "languages" includes Auslan and other methods of communication by deaf or mute persons. "Interpreting" refers to the spoken word and "translating" refers to written text.

[1-0910] Legal issues

Meeting the needs of culturally and linguistically diverse persons in legal proceedings raises numerous practical and legal issues. These include:

- Procedural fairness requires litigants to be "linguistically present" in addition to being physically present: see, for example, *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 (NSWCA).
- Section 30 *Evidence Act* 1995 (NSW) provides:

> 30 Interpreters
>
> A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

[1-0920] Resources

The Council of Chief Justices of Australia and New Zealand has approved the Judicial Council on Cultural Diversity's (JCCD) *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. The standards contain sections including "Plain English Strategies", "Four-part test for determining need for an interpreter" and "What judicial officers can do to assist the interpreter". The Recommended National Standards can be found on the JCCD website at https://jccd.org.au/publications/ (accessed 12 November 2021). See also an explanatory article in the *Judicial Officers' Bulletin*: S Olbrich, "Recommended National Standards for working with interpreters in courts and tribunals" (2018) 30 *JOB* 36.

An Addendum to the *Recommended National Standards for Working with Interpreters in Courts and Tribunals* has been published.

Information on working with interpreters can also be found in the *Equality before the Law Bench Book* at [3.3].

[1-0930] Implementation

The Uniform Civil Procedure Rules were amended on 8 November 2019 to insert Pt 31, Div 3 (r 31.55–31.64). This provides for rules concerning interpreters based on the JCCD's Model Rules set out in the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. The rules apply in all NSW civil proceedings. The application of the *Evidence Act* 1995 is unaffected by the amendments.

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[1]ABS, "2016 Census: Multicultural media release" at www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3, accessed 23/7/2019.

The amended rules also provide for the Court Interpreters' Code of Conduct at Sch 7A of the UCPR.

Practice Note SC Gen 21 — Interpreters in Civil Proceedings commenced operation on 4 March 2020 and applies to all civil proceedings commenced after its commencement and to any existing proceedings which the court directs should be subject to the Practice Note, in whole or in part. This Practice Note implements and applies the National Standards.

Practice Notes

- Supreme Court General Division — SC Gen 21

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Adjournment

[2-0200] Court's power of adjournment

The court has both an inherent power: *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 252; and a specific statutory power under s 66 of the CPA, to adjourn the hearing of any matter in appropriate circumstances.

This power must be exercised in accordance with the overriding purpose of the CPA and the UCPR of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s 56(1)); in accordance with the dictates of justice: s 58 and the importance of elimination of delay: s 59 of the CPA.

[2-0210] General principles

In determining whether an adjournment should be granted, the court is not confined to applying the general traditional view that regard is only to be had to the interests of the litigants in the particular case, but should also take into account the effect of an adjournment on court resources; the competing claims of litigants in other cases awaiting hearing in the particular list; the working of the listing system of the particular court or list; and the importance in the proper working of that system of adherence to dates fixed for hearing.

In *Sali v SPC Ltd* (1993) 67 ALJR 841, the majority of the High Court observed (at 843–844):

> In *Maxwell v Keun*, [[1928] 1 KB 645] English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition: an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action. However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become.
>
> In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources, the competing claims by litigants in other cases awaiting hearing in the court as well as interests of other parties … What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

A similar approach was expressed by Gleeson CJ in *State Pollution Control Commission v Australian Iron and Steel Pty Ltd* (1992) 29 NSWLR 487 at 493–494:

> The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase in the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an ever increasing responsibility on the part of the judges to have regard, in controlling their lists and the cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs.

See also the views of Toohey and Gaudron JJ in *Sali v SPC Ltd* at 849 above; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716.

In *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154 Dawson, Gaudron and McHugh JJ said:

> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

However in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 Spigelman CJ, with whom Basten and Campbell JJA agreed, observed that, while *State of Queensland v J L Holdings Pty Ltd* remained binding authority with respect to applicable common law principles, those principles could be and had been modified by statute both directly and via statutory authority for rules of court: [28].

The Chief Justice said at [29]:

> In this State *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act* 2005, which requires the Court in mandatory terms — "must seek" — to give effect to the overriding purpose — to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" — when exercising any power under the Act or Rules. That duty constitutes a significant qualification of the power to grant leave to amend a pleading under s 64 of the *Civil Procedure Act*.

The duty referred to applies to the exercise of the power of adjournment.

Subsequent to *Dennis* the High Court held that the statement from *J L Holdings* set out above is not authoritative and is not to be followed: *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175 French CJ at [6]; Gummow, Hayne, Crennan, Kiefel and Bell JJ at [111]; Heydon J at [133].

The statements in *Sali v SPC Ltd* and *Frugtniet v State Bank of New South Wales* [1999] NSWCA 458 that it is only in extraordinary circumstances that an adjournment will be refused where the practical effect of the refusal will be to terminate proceedings adversely to the applicant for adjournment are qualified by the above referred to changes. For an example of the refusal of an adjournment on case management principles see *Szczygiel v Peeku Holdings Pty Ltd* [2006] NSWSC 73 and see *Hans Pet Construction v Cassar* [2009] NSWCA 230.

Matters which may justify an adjournment include that the applicant is taken by surprise: *Collier Garland (Properties) Pty Ltd v Northern Transport Co Pty Ltd* [1964–5] NSWR 1414; *Biro v Lloyd* [1964–5] NSWR 1059 at 1062; and insufficient time to deal with affidavit material: *Scott v Handley* (1999) 58 ALD 373. See also *Kelly v Westpac Banking Corporation* [2014] NSWCA 348.

[2-0220] Short adjournments

A short adjournment, for example, for a matter of hours or until the following day, should normally be allowed: *Carryer v Kelly* [1969] 2 NSWR 769; *Petrovic v Taara Formwork (Canberra) Pty Ltd* (1982) 62 FLR 451.

[2-0230] Unavailability of party or witness

That a party or a material witness is unavailable will usually be a sufficient ground for an adjournment, provided such unavailability is not the fault of the party whose interests will be prejudiced by the refusal of the adjournment or of his or her solicitor: *Walker v Walker* [1967] 1 WLR 327; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497; *Petrovic v Taara Form Work (Canberra) Pty Ltd* (1982) 62 FLR 451. Cf *Bloch v Bloch* (1981) 180 CLR 390.

In *Ellis v Marshall* [2006] NSWSC 89, Campbell J, refused a plaintiff's application to vacate a hearing date, where after the date was fixed, but before being notified, she had booked an overseas holiday, referred to ss 56 and 57 of the CPA.

[2-0240] Legal aid appeals

Where an applicant for legal aid is dissatisfied with the determination of such application and has appealed or intends to appeal, s 57 of the *Legal Aid Commission Act* 1979 applies. Section 57 provides:

> Where it appears to a court or tribunal, on any information before it:
>
> (a) that a party to any proceedings before the court or tribunal:
>
> (i) has appealed, in accordance with section 56, to a Legal Aid Review Committee and that the appeal has not been determined, or
>
> (ii) intends to appeal, in accordance with section 56, to a Legal Aid Review Committee and that such an appeal is competent,
>
> (b) that the appeal or intention to appeal is bona fide and not frivolous or vexatious or otherwise intended to improperly hinder or improperly delay the conduct of the proceedings, and
>
> (c) that there are no special circumstances that prevent it from doing so,
>
> the court or tribunal shall adjourn the proceedings to such date on such terms and conditions as it thinks fit.

See generally *Friends of the Glenreagh Dorrigo Line Inc v Jones* (unrep, 30/3/94, NSWCA).

[2-0250] Consent adjournments

The fact that both parties consent to the adjournment is not decisive and does not mean that it must be granted: *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246. It is for the court, not the parties, to decide whether the case should be adjourned.

[2-0260] Apprehended change in legislation

It is not proper to grant an adjournment because of an apprehended change in legislation, even if such apprehended change has been announced by the relevant Minister: *Sydney City Council v Ke-Su Investments Pty Ltd*, above; *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 WLR 213 at 215–216; *R v Whiteway; Ex parte Stephenson* [1961] VR 168 at 171; *Meggitt Overseas Ltd v Grdovic* (1998) 43 NSWLR 527.

A possible exception may be in cases seeking discretionary relief, for example, prerogative orders or injunctions, where the proposed changes may render any orders futile: *Meggitt Overseas Ltd v Grdovic*, above.

[2-0265] Pending appeal in other litigation

Generally speaking a possible change in the law, whether judicial or legislative, is not treated as justification for failing to hear a case fixed and ready for trial: *Geelong Football Club Ltd v Clifford* [2002] VSCA 212; *Meggitt Overseas Ltd v Grdovic*, above.

However, a court in exercising its discretion as to adjournment, may properly have regard to an appeal brought by parties in another case seeking to test a relevant proposition established in that case: *Meggitt Overseas Ltd v Grdovic*, above, at 534–535.

An application for leave to appeal in such a case will not, generally at least, afford an adequate basis to grant an adjournment: *City of Sydney Council v Satara* [2007] NSWCA 148.

[2-0267] Adjournment of motions on a procedural question

It is inconsistent with the statutory framework in the *Civil Procedure Act* 2005, ss 56–60, to adjourn motions without sufficient reason. For example, an applicant for interlocutory relief in

connection with an appeal should anticipate being required to argue the motion on the first return date, particularly where the respondents have filed their evidence in opposition to the motion and are ready to argue the motion. The referrals list operates on the basis that motions are disposed of expeditiously and without delay: *Zong v Lin* [2021] NSWCA 209 at [6], [11].

[2-0270] Failure to comply with directions

As to applications for adjournment where there has been a failure to comply with directions, see *Ritchie's* at [s 66.25].

[2-0280] Concurrent civil and criminal proceedings

Whether a party to civil litigation, who is facing criminal proceedings in relation to the same subject matter, should be granted a stay or an adjournment depends upon the necessity to ensure that the ordinary procedures of the court do not cause injustice to a party to that litigation.

> The Court must balance the prejudice claimed by the defendant to be created by the continuation of the litigation against the interference which would be caused to the plaintiff's right … to have his claim heard without delay in the ordinary course of the court's business … Three matters of prejudice have been envisaged in the cases: the premature disclosure of the defendant's case in the criminal prosecution; the possibility of interference with the defendant's witnesses prior to the trial of that prosecution; and the effect of publicity given to the civil litigation upon jurors in the criminal trial: *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382 at 386, 387.

See also *McMahon-Winter v Larcombe* [1978] 2 NSWLR 155; *Ceasar v Sommer* [1980] 2 NSWLR 929 and *McMahon v Gould* (1982) 7 ACLR 202.

[2-0290] Felonious tort rule

It would appear that the felonious tort rule, also known as the rule in *Smith v Selwyn* [1914] 3 KB 98, that is, that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted, no longer applies in New South Wales as a separate principle. Cases where it would formerly have applied should be dealt with under the principles set out for concurrent criminal proceedings at [2-0280]: *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26.

[2-0300] Judge's control of trial

Often, at least in cases without a jury, when an adjournment is sought on account of some procedural defect of the other side, for example late service of amended particulars or additional medical reports, an adjournment can be avoided by reserving the rights of the party not in default; as the case proceeds, the adjournment often becomes unnecessary.

There is a need to take into account, in considering the effect of a refusal to grant an adjournment, "the control which the judge will enjoy over the action when it comes on for trial including, particularly in a case such as the present where no jury is involved, the power to deal with any particular applications for adjournments which may subsequently be made": *Squire v Rogers* (1979) 39 FLR 106 at 114.

[2-0310] Costs

When an adjournment is granted, the parties whose conduct is responsible for the adjournment is usually ordered to pay the additional costs incurred by the other party as a result of the adjournment.

However, as to an order for costs as a panacea, the traditional view that such an order is adequate compensation for delay occasioned by the grant of an adjournment (or amendment) is no longer regarded as sound: *GSA Industries Pty Ltd v NT Gas Ltd*, above, at 716 per Samuels JA; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 465 per Toohey J.

[2-0320] Adjournment only to "specified day"

Section 66 of the CPA only permits the adjournment of proceedings to a "specified day" and proceedings should not be stood over generally in the exercise of any inherent power of the court. It would not ordinarily be proper to adjourn possession proceedings indefinitely merely for the purpose of allowing the mortgagor to pay the secured debt by instalments: *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 and *Mobil Oil Co Ltd v Rawlinson* (1982) 43 P & CR 221.

[2-0330] Procedure

When an adjournment is granted, directions should be given to ensure, as far as possible, that the matter be ready to proceed when next listed.

As to the listing of applications for adjournments and the practice of the particular courts or divisions, see the relevant Practice Notes, namely:

- Supreme Court, Common Law Division: SC CL 1, cll 25, 33–36
- Supreme Court, Possession List, SC CL 6, cll 18, 43–45
- District Court, General List: Practice Note DC (Civil) No 1, cl 13
- District Court, Case Management in Country Sittings, DC No 1A, cl 13
- Local Court, Case Management of Civil Proceedings in the Local Court: Practice Note Civ 1, cl 5, 44.2

[2-0340] Sample orders

1. I order that the [*proceedings, matter, application*] be stood out of today's list.
2. I direct that the [*proceedings, matter, application*] be listed before the [*List Judge, Registrar, etc*] on [*date*] at [*time*] to fix a fresh hearing date.
3. I direct that [*directions relating to filing and/or service of affidavits, further particulars, experts' reports, service of subpoenas, interrogatories, etc, inspection of documents, etc*].
4. Further directions relating to joint conferences of experts or otherwise as appropriate.
5. I order that the costs of today [*or the costs occasioned by the adjournment, as appropriate*] be paid by the [.....] [*or be costs in the cause, or plaintiff's/defendant's costs in the cause, as appropriate*].

Legislation

- CPA ss 56–60, 66
- *Legal Aid Commission Act* 1979 ss 56, 57

Practice Notes

- Supreme Court Common Law Division — General SC CL 1
- Supreme Court Equity Division — Case Management SC Eq 1
- District Court, General List: Practice Note DC (Civil) No 1
- District Court, Commercial List: Practice Note DC (Civil) No 2
- Local Court, Case Management of Civil Proceedings in the Local Court: Practice Note Civ 1

[The next page is 655]

Persons under legal incapacity

[2-4600] Definition

Section 3 of the CPA defines a person under a legal incapacity as:

> any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the *Felons (Civil Proceedings) Act* 1981 and, in particular, includes:
>
> (a) a child under the age of 18 years, and
>
> (b) an involuntary patient or forensic patient within the meaning of the *Mental Health Act* 2007, and
>
> (c) a person under guardianship within the meaning of the *Guardianship Act* 1987, and
>
> (d) a protected person within the meaning of the *NSW Trustee and Guardian Act* 2009, and
>
> (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

Rule 7.13 of the UCPR provides that for the purpose of the relevant division of the Rules, such a person includes a person who is incapable of managing his or her affairs.

For a discussion of the definition of a person under a legal incapacity and how a challenge to a claimed state of such incapacity should be made, see *Doulaveras v Daher* (2009) 253 ALR 627 at [76]–[159].

For an application under s 4 of the *Felons (Civil Proceedings) Act*, see *Potier v Director-General, Department of Justice and Attorney General* [2011] NSWCA 105 and *Potier v Arnott* [2012] NSWCA 5, where the prisoner failed to establish before the Court of Appeal that there was prima facie grounds for the proceedings. Such grounds must be arguable and not hopeless: *Application of Malcolm Huntley Potier* [2012] NSWCA 222 at [17].

[2-4610] Commencing proceedings

A person under a legal incapacity may not commence or carry on proceedings, including defending proceedings, except by his or her tutor: r 7.14(1).

The court may, pursuant to CPA s 14, dispense with compliance with r 7.14(2): *Mao v AMP Superannuation Ltd* [2015] NSWCA 252 at [59]. As to the exercise of this power, see *Mao v AMP Superannuation Ltd* [2018] NSWCA 72 at [11]–[15], [37].

A tutor may not commence or carry on proceedings, including defending proceedings, except by a solicitor unless the court orders otherwise: r 7.14(2). As to such orders, see *Wang v State of New South Wales* [2014] NSWSC 909.

One purpose of the appointment of a tutor is to provide a person answerable to the defendant for the costs of the litigation: *NSW Insurance Ministerial Corp v Abualfoul* (1999) 162 ALR 417 at [28].

Another purpose is to provide a person regarded as an officer of the court to act for the benefit of the infant in the litigation: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 113.

It is not necessary for a person under legal incapacity to have a tutor in order to be a group member in representative proceedings, however, such a person may only take a step in representative proceedings, or conduct part of the proceedings, by the member's tutor: s 160 of the CPA.

[2-4620] Defending proceedings

Following service of proceedings upon a person under a legal incapacity, the plaintiff may take no further steps in the proceedings until a tutor has entered an appearance on behalf of the defendant: r 7.17(1).

If no such appearance is entered the plaintiff may apply to the court under r 7.18 for an appointment of a tutor for the defendant, or for the removal of such a tutor: see Note to r 7.17(1).

A proviso to r 7.17 in respect of Local Court proceedings permits a plaintiff, where the reason for the legal incapacity of the defendant is minority only, to serve on the defendant a notice requiring a tutor of the defendant to enter an appearance in the proceedings. Unless an appearance is filed within 28 days after such service, the plaintiff may continue the proceedings as if the defendant were not a person under a legal incapacity unless the court otherwise orders: r 7.17(2).

[2-4630] Tutors/Guardians ad litem

A person may become a tutor without the need for any formal instrument of appointment or any order of the court: r 7.15(1). However, a tutor can only be changed by an order of a court: r 7.15(5).

Any person, but not a corporation, may be a tutor unless the person is:

- a person under a legal incapacity: r 7.15(2)(a);
- a judicial officer, a registrar or any other person involved in the administration of a court: r 7.15(2)(b);
- a person who has an interest in the proceedings adverse to the interests of the person under legal incapacity: r 7.15(2)(c).

Particular provision is made in respect of an estate managed under the *NSW Trustee and Guardian Act* 2009: r 7.15(3) and (4). See *Bobolas v Waverley Council* (2012) 187 LGERA 63.

A valid appointment of a guardian ad litem under s 45(4) and (6) of the *Civil and Administrative Tribunal Act* 2013 requires that the tribunal appoint a specified person to act in that role. The appointment of "a person" without nominating the person appointed effects no appointment at all: *Choi v NSW Ombudsman* (2021) 104 NSWLR 505 at [44].

The tutor may do anything that the rules allow or require a party, being under legal incapacity, to do in relation to the conduct of any proceedings: r 7.15(6).

A tutor may not commence or carry on proceedings unless there has been filed the tutor's consent to act as tutor (r 7.16(a) — Form 24) and a certificate signed by the tutor's solicitor in the proceedings, to the effect that the tutor does not have any interest in the proceedings adverse to the interest of the person under legal incapacity: r 7.16(b).

The court may appoint a tutor or remove a tutor and appoint another: r 7.18(1). For examples, see *South v Northern Sydney Area Health Service* [2003] NSWSC 479 and *Wang v State of NSW* [2014] NSWSC 909. The court may appoint a tutor for a person under legal incapacity who is not a party and join that person as a party: r 7.18(2). If the court removes a party's tutor, it may stay the proceedings until the appointment of a new tutor: r 7.18(3).

Unless the court otherwise orders, notices of motion under r 7.18 are to be served on the person under a legal incapacity and, if it proposes removal of a person's tutor, upon the tutor: r 7.18(4).

In proceedings on a motion to appoint a tutor the evidence must include evidence of legal incapacity, the consent of the tutor and absence of any adverse interest: r 7.18(5).

An application for appointment under r 7.18 may be made by the court on its own motion or by any person including the proposed tutor: r 7.18(6).

[2-4640] Proceedings commenced or continued by a person under legal incapacity without a tutor

Such proceedings are an irregularity which may be conveniently cured by the court appointing a tutor under r 7.18(1). The Supreme Court can also make such an appointment in the exercise of its parens patriae jurisdiction: *Bobolas v Waverley Council* (2012) 187 LGERA 63.

If there is no relative or suitable friend willing to so act and not having a conflicting interest, an independent solicitor is a suitable choice as a tutor: *Deputy Commissioner of Taxation v P* (1987) 11 NSWLR 200 at 204.

It would be inappropriate to dispense with the requirement of evidence of consent and absence of conflicting interest. However, it may be appropriate to dispense with the requirement that the solicitor tutor act by another solicitor: *Deputy Commissioner of Taxation v P*, above, at 206.

[2-4650] No appearance by tutor for a defendant under legal incapacity

In default of such an appearance, the plaintiff is unable to proceed until a tutor has been appointed and an appearance filed: r 7.17(1). This rule does not apply in respect of certain Local Court matters: r 7.17(2).

The plaintiff may apply to the court under r 7.18 for the appointment of a tutor of the defendant or for the removal of a tutor and the appointment of another: r 7.17(1) Note.

An independent solicitor would be a suitable nominee, however, the tutor must consent to being so appointed and may well require that the plaintiff indemnify him or her as to costs.

For discussions of possible approaches, see *Deputy Commissioner of Taxation v P*, above; *Iskanda v Mahbur* [2011] NSWSC 1056 and *Sperling v Sperling* [2015] NSWSC 286.

[2-4660] The end of legal incapacity

Should legal incapacity end during the course of the proceedings, typically, although not solely, by the plaintiff coming of age, the tutor is not entitled to take further steps in the proceedings: *Brown v Weatherhead* (1844) 4 Hare [122].

Upon the end of legal incapacity, the plaintiff's solicitor should ascertain whether the plaintiff elects to continue. If the plaintiff does elect to continue, the solicitor should file a notice to that effect and serve the other parties. The proceedings should be entitled accordingly. For example, "AB late an infant but now of full age, Plaintiff": *Feeney v Pieper* [1964] QWN 23; *Carberry (formerly an infant but now of full age) v Davies* [1968] 2 All ER 817.

[2-4670] Costs — legally incapacitated person's legal representation

A tutor is liable for the costs of the legally incapacitated person's own legal representation and is entitled to be indemnified by the legally incapacitated person for any costs reasonably and properly incurred in litigation: *Thatcher v Scott* [1968] 87 WN (Pt 1) (NSW) 461 at 463; *Chapman v Freeman* [1962] VR 259; *Murray v Kirkpatrick* (1940) 57 WN (NSW) 162 at 163.

[2-4680] Costs — tutor for plaintiff (formerly "next friend")

The tutor for a plaintiff is liable to pay the costs of a successful defendant. That defendant may enforce a costs order directly against a tutor where the plaintiff is legally incapacitated: *Poy v Darcey* (1898) 15 WN (NSW) 161; *Radford v Cavanagh* [1899] 15 WN (NSW) 226; *NSW Insurance Ministerial Corp v Abualfoul* (1999) 162 ALR 417.

The tutor's liability for further costs ceases at the time the incapacity ceases unless the tutor actively participates in the proceedings after that date: *Abualfoul*, above, at [40].

If the incapacitated person elects to continue the proceedings, he or she becomes liable for all the costs. There is no apportionment based on the change from being legally incapacitated to having full capacity: *Bligh v Tredgett* (1851) 5 De G & Sm [74]; *Abualfoul* at [39].

Similarly a replacement tutor is liable for the whole costs of the proceedings and not just those after appointment: *Bligh v Tredgett*, above at [77].

The tutor is ordinarily entitled to recover the costs from the legally incapacitated person's estate if he or she acted bona fide: *Abualfoul* at [28].

[2-4690] Costs — tutor for the defendant (formerly "guardian ad litem")

The tutor for a defendant is not, except in the case of misconduct, personally liable to pay the costs of an action which he or she has defended unsuccessfully: *Morgan v Morgan* (1865) 12 LT 199.

[2-4700] Compromise

A tutor can only compromise proceedings if the compromise is for the benefit of the person under legal incapacity: *Rhodes v Swithenbank* (1889) 22 QBD 577. The court cannot force a compromise upon a person under legal incapacity against the opinion of a tutor or his or her advisers: *Birchall, In re; Wilson v Birchall* (1880) 16 Ch D 41.

With some limited exceptions, see CPA s 74(2), compromises or settlements by persons under legal incapacity require the approval of the court.

Compromise of claims enforceable by proceedings in the court made on behalf of or against a person under legal incapacity may be approved by the court before proceedings are commenced: s 75(2). If not approved the agreement is not binding on the person under legal incapacity: s 75(3). If approved, the agreement is binding on the person under legal incapacity and his or her agents: s 75(4). Applications for such approval should be made by summons: r 6.4(1)(e).

In proceedings commenced by, on behalf of, or against a person under legal incapacity, a person who, during the course of the proceedings, becomes a person under legal incapacity or a person who the court finds to be incapable of managing his or her own affairs, there cannot be a compromise of the proceedings or an acceptance of money paid into court without the approval of the court: s 76(3). However approval is not required where the person under legal incapacity has attained the age of 18 years on the day the agreement for the compromise or settlement is made unless that person is otherwise under legal incapacity or found by the court to be incapable of managing his or her own affairs: s 76(3A).

The court may approve or disapprove an agreement for compromise: s 76(4). If not approved, the agreement does not bind the person by whom or on whose behalf it was made: s 76(5). If approved, it binds that person and his or her agent: s 76(6).

The court finding referred to above can only be made on the basis of evidence given in the proceedings and has effect only for the proceedings. As to findings of incapacity to manage affairs, see *Murphy v Doman* (2003) 58 NSWLR 51 at 58.

Principles dealing with the process of approval are collected in *Yu Ge v River Island Clothing Pty Ltd* [2002] Aust Torts Report ¶81-638. These principles do not depend upon the *Damages (Infants and Persons of Unsound Mind) Act* 1929 which has been repealed: CPA s 6. Consideration should be given to any deductions or payments required by statute or the terms of settlement.

In general, agreements for compromise on behalf of persons under legal incapacity should not be on an inclusive of costs basis to avoid a possible conflict between the interests of those persons and their solicitors: Practice Note — Settlement of Claims for Damages for Infants [1967] 1 NSWR 276; *McLennan v Phelps* (1967) 86 WN Pt 1 (NSW) 86. Consideration should be given to any additional costs the plaintiff may be liable for.

[2-4710] NSW Trustee and Guardian Act 2009

Subject to the last paragraph below, once a settlement involving a plaintiff under legal incapacity (other than solely as a minor) has been approved by the court, an application should be made for a declaration under s 41 of the *NSW Trustee and Guardian Act* 2009 that the plaintiff is incapable of managing his or her affairs and an order that the estate of the plaintiff be subject to management under that Act.

Such an application does not affect the requirement of s 77(2) of the CPA that the monies recovered should be paid into court. It is, however, inappropriate for an order under s 77(3), as to payment to such person as the court may direct rather than into court, to be made before the application is determined other than to provide for non-discretionary payments required by statute or the terms of settlement. For greater caution the order approving the compromise may order that the balance after such deductions be paid into court. See Sample orders — "Approval of settlement", at [2-4740].

The application is made by summons in the Supreme Court in accordance with the procedure provided by Pt 57 of the UCPR: *Ritchie's* [57.3.5] ff and *Thomson Reuters* [57.3] ff.

The plaintiff must be made a defendant and must be served: UCPR r 57.3. Usually the application will be dealt with within 28 days including the time for service.

Usually, it will be ordered that the estate of the plaintiff be managed by the NSW Trustee and Guardian, a named Trustee company or another person or persons. The cost of that management will often be recoverable as damages, and is a factor to be taken into account in consideration of the adequacy of the proposed settlement: *The Nominal Defendant v Gardikiotis* (1996) 186 CLR 49. Where the manager appointed is not the NSW Trustee and Guardian, the cost of management includes the cost of supervision of that manager by the NSW Trustee and Guardian.

An application will be unnecessary where the estate of the plaintiff is already under relevant management: *NSW Trustee and Guardian Act* 2009 ss 44, 45 and 52; *Guardianship Act* 1987, s 25E. An application can be made under the *Guardianship Act* 1987, however, the procedure is more cumbersome and time consuming.

[2-4720] Directions to tutor

On application by a tutor the Supreme Court may give directions with respect to the tutor's conduct of proceedings in any court: s 80.

[2-4730] Money recovered

Money recovered in proceedings on behalf of a person under legal incapacity is to be paid into court: s 77(2). However, the court may order that the whole or part of such money be paid instead to such persons as the court may direct including the NSW Trustee and Guardian or manager of a protected person's estate: s 77(3). Money paid into court is to be paid out to such person as the court may direct including the NSW Trustee and Guardian or manager: s 77(4).

It has been argued that the effect of s 77(3) and (4) is to restrict payments made under those subsections to the NSW Trustee and Guardian where the person on whose behalf the money was recovered is a minor and to the manager of the protected person's estate where that person is a protected person. The better view would appear to be that upon their true construction the subsections do not impose such a limitation.

Whilst it is arguable that the terms of s 77 permit the court to order payment to a voluntary service provider in respect of some or all of amounts awarded under the *Griffiths v Kerkemeyer* (1977) 139 CLR 161 principles, the better course would appear to be to leave such a payment to the NSW Trustee and Guardian or other person appointed (but see below). A judge may usefully make a recommendation if so minded.

It is to be remembered that the moneys are the plaintiff's funds, there is no obligation to pay and the plaintiff is incapable of making the decision.

The NSW Trustee and Guardian has power to make such a payment under s 59 of the *NSW Trustee and Guardian Act* 2009: *Protective Commissioner v D* (2004) 60 NSWLR 513. It remains doubtful if the NSW Trustee and Guardian has power to authorise other managers to make such payments. However, the Supreme Court, in its protective role, has inherent power to authorise them after a management order is made. The NSW Trustee and Guardian customarily makes such payments in appropriate cases.

For an example of an order for payment other than to the NSW Trustee and Guardian or manager, see *Lim v Nominal Defendant* (unrep, 27/6/97, NSWSC) and also see *Walker v Public Trustee* [2001] NSWSC 1133.

[2-4740] Sample orders

Removal of tutor

I order:

1. That AB be removed as the tutor of XY.
2. That the proceedings be stayed pending the appointment of a new tutor.
3. Costs [*as appropriate*].

Appointment of tutor and addition of party

I order:

1. That AB be appointed as the tutor of XY.
2. That XY be joined as a defendant in the proceedings.
3. That the plaintiff file an amended statement of claim with 28 days.
4. Costs [*as appropriate*].

Approval of settlement

Having considered the affidavits [identify] and other material tendered [if any], I approve the compromise.

By consent, I make the following orders:

1. Judgment for the plaintiff pursuant to term 1 [of the terms of settlement initialled by me and placed with the papers].
2. An order for costs pursuant to term 2.
3. Terms 3, 4, 5 and 6 are noted, as is the agreement as to non disclosure in term 7.
4. An order that the judgment sum payable pursuant to term 1 (after deductions permissible under term 4) be paid into court to await further order.

   OR

An order that the judgment sum (after deductions permissible under term 4 be paid direct to the NSW Trustee and Guardian pursuant to s 77(3) of the CPA to be held and applied for the maintenance and education or otherwise for the benefit of the plaintiff.

Notes

1. The order will refer to the term numbering of the applicable terms of settlement.
2. Appropriate orders should be made in respect of any additional plaintiffs, however, expression of approval is not required unless one or more of them is also under a legal incapacity.
3. Commonly, term 4 [or as to case may be] will be all embracing, however, should it not cover all deductions, including those provided for by Statute, the order 4 [or as the case may be] may require qualification. It may be appropriate in a given case to identify the sum or a maximum sum to be so deducted.
4. The first form of order 4 will be appropriate where an application under the *NSW Trustee and Guardian Act* is contemplated, the second where infancy is the sole ground of legal incapacity. Should the estate of the plaintiff be already under relevant management, an order for direct payment to the appointed manager could be made.

Legislation

- CPA ss 3, 6, 74–77, 80, 160
- *Felons (Civil Proceedings) Act* 1981 s 4
- *Guardianship Act* 1987, s 25E
- *Mental Health Act* 2007
- *NSW Trustee and Guardian Act* 2009, ss 41, 44, 45, 52 and 59
- Civil and Administrative Tribunal Act 2013, s 45

Rules

- UCPR Form 24, rr 6.4, 7.13, 7.14, 7.15, 7.16, 7.17, 7.18, Pt 57, r 57.3

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Summary disposal and strike out applications

[2-6900] Summary disposal

The courts have power to terminate proceedings at an early stage where either the plaintiff or defendant has no prospect of success, without putting the other party to the expense and delay of a full trial of the proceedings or the preliminary steps involved in preparing for such a trial such as discovery, interrogatories and inspection of property.

These powers, which apply in all courts, may be summarised as follows:

- the power to enter judgment for a plaintiff pursuant to UCPR r 13.1,
- the power to summarily dismiss proceedings pursuant to r 13.4,
- the power to dismiss proceedings for non-appearance of the plaintiff at the hearing pursuant to r 13.6,
- the power to strike out pleadings pursuant to r 14.28,
- the court's inherent power to prevent abuse of its process.

The exception to this is the Small Claims Division of the Local Court. The only power which the Small Claims Division has is to strike out pleadings pursuant to r 14.28.

See generally *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 940–944.

Remedy discretionary

Summary judgment and summary dismissal are discretionary remedies and although detailed argument may be necessary to determine the hopelessness of the respondent's case, the more complex and arguable the legal point, or the more dependent it may be on debatable factual premises, the less likely that summary disposal will be appropriate, particularly if the relevant law is in a state of development: *NRMA Insurance Ltd v AW Edwards Pty Ltd* (1995) 11 BCL 200. Where there are multiple parties, the desirability of proceedings against all parties being heard before removing one party may constitute a reason for refusing summary judgment: *NRMA Insurance Ltd v AW Edwards Pty Ltd*, above.

As to applications for summary judgment in cases where a defendant seeks to rely on the *Contracts Review Act* 1980, see *Ritchie's* at [13.1.40].

Generally

Although its use is appropriate in a variety of circumstances provided they come within the principles set out above, the procedure of summary judgment or dismissal is particularly useful in cases where irrelevant and extravagant claims are made in pleadings by a party (often unrepresented), and the other party will be put to considerable expense in providing evidence to refute such irrelevant and extravagant allegations. On the other hand, where there can be no dispute on the facts, there is often little point in an application for summary disposal and the preferable course is to proceed expeditiously to a final hearing.

Further proceedings

If a party against whom summary judgment is given has made a cross-claim against the party obtaining the judgment, the court may stay enforcement of the judgment until determination of the cross-claim: r 13.2.

If on an application for summary judgment, the proceedings are not wholly disposed of by the judgment, the proceedings may be continued as regards any claim or part of a claim not disposed of by the judgment: r 13.3.

[2-6910] Summary judgment for plaintiff

Rule 13.1 provides that, if on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:

(a) there is evidence of the facts on which the claim or part of the claim is based, and

(b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

In order to succeed on such an application, the plaintiff must adduce evidence (on affidavit):

- to establish the facts justifying the claim to relief, and
- from the plaintiff or some responsible person that in his or her belief, the defendant has no defence to the claim or part thereof, or except as to the amount of damages, and
- if the claim for summary judgment is disputed, to show that there is no real issue to be tried.

The rules of the various courts formerly provided that applications for summary judgment were not available in respect of claims for fraud, defamation, malicious prosecution or false imprisonment. No such restriction exists under the UCPR.

Where the plaintiff's entitlement to judgment is clearly established, but the amount of damages or the value of the goods the subject of the proceedings remains to be determined, the court may give judgment for damages to be assessed: r 13.1(2).

When entering judgment for the plaintiff under r 13.1, it is desirable to deal not only with the costs of the motion for summary judgment, but also with the costs of the proceedings so far.

No issue to be tried

The plaintiff must show that any defence intended to be relied on is untenable and cannot possibly succeed. See generally *Spellson v George* (1992) 26 NSWLR 666 at 678–679 per Young AJA, with whom Handley JA and Hope AJA agreed. Summary judgment will not be granted where there is any serious conflict as to a matter of fact (*Sidebottom v Cureton* (1937) 54 WN (NSW) 88), or any question of credit involved: *Bank of New South Wales v Murray* [1963] NSWR 515. The power to order summary judgment should be exercised with great care, and not unless it is clear that there is no real question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

In practice, the test applied to summary judgment applications by plaintiffs is the same as that applied to summary dismissal applications by defendants. That test is that "the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion". The test has been variously expressed, including "so obviously untenable that it cannot possibly succeed", "manifestly groundless", etc: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–129 per Barwick CJ. See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 at 514; *Webster v Lampard* (1993) 177 CLR 598 at 602–603; *Cosmos E-C Commerce Pty Ltd v Sue Bidwell & Associates Pty Ltd* [2005] NSWCA 81 at [37]–[38].

Summary disposal is not limited to cases where argument is unnecessary to show the futility of the claim or defence, and argument, even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff (or of the defendant) is so clearly untenable that it cannot possibly succeed: *General Steel Industries v Commissioner for Railways (NSW)*, above, at 130. The court will determine questions of law on such applications if satisfied that the point is clear: *Silverton*

Evidence

para

Admissions

Evidence of judgments and convictions

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Discretionary and mandatory exclusions

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Extrinsic material relating to the Evidence Act 1995

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Privilege

Evidence Act 1995, Pt 3.10 (ss 117–126)

[4-1500] General

A judge is, sometimes at short notice, confronted with an issue about privilege. In a civil trial, more often than not, the privilege claimed will arise in connection with legal professional privilege, as it is known in the common law. Such a privilege has existed since Elizabethan times, although its derivation and nature altered during the 18th century: J D Heydon, *Cross on Evidence* at [25005].

This section of the Evidence chapter is principally concerned with "client legal privilege", the terminology by which legal professional privilege is described in the *Evidence Act* 1995 (NSW) ("the Act"). The legislation, however, also concerns itself with other kinds of privilege: professional confidential relationships (Pt 3.10 Div 1A), sexual assault communications (Div 1B), religious confessions (s 127), self-incrimination (s 128), judicial and jury reasons (s 129), matters of state (s 130), and negotiations for settlement (s 131).

The confidential relationship between client and lawyer is central to the existence of the privilege. The common law of privilege concerning confidential communications passing between a client and a legal adviser is now largely absorbed by and reflected in the Act, ss 118 and 119: S Odgers, *Uniform Evidence Law*, 13th edn at [EA.118.60]. See also the decision of Campbell JA in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCA 430. This decision, although containing a useful and scholarly history of the development of legal professional privilege to "client legal privilege", did not survive the High Court's pragmatic and practical approach to a classic example of inadvertent disclosure of privileged material: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

A judge, facing such an issue, normally will need to address two fundamental questions:

1. Has the claim for privilege been established?
2. If so, has the privilege been waived?

The first question is dealt with by ss 118 and 119 of the Act (note: the important definition section s 117); the second question is resolved by the application of ss 122–126 of the Act.

Before these matters are addressed, however, the judge must take into account the proper procedure for production of the documents sought. The documents will be brought to court usually as a consequence of the subpoena process. What happens when a party or third party objects to production?

In *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, Brereton J refined the procedure to be adopted where a claim of legal professional privilege is taken to documents sought on subpoena. In so doing, his Honour re-examined the traditional common law authorities and the impact of the UCPR. At issue was the plaintiff's contention that she could simply tender the relevant documents and (absent their production to the other parties) ask the judge to inspect them and determine privilege. Brereton J rejected this proposition, and held:

1. Generally, the court must rule on the privilege objection before production can be compelled. This is so both at common law and pursuant to the UCPR. The privilege is a privilege against production. The claims should be made before the documents are produced to the court.
2. It is inconsistent with the maintenance of privilege for a party to voluntarily put them before the court, even for the limited purpose of inspection by the judge.
3. The claimant must establish the privilege by admissible direct evidence on oath. The claim may be tested by cross-examination. The court's power to inspect documents — and to require their production for that limited purpose — is not intended to detract from the requirement that a person claiming privilege prove, by admissible evidence, the grounds of the claim.

The NSWCA heard and dismissed an urgent application for leave to appeal from Brereton J's decision: *Rinehart v Rinehart* [2016] NSWCA 58. The court acknowledged that the primary judge recognised the existence of a discretionary power to inspect documents, and that there was no power on the part of a person claiming privilege to require the court to inspect documents in the course of the hearing of an application making a claim for privilege. The court thought it "neither necessary nor appropriate" to express views as to all the propositions enunciated by the primary judge. This should only occur, it said, where "something will turn on the outcome": [40]. The present case was "highly unusual" in that at issue was not the existence of privilege, but whether or not any privilege was maintainable by Mrs Reinhart in her personal capacity as opposed to her capacity as trustee. The primary judge's decision was made in the context of a claim unsupported by any evidence at all. His Honour has been correct to find, in that context, that the UCPR in question was not intended to subvert the ordinary obligation upon a party to support a contested claim for privilege by evidence.

Rule 1.9 UCPR has since been amended to clarify that when an objection is made to the production of a document on the ground of privilege, access to the document must not be granted unless and until the objection is overruled, and that the production of a document to the court under a claim for privilege does not constitute a waiver of privilege.

[4-1505] Client legal privilege

The general proposition has been stated as follows:

> In civil and criminal cases, confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal advisor if made either (1) to enable the client to obtain, or the advisor to give legal advice, or assistance, or (2) with reference to litigation that is actually taking place or was in the contemplation or anticipation of the client. … The relevant time for a assessing whether the conditions antecedent to a valid claim of privilege are satisfied is the time when the communication was made. …
>
> Documents prepared by or communications passing between the legal adviser or client and third parties need not be given in evidence or otherwise disclosed by the client and, without the consent of the client, may not be given in evidence or otherwise disclosed by the legal adviser if they come within (2) above.: J D Heydon, *Cross on Evidence* at [25210].

The first aspect of client legal privilege (as described above) is often called "advice privilege". The second aspect is referred to as "litigation privilege". Section 118 deals with the first; s 119 is concerned with the second.

[4-1510] Advice privilege — s 118

Section 118 creates a privilege for, in general terms, confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice: S Odgers, *Uniform Evidence Law*, 13th edn at [EA.118.60]. As originally framed, the section did not permit the extension of "advice privilege" to third party communications made for the purpose of obtaining legal advice where litigation was not pending or anticipated. However, the 2007 amendments to the Act ensured that the privilege attached to any confidential document prepared for the dominant purpose of legal advice being provided. It did not extend, however, to all communications with a third party, (*ALRC Report 102* at 14.122) only those prepared with the relevant dominant purpose in mind.

Note: Evidence that must not be adduced in a proceeding (ss 118 and 119) is not admissible in the proceedings: s 134. Equally, a document to which the provision applies may not be tendered in evidence.

[4-1515] Observations on the operation of s 118

The common law in relation to legal professional privilege is complicated and highly technical. It may be said that the *Evidence Act's* attention to the subject (and to litigation privilege) brings with it its own range of technicalities and unresolved problems. However, the following broad propositions (emerging from relatively recent decisions) may be of assistance to trial judges faced with a claim for this type of privilege:

- "the purpose" referred to s 118 is the purpose which, at the time, led to the making of the communication or the preparation of the document: *Carnell v Mann* (1998) 159 ALR 647.
- It will not always or necessarily be the understanding or motive of the person who made the statement that determines the issue, although this will be relevant (*Esso Australia Resources Ltd v The Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at [39]) — and in some cases decisive: *Sydney Airport Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [6] per Spigelman CJ.
- It is important to recognise that particular communications may combine a number of different purposes. An in-house lawyer, for example, may provide in the one document legal advice to the client and, in addition, commercial advice. The former will attract privilege; the latter will not: *Kennedy v Wallace* (2004) 213 ALR 108 per Allsop J.
- A document created for two purposes, neither of which is dominant, it is not privileged from production: *Gibbins v Bayside Council* [2020] NSWSC 1975 at [41]–[45].
- The dominant purpose test has been suggested as involving these questions: "would the communication have been made or the document prepared even if the suggested dominant purpose had not existed? If the answer is 'yes', the test is not satisfied. If the answer is 'no', the test will be satisfied, notwithstanding that some ancillary use or purpose was contemplated at the time": S Odgers, *Uniform Evidence Law*, 13th edn at [EA.118.390] citing *Sparnon v Apand Pty Ltd* (1996) 138 ALR 735 at 741 per Branson J; *Australian Competition and Consumer Commission v Australian Safeways Stores Pty Ltd* (1998) 153 ALR 393; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 per Finn J.
- As to dominant purpose — "In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing or most influential purpose": *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416. In *Douglas v Morgan* [2019] SASCFC 76, the Full Court sets out a useful summary of the criteria for determination of the existence of the privilege: at [44]–[53].

A practical illustration of some of these principles is provided in the decision of Schmidt J in *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535. In that case, an in-house solicitor (who also had a private practice) provided an email advice to the plaintiff's risk manager concerning an application for a loan by the defendant. An issue in the proceedings was whether the contents of the email were privileged.

Schmidt J determined that the contents of the email were confidential; that the major portion of the document contained legal advice for the client; and that the in-house solicitor's role was not such as to suggest he lacked the necessary independence to prevent him providing an uncompromised legal opinion.

Consequently, her Honour held that the major portion of the email (with the exception of two paragraphs) attracted privilege.

[4-1520] Litigation privilege — s 119

This provision creates a privilege for confidential communications and confidential documents made or prepared for the dominant purpose of a lawyer providing professional legal services relating to existing or contemplated litigation: S Odgers, *Uniform Evidence Law*, 13th edn at [EA.119.60]; J D Heydon, *Cross on Evidence* at [25225]. As with s 118, the privilege is that of the client.

Note: the width of the definition of "Australian Court" in the Dictionary to the Act. It extends to certain tribunals that are not required to apply the rules of evidence; see also the definition of "foreign court".

The reference to "another person" in s 119(a), in contrast to its absence in s 118, indicates that communications between third parties and the lawyer or the client are protected only where the dominant purpose is the provision of professional legal services in litigation, as distinct from legal advice: J D Heydon, *Cross on Evidence* at [25300].

Examples of privilege within s 119 include:

- In *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mine Regulations* (1997) 42 NSWLR 351 at 389, a record of interview between a solicitor for the coal company and an employee about a mine accident was held to be within s 119.
- Similarly with communications between the party and an expert witness called by that party: *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 156 ALR 364 at 365.
- s 119 has been held to apply to documents recording communications between prosecution lawyers and prosecution witnesses for the dominant purpose of pending legal proceedings against the accused: *R v Petroulias (No 22)* [2007] NSWSC 692 per Johnson J.
- s 119 (and s 118) protect equally both original documents and copies of them: *Carnell v Mann*, above, at 254; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.
- A document prepared as an originating process of legal proceedings or pleadings (as distinct from a draft witness statement or affidavit) is not privileged because it was not made for the dominant purpose of providing legal services: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2004] NSWSC 40.

See also White J in *New Cap Reinsurance Corp Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, and also in *Buzzle Operations v Apple Computer Australia* (2009) 74 NSWLR 469 for the more complicated situation in relation to witness statements, affidavits and documents or reports prepared by experts. A finalised proof of evidence or affidavit created for the purpose of serving it on the opposing party may not be "confidential" and privilege may never have attached to it.

See also *Sexton v Homer* [2013] NSWCA 414. The NSW Court of Appeal analysed the circumstances in which a report concerning possible litigation furnished by an accident investigator to an insurance company attracted privilege. It also examined the circumstances in which such a report attracts the concept of confidentiality for the purposes of securing the protections of litigation privilege.

[4-1525] Litigants in person — s 120

Somewhat anomalously, s 120 of the Act protects from tender certain confidential communications and the contents of a confidential document where objection is taken by a party to litigation who is not represented in the proceedings by a lawyer. It was clearly considered that fairness should protect confidential communications prepared for the "dominant purpose of preparing for or conducting the proceedings". Trial judges dealing with unrepresented persons should be astute to draw this protection to the attention of the parties.

[4-1530] Loss of client legal privilege: consent — s 122

Section 122(1) provides that "this Division does not prevent the adducing of evidence given with the consent of the client or party concerned".

Odgers suggests that, in view of recent amendments to the Division, this apparently simple (but historically complex) provision "now appears otiose and a source of potential confusion": S Odgers, *Uniform Evidence Law*, 13th edn at [EA.122.60].

The reference is to amendments made following upon the High Court's decision in *Mann v Carnell* (1999) 201 CLR 1. In that case the High Court changed the focus of the common law (Odgers, above): the test for waiver at common law became whether the conduct of the client was, bearing in mind "considerations of fairness", "inconsistent with maintenance of the confidentiality of communications between lawyer and client".

ALRC Report 102 (Recommendation 14-5) proposed that s 122(2) should be amended to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege. Attention thus focused on the behaviour of the holder of the privilege as opposed to his or her intention.

Section 122(2) now provides:

> Subject to subs (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

Section 122(3) provides:

> Without limiting subs (2), a client or party is taken to have so acted if:
>
> (a) The client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or
>
> (b) the substance of the evidence has been disclosed with the express or implied consistent of the client or party.

Subsection 5 outlines circumstances in which a client or party will not be taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence. He or she will not be taken to have so acted "merely because" of those circumstances. They include where:

> [T]he substance of the evidence has been disclosed:
>
> (i) In the course or making a confidential communication or preparing a confidential document; or
>
> (ii) As a result of duress or deception; or
>
> (iii) Under compulsion of law... : s 122(5)(a).

Similarly, a disclosure by a client to a person for whom a lawyer is providing professional legal services to both regarding the same matter (s 122(5)(b)); or to a person with whom the client or party had, at the time of the disclosure, a common interest in an existing, anticipated or pending proceeding: s 122(5)(c).

Section 122(6) provides that, notwithstanding a claim for privilege, a document that has been used to try to revive a witness's memory about a fact or opinion (or by a police officer under s 33) may be adduced in evidence.

[4-1535] The inconsistency test — s 122(2)

A useful example of the correct approach to the concept is provided for in *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275. (This case involved, however, the application of the common law, not the *Evidence Act*.)

In *Osland*, above, the Victorian Government had obtained confidential legal advice concerning a petition for mercy. The Attorney-General issued a press release which said that the advice had recommended that the petition be refused. The High Court unanimously held that there was no inconsistency between disclosing the fact of, and the conclusions of, the advice for the purpose of informing the public that the Government's decision was based on independent legal advice, and its desire to maintain the confidentiality of the advice itself. It is necessary, the court said at [49], that the question of inconsistency should depend "upon the circumstances of the case ... questions of waiver are questions of fact and degree". S Odgers, *Uniform Evidence Law*, 13th edn at [EA.122.120], suggests this approach is likely to be adopted by the courts in application of s 122(2): *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333.

More recently, the NSW Court of Appeal considered waiver of privilege under the *Evidence Act*: *Cooper v Hobbs* [2013] NSWCA 70. This was a case where the issue before the District Court had been a simple one: had the respondents to the appeal lent $150,000 to the appellant (as they claimed); or had they invested that sum in a company recommended by the appellant (as he claimed)? The primary judge had found in favour of the respondents, preferring their version of the facts to the appellant's version. This was notwithstanding the existence of a letter from the respondent's then solicitor to a third party in which the transaction was plainly referred to as an investment not a loan.

The Court of Appeal held that there had been an error in the fact-finding process, particularly in light of the fact that the respondents had not called the solicitor to give evidence as to the circumstances in which he had written the letter.

A central issue in the appeal was whether the respondents, by giving evidence as to the solicitor's advice to them (as to why the letter was written referring to an investment rather than a loan) had effectively waived privilege. The Court of Appeal found that it was inconsistent for the respondents to "deploy the substance" of the solicitor's advice "for forensic purposes" while maintaining a claim for privilege. This was so whether the test in *Mann v Carnell* (1999) 201 CLR 1 was applied or that arising under s 122(2) *Evidence Act*.

[4-1540] Loss of privilege: knowing and voluntary disclosure — s 122(3)(a), (4), (5)

These provisions result in the loss of the ss 118–120 privileges. Some illustrations of "disclosure" follow:

1. In general terms, a statement of a potential witness is protected by privilege. Delivery of it to the witness, provided its confidentiality is maintained, will not destroy the privilege. However, once it is filed and served, it loses its characteristic of confidentiality and no privilege remains for it: J D Heydon, *Cross on Evidence* at [25225].

2. In *Banksia Mortgages Ltd v Croker*, above, a second aspect of the litigation involved the plaintiff's claim that the defendant had waived privilege in relation to certain emails delivered by the defendants to their former solicitor. The documents were clearly privileged under s 119. The issue as to waiver arose because of the contents of an affidavit sworn by the solicitor in an earlier application where summary judgment had been sought by the plaintiff. The affidavit had referred directly to the emails and their content, stressing their importance to the defendant's rights to resist summary judgment. Schmidt J held that this earlier disclosure of part of the contents of the emails was inconsistent with the later attempt to maintain privilege. The disclosure was voluntary and the situation was governed by both ss 122(2) and (3). Production of the documents was ordered.

3. For privilege to be lost, the disclosure must be both "knowing" and "voluntary". However, a disclosure made under a mistaken belief as to what is being disclosed will not be one made "voluntarily" and will not necessarily result in the loss of privilege: *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at 22 per Rolfe J. Further, if the mistake is

"obvious", and should have been appreciated by the party to whom the document is disclosed, privilege may not be lost: *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 at 405 per Goldberg J.

4. Counsel's failure to object to the disclosure of privileged material during a witness's cross-examination may satisfy the "knowing" and "voluntary" limbs of the disclosure test to waive privilege. For example, in *Divall v Mifsud* [2005] NSWCA 447, a witness called by a party was asked in cross-examination to reveal the substance of a privileged statement and counsel for the party who called the witness failed to object. The substance of the statement was subsequently disclosed in the witness's answers. Ipp JA (McColl JA agreeing) held at [10] that failure to object to those questions meant that the substance of the statement had been "knowingly and voluntarily disclosed to another person": S Odgers, *Uniform Evidence Law*, 13th edn at [EA.122.210].

5. Disclosure on the mistaken basis that privilege is unavailable has been held to be irrelevant to the assessment whether privilege has been lost: *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353 per White J at [35].

[4-1545] "the substance of the evidence" — s 122(3)

Whether disclosure amounts to disclosure of the substance of a privileged communication is a question of degree. The balance of authority suggests that, at the least, an express or implied summary of the subject legal advice is required. In this regard, the conclusions of the advice may not sufficiently be "the substance of the evidence", without disclosure of relevant factual bases and a reasoning process proceeding from those bases to the conclusions reached. For example, in *Fenwick v Wambo Coal Pty Ltd (No 2)*, above, after referring to authorities on the point, White J concluded that a draft letter disclosed the substance of the legal advice as it disclosed the reasoning. His Honour, at [24], appeared to consider the inclusion of reasoning to be determinative.

[4-1550] "in the course of making a confidential communication or preparing a confidential document" — s 122(5)(a)(i)

"[C]onfidential communication" and "confidential document" are defined in s 117 of the Act. Both incorporate a requirement of "an express or implied obligation not to disclose [the communication's or document's] contents, whether or not the obligation arises under law". There is a need to examine carefully the terms on which the communication is made. The Full Court of the Federal Court in *Carnell v Mann* (1998) 159 ALR 647 has observed (at 659, per Higgins, Lehane and Weinberg JJ) in relation to this phrase that it should not be read narrowly and should not be confined to "the type of obligation which arises in the course of a solicitor/client relationship". It is important to note that the provision is expressed in terms that a client or party objecting to the adducing of the evidence "merely because" the substance of the evidence has been disclosed on a confidential basis. It follows that circumstances may arise where privilege is lost notwithstanding disclosure of the substance of the evidence on a confidential basis: S Odgers, *Uniform Evidence Law*, 13th edn at [EA.122.300].

[4-1555] "under compulsion of law" — s 122(5)(iii)

The effect of this provision changed with amendments made following *ALRC Report 102*, and although the issue is yet to be tested before the NSW Court of Appeal, the preferable approach may prove to be that suggested by Garling J in *Gillies v Downer EDI Ltd* [2010] NSWSC 1323 at [46]. In that case, his Honour posited that if a party objects to the disclosure of a document on the basis of privilege in the pre-trial gathering of evidence — for example, during discovery, interrogatories, or the production of documents under a subpoena or Notice to Produce — the court is to apply forthwith the principles expressed in Pt 3.10 of the *Evidence Act* 1995 (NSW): s 131A. (See, for the contrary

view, Harrison J in *Actone Holdings Pty Ltd v Gridtek Pty Ltd* [2012] NSWSC 991.) There had been a line of authority suggesting such a determination was to be reserved until the document/evidence imputed to support the waiver was tendered at trial or otherwise used in such a way on the hearing of those proceedings as would make it unfair not to treat the privilege as having been waived: *Sevic v Roarty* (1998) 44 NSWLR 287; *Akins v Abigroup Ltd* [1998] 43 NSWLR 539. These cases however did not have the benefit of s 131A which was introduced by the *Evidence Amendment Act* 2007 and only came into force on 1 January 2009. The effect of this provision, it is suggested, coheres with modern case-management practices, in particular, the more efficient running of trials.

[4-1560] Joint clients and "common interest" — s 122(5)(b), (c)

Section 122(5) does not itself confer privilege. Where applicable, it only prevents privilege being lost by a particular disclosure. Under s 122(5), a client is not taken to have acted in a manner inconsistent with the client objecting to the adducing of the evidence "merely because" of a disclosure by the client to "another person" concerning a matter in respect of which they are joint clients of the same lawyer (s 122(5)(b)) or the client and the other person share a "common interest" in current or anticipated legal proceedings (s 122(5)(c)): S Odgers, *Uniform Evidence Law*, 13th edn at [EA.122.360].

The concept of common interest for the purposes of s 122(5(c) is not rigidly defined. Examples of situations where the provision may apply include disclosure by insured to insurer, partner to partner, and co-tenant to co-tenant. Each case must be considered on its own facts. It has been suggested that a mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely upon it: *Marshall v Prescott (No 4)* [2012] NSWSC 992 per Bellew J at [61]. In that case, a deceased's de facto partner and workers' compensation insurer succeeded in establishing a common interest in relation to proceedings concerning the entitlement to damages from class action litigation in the United States against the manufacturer of the engine of a plane that crashed, killing the deceased. The de facto had succeeded against the insurer in prior proceedings in the Compensation Court. The common interest stemmed from s 151Z(1)(b) of the *Workers Compensation Act* 1987 (NSW) which permitted the insurer to recover compensation already paid to the de facto from the damages. For another example, in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234, Bergin J (as her Honour then was) found at [57] that since a "litigation funder" had "an interest in the most advantageous conduct of [those] proceedings by the plaintiff" and that interest "[was] identical with that of the plaintiff", the "funder in [that] case [had] a 'common interest in relation to' the proceedings".

A further example is afforded by *Hamilton v State of NSW* [2017] NSWCA 112. The appeal concerned controversial proceedings following the death of the applicant's partner. In those proceedings, the applicant had sought production of documents from the DPP concerning the prosecution of her partner. The court at first instance had found that the claim for client legal privilege was valid. Although the DPP had voluntarily disclosed the documents to the Crown Solicitor, the disclosure did not result in a waiver or loss of client privilege. The Court of Appeal agreed with Beech-Jones J, that, as the possibility of the joinder of the DPP as a party to the proceedings was "realistic", there was an interest in common with the State in the common law proceedings. This was "more than a mere preference as to how the litigation should unfold". Leave to appeal was refused.

[4-1562] Discovery — documents mistakenly produced without a claim for privilege

In *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCA 430, the NSW Court of Appeal considered the situation where, in a complicated and lengthy pre-trial discovery process, a number of documents (apparently privileged) were listed as non-privileged, produced (on compact disc), and inspected by the other side. Some three months later, a demand was made that the documents be returned and that an undertaking be

given that they not be used. Both requests were refused. The primary judge issued an injunction on the parties who had received the privileged material from making any further use of it and ordered the delivery up of the documents.

The Court of Appeal granted leave on the principal issues and allowed the appeal. The principal judgment was given by Campbell JA (McFarlan JA agreeing). The third member of the court (Sackville AJA) agreed with the orders, reversing those made by the primary judge. However, his Honour reserved his position on several matters.

In the course of his reasons, Campbell JA made the following important points:

- There is at present no High Court decision that makes clear the principles to be applied when deciding whether privileged documents provided on discovery by an apparent mistake should be returned; or whether any restriction should be placed on the use of information contained within those documents.
- The claims in the present case for injunctions based upon the existence of legal professional privilege were misconceived. The primary judge had erred in treating the principal issue as one of waiver of privilege.
- Common law concerning legal professional privilege does no more than provide a ground on which a person entitled to the privilege may restrict or seek to restrict what would otherwise be a legal demand for the disclosure of the privileged material. It did not provide a foundation for injunctive relief in the present matter.
- Similarly, in so far as reliance had been placed on client legal privilege under ss 117 and 118 of the *Evidence Act*, this also could not provide a basis for the injunctions sought and granted at first instance. Sections 117 and 118 might provide a basis at an eventual trial for preventing the privileged documents going into evidence. They did not, however, give the party claiming that a mistake had been made any right to receive the documents back either at the discovery stage or at all.
- Further, s 131A did not advance the discovering party's case. The task of the court under s 131A is to determine whether an objection to the production of a document pursuant to a "disclosure requirement" is well founded. The court's task did not extend to the granting of injunctive relief.

In the course of his reasons, Campbell JA made an erudite and exhaustive analysis of a number of United Kingdom and Australian cases bearing on the one basis which might have sustained the injunctions granted by the primary charge. These were cases dealing with the law of confidential information and equity's protection of such information. His Honour paid particular attention to recent Australian decisions where the protection of confidential information had been considered in the context of the modern discovery process.

Campbell JA enunciated a simple proposition: in the circumstances of the present case, the question needed to be asked whether a reasonable solicitor (in the position of the solicitor who had received the documents) would have realised that the documents had been disclosed by an obvious mistake. If the answer to this question is yes, then, depending on the overall circumstances, equity might impose an obligation on the solicitor to return the documents in much the same way as the court might order the return of documents obtained by fraud. Of course, had the receiving solicitor in fact realised that the documents were confidential and that they had been disclosed by mistake, that also might suffice to impose an obligation.

His Honour made a detailed analysis of the facts surrounding the discovery process in the case before the court. His conclusion was that a reasonable solicitor in the position of the solicitor receiving the documents would not have considered that the disclosure had been made as a result of an obvious mistake. Consequently, there was no basis on which the injunctions should have been made. Campbell JA stressed that the case had been wrongly decided at first instance on a waiver of privilege basis rather than by the correct consideration of the law of confidential information.

If, contrary to his views, the availability of the injunctions had depended upon whether privilege had been waived, his Honour said that he would hold, applying s 122 of the *Evidence Act*, that it had been waived on the basis of the inconsistency test. Once again, his Honour conducted a thorough analysis of the facts in coming to this conclusion. (Sackville AJA reserved his decision on this point on the basis that the matter had not been fully or adequately argued either at first instance or on appeal and that it was an issue that might arise, if at all, only at trial.)

During the course of his obiter analysis of the waiver issue, Campbell JA made an obvious but important point. Section 122 inhibited a finding a waiver where documents were produced under "compulsion of law". However, the solicitors were never compelled by the discovery process to produce privileged documents for inspection. The fact that they did so occurred at best as a result of their own mistake. Consequently, s 122(5)(a)(iii) did not assist their argument.

On appeal, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, the High Court, while not doubting Campbell JA's analysis, in relation to injunctive relief concerning confidential information, held in effect that the litigation in the courts below had missed the point. This was simply a case in which an inadvertent and unintentional mistake had been made. As such, it should have been promptly corrected either by the parties themselves or by a simple court order amending the discovery lists and directing the return of the documents listed by mistake as non-privileged material. Where disclosure has been inadvertent, then, absent a compelling reason, a court will ordinarily correct the mistake and make orders for the return of the documents. The ordinary case is one in which the party claiming privilege has acted promptly and the other party has not been placed, as a result of the disclosure, in a position which would make an order to return the documents unfair. In such a case, no issue of waiver arises.

The High Court reminded the Supreme Court and, in particular, practitioners that the purpose of the powers in the *Civil Procedure Act* 2005 is to facilitate the overriding purpose of the legislation. A prompt direction and order to amend the list of documents in the present case would have satisfied the dictates of justice and avoided the complex and lengthy litigation which followed the discovery of the original mistake. There was a duty cast upon solicitors to support the objectives of the proper administration of justice by avoiding unnecessary and costly interlocutory applications.

For a case on "mistaken" production of privileged documents, see *Bendigo and Adelaide Bank Limited v Stamatis* [2013] NSWSC 248. It was held that the documents were not privileged; if they had been, their production to the respondent's solicitors would have been reasonably seen as intentional, and not as a mistake.

[4-1565] Loss of privilege: a document used to try to revive a witness's memory (or by a police officer under s 33) — s 122(6)

Privilege does not apply to a document that a witness has used to try to revive his or her memory about a fact or opinion under s 32 of the Act, or that a police officer has read or been led through under s 33 of the Act. The success of the attempt to revive memory is irrelevant to the operation of s 122(6).

By contrast, in *El-Zayet v R* (2014) 88 NSWLR 534 an undoubtedly privileged document (the Deputy DPP's advice as to why a prosecution should be discontinued) was inadvertently handed up to the court. The CCA unanimously held that the DPP's privilege had not been waived either expressly or by implication. The Crown Prosecutor, who had mistakenly handed up the document had no authority to waive privilege.

[4-1570] Loss of client legal privilege: defendants in a criminal trial — s 123

The general effect of this provision is that privilege is lost if evidence is adduced by a defendant in criminal proceedings, unless the evidence derives from an associated defendant.

An "associated defendant" is defined in the Dictionary to the Act as follows:

> "[A]ssociated defendant", in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:
>
> (a) An offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
>
> (b) An offence that relates to or is connected with the offence for which the defendant is being prosecuted.

The term "adducing evidence" as it appears in the provision does not encompass a "call" made by a defendant on the prosecution for production of documents during the hearing of a criminal proceeding: S Odgers, *Uniform Evidence Law*, 13th edn at [EA.123.90]. The provision would apply, for example, where the defendant, in actual possession of the documents, seeks to tender them in the proceedings: *R v Wilkie* [2008] NSWSC 885, per Grove J at [4].

[4-1575] Loss of client legal privilege: joint clients — s 124

The effect of this provision is that privilege under ss 118 or 119 is lost if, in civil proceedings where "2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter", evidence of a communication made by any of the parties to the lawyer, or a confidential document prepared by or for any of the parties, in relation to the same matter, is adduced by one of the parties. Whether there is a communication made to, or from, a solicitor in his or her joint capacity is decided by objective evidence about whether the occasion for the communication was one where the solicitor was being asked to advance the purpose for which he or she was jointly consulted: *Doran Constructions Pty Ltd (in liq), Re* [2002] NSWSC 215 at [72] per Campbell J.

In *Feridun Akcan v Cross* [2013] NSWSC 403, Rein J held that s 118 did not prevent a barrister giving evidence (said by the plaintiff to have been jointly retained by himself and the defendants) as to what the defendants said at a conference at which they all attended. The issue was whether the plaintiff was a silent partner with the defendants in a restaurant venture at the Drummoyne Sailing Club. The barrister's evidence was that the defendants, during the conference, confirmed that this was the situation.

Rein J first examined the position at common law. His Honour considered that the better view was not that there had been a waiver of privilege; rather the more coherent view was that no privilege arose as between the three persons in the first place.

Rein J found that s 124 operated in the same manner as the common law position notwithstanding its somewhat infelicitous expression.

[4-1580] Loss of client legal privilege: misconduct — s 125

In general terms, this provision results in loss of privilege if a communication or document was made or prepared by a client, lawyer or party in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty. Further, the privilege will be lost if the communication or document was known, or should reasonably have been known, by the client, lawyer or party, to have been made or prepared in furtherance of a deliberate abuse of statutory power: s 125(1)(a) and (b): S Odgers, *Uniform Evidence Law*, 13th edn at [EA.125.90]–[EA.125.120].

Section 125 relates only to the adducing of evidence. Where no question of adducing evidence has arisen and the matter is concerned with an order for access to documents produced on subpoena, s 131A provides that the disclosure requirements under Div 1 (client legal privilege) apply to the production of documents pursuant to a subpoena: s 131(2)(a) *Evidence Act*; *DPP v Stanizzo* [2019] NSWCA 12 at [32].

In *Kang v Kwan* [2001] NSWSC 697, the plaintiff had carried out work on certain property at Castlecrag owned by the second and third defendants. There was evidence to show that the first defendant colluded with the others to create a false mortgage, participated in a sale of the property to a third party, received "payment" of the mortgage monies and dissipated the funds overseas. The privilege argument centred on legal advice and other confidential communications passing between various lawyers and the defendants. Santow J held that there were reasonable grounds to hold that both limbs of s 125 were established and that privilege had been lost.

Arising from *Kang v Kwan* at [37] and [40] and other decisions indicated, the following useful list of propositions relevant to the operation of "fraud" and "abuse of power" loss of privilege may be stated:

- a person asserting that legal professional privilege does not apply to a communication has the onus of proving it. Where fraud is asserted, there must be evidence to support the assertion: *Kang v Kwan*, above at [37]. In a case where there is a serious fraud allegation, the evidence tendered needs to properly be identified and addressed: *DPP v Stanizzo*, above at [37]–[38]. Simply referring to a document in the evidence does not mean it is "drawn in" and becomes part of the evidence: *DPP v Stanizzo* at [36], [38].
- the standard of proof is not required to the level of proof on the balance of probabilities. There must, however, be some evidence at a prima facie level — "something to give colour to the charge": *Kang v Kwan*, above at [37]. Note that while the court does not need to be satisfied on the balance of probabilities as to the existence of the fraud or abuse of power, to enliven the operation of s 125, such an allegation must be made in clear and definite terms, and there must be some evidence that it has some foundation in fact: at [30], [33]; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 521–522; *DPP v Stanizzo* [2019] NSWCA 12 at [30], [33].
- the court itself may inspect the documents: s 133. It may do so for the purpose of determining whether privilege has been lost: *Kang v Kwan,* above at [37].
- "fraud" in s 125, requires an element of dishonesty; some level of "sharp practice". Similarly with "abuse of power", especially because of the word "deliberate" in s 125(1)(b): s 125(1)(b): *Kang v Kwan*, above, at [37], [40].

[4-1585] Loss of client legal privilege: related communications and documents — s 126

This effect of this provision is to permit the adducing of "evidence of another communication or document" if it is reasonably necessary to do so to enable a prior understanding of a communication or document before the court. Sackville J made the following helpful observations about the operation of s 126 of the Act in *Towney v Minister for Land & Water Conservation (NSW)* (1997) 147 ALR 402:

1. Though s 126 does not specify whose understanding is to be considered when determining whether or not a source document is reasonably necessary "to enable a proper understanding" of a document in respect of which client legal privilege has been lost by reason of voluntary disclosure, an objective standard is contemplated: *Towney v Minister for Land & Water Conservation (NSW)*, above, at 412 per Sackville J; cited with approval in *Sugden v Sugden* (2007) 70 NSWLR 301 at [94] per McDougall J (Mason P and Ipp JA agreeing).
2. The meaning of "proper understanding" is not narrow. If a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character, significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privileged, ordinarily the test laid down by s 126 of the Act will be satisfied: *Towney*, per Sackville J at 413–414.
3. Mere reference to a privileged source document, of itself, does not necessarily result in loss of the privilege attaching to the whole or even part of that document. It is plausible that a

source document may be divided clearly into discrete parts, with only one part relevant to gaining a proper understanding of a document. In such circumstances, it could not be said that inspection of other portions of the source document is reasonably necessary to enable a proper understanding of the report: *Towney*, per Sackville J at 413–414.

[4-1587] Cabinet papers

In *Ku-ring-gai Council v West* (2017) 95 NSWLR 1, the NSW Court of Appeal considered a claim for public interest immunity pressed on behalf of the NSW Government. The claim arose in the context of the proposed merger of local government areas. It concerned an expert report by KPMG for submission to Cabinet regarding the proposed local government reforms. Production under s 130 had been refused at first instance. The majority of the court allowed production on the basis that it would have little impact on the "frankness and candour" of the firm preparing the report. That it might do so was dismissed as "fanciful". The public interest in the production of the material outweighed any notion of preserving secrecy or confidentiality.

[4-1588] Privilege in respect of self-incrimination — exception for certain orders — s 128A

The effect of this provision is that the privilege against self incrimination under the *Evidence Act* applies to disclosure orders. The approach of s 128A to the protection of a person's privilege against self-incrimination in relation to disclosure of information that may tend to prove that the person has committed an offence under an Australian law or a law of a foreign country is in substance identical to that of s 128.

Section 128A(5) makes clear that the discretion to make or refuse to make an order under s 128A(6) arises for consideration by a court only where the person to whom a disclosure order is directed has taken an objection to disclosure of information under s 128A(2) and only where the court has found under s 128A(4) that there are reasonable grounds for the objection that has been taken. The party making a claim for self-incrimination privilege must set out the basis for the objection. Under s 128A(2)(c), the person must disclose so much of the information required to be disclosed to which no objection is taken and under s 128A(2)(d) the person must prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the privilege affidavit) and deliver it to the court in a sealed envelope. Section 128A(6) in that context operates to permit the court to make an order requiring information that the court is satisfied under s 128A(6)(a) may tend to prove that the person has committed an offence against Australian law to be filed and served on the parties only if the court is also satisfied that both of the propositions in s 128A(6)(b) and (c) apply to that information.

Making or refusing to make an order under s 128A(6) is a discretionary decision in respect of which the applicable standard of appellate review is that identified in *House v The King*.

Under s 128A(6), the court may order the privilege affidavit, in whole or in part, be disclosed if satisfied that (a) any information in it may tend to prove the person committed an offence under Australian law; and (b) the information does not tend to prove the person committed an offence under a foreign country's law; and (c) the interests of justice require disclosure.

Section 128A(6)(a) and (b) do not impose a standard or burden on the party claiming privilege against self-incrimination additional to or higher than that imposed by s 128A(2) and (4): *Deputy Commissioner of Taxation v Shi* [2021] HCA 22 at [70]. In that case, the majority of the High Court found there was an unchallenged finding that the information in the privilege affidavit may tend to prove that the respondent had committed an offence under an Australian law. The question for the court under s 128A(6) is whether it is satisfied the interests of justice require that the privilege affidavit be disclosed. In the circumstances of *Shi*, a failure to object on the grounds of foreign law meant that the question raised by s 128A(6)(b) did not arise.

[4-1590] Settlement negotiations are excluded from admission into evidence — s 131

In *Galafassi v Kelly* (2014) 87 NSWLR 119 the Court of Appeal analysed the section and its important "exception" in s 131(2)(g). The principal section (excluding settlement negotiations) does not apply where "the court would be likely to be misled as to the existence or contents of an excluded communication or document, where those matters are in issue in the proceedings."

In the instant case, an important issue was whether the purchasers of a Paddington property intended to continue to repudiate the contract for sale after equity proceedings had been commenced. The correspondence in question showed that this was plainly the case — the email from the purchasers made it clear that they would never be in a position to complete. Hence, even if the document were capable of being viewed as an attempt to negotiate a settlement, the exception provision in s 131(2)(g) made it essential that the documents be received into evidence.

Third parties In *Dowling v Ultraceuticals Pty Ltd* (2016) 93 NSWLR 155, the court was faced with a claim for privilege where the relevant documents were brought into existence for the purpose of enabling settlement negotiations between third parties involved in a separate dispute. Justice Hammerschlag affirmed that the relevant privilege extended to "without prejudice" communications between parties to litigation from prosecution to other parties in the same litigation. What was the situation where, as here, the party seeking production was neither party to, nor concerned with, the earlier litigation? The rationale, the court held, was that the privilege extends to cover disclosure to a third party provided there is sufficient connection between the subject matter of the original dispute and the latter one. The extension of the privilege should be made by reference to whether the party resisting disclosure would have had a legitimate expectation that the material brought into existence to settle the earlier litigation would not be used against it in the later dispute. In the present case, the privilege claim was denied.

Legislation

- *Evidence Act* 1995, ss 32–33, Pt 3.10 (ss 117–126), ss 127–131A, ss 133–134, Dictionary
- *Evidence Amendment Act* 2007
- *Workers Compensation Act* 1987, s 151Z(1)(b)

Further references

- J D Heydon, *Cross on Evidence*, 12th edn, LexisNexis, 2020
- S Odgers, *Uniform Evidence Law*, 15th edn, Thomson Reuters, 2020
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005

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Particular proceedings

The Mining List

The Special Statutory Compensation List

Monetary jurisdiction in the District Court

Equitable jurisdiction of the District Court

Appeals except to the Court of Appeal, applications, reviews and mandatory orders

Appeals from judges of the Supreme Court and the District Court and from certain decisions of the Civil and Administrative Tribunal lie to the Court of Appeal and are not covered by this review.

[5-0200] Appeal from an associate judge of the Supreme Court to a judge of that court

An appeal lies from an associate judge of the Supreme Court to a judge of that court except where an appeal lies to the Court of Appeal: r 49.4.

Section 75A, Appeal, of the SCA applies: s 75A(1). The section includes the following provisions:

- Where the decision under appeal follows a hearing, the appeal is by way of rehearing: s 75A(5). That is a rehearing on the record, as delineated in *Warren v Coombes* (1979) 142 CLR 531 at 553. See also *Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409 at 420 per Cross J and *Morrison v Judd* (unrep, 10/10/95, NSWCA). For a fuller discussion of the nature of such an appeal, see *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40] and *Thomson Reuters* [SCA 75A.60]
- The court has the powers and duties of the court, body or person from whom the appeal is brought: s 75A(6)
- The court may receive further evidence (s 75A(7)), but only on special grounds if the appeal is from a judgment following a trial or hearing on the merits unless the evidence concerns matters occurring after the trial or hearing: s 75A(8) and (9). What constitutes "special grounds" depends on the circumstances of the case. For a fuller discussion, see *Ritchie's* [SCA s 75A.45]–[SCA s 75A.52]; *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* (2019) 99 NSWLR 447 at [68]–[70], [83]. Also see *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 and *Levy v Bablis* [2013] NSWCA 28,
- The court may make any finding, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires: s 75A(10).

Part 49 of the UCPR, Reviews and Appeals within the court, applies insofar as it relates to appeals. The Part includes the following provisions:

- an appeal is instituted by notice of motion: r 49.8(1)
- time for appeal: r 49.8(2)–(5)
- contents of notice of motion: r 49.9
- institution of an appeal has no effect on the judgment, order or decision under appeal unless otherwise directed: r 49.10
- cross appeal: r 49.11
- no further evidence on appeal unless by leave, and the form of any such further evidence: r 49.12,
- notice of contention: r 49.13.

It appears that the requirement for leave under r 49.12 is intended to restrict the reception of further evidence pursuant to s 75A(7) of the SCA.

The practice is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

[5-0210] Sample orders

Appeal allowed / dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0220] Appeals to the Supreme Court and to the District Court

Such appeals are constituted by the legislation relating to the court or tribunal from which the appeal lies.

Whether the appeal is as of right or only by leave depends on the legislation constituting the appeal. The nature of the appeal may be specified or may have to be inferred from the legislation: *Builder Licensing Board v Sperway Construction (Sydney) Pty Ltd* (1976) 135 CLR 616.

As to appeals from the Civil and Administrative Tribunal, see R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney. Also at R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87.

Most appeals to the Supreme Court, other than to the Court of Appeal, are assigned to the Common Law Division: see r 45.8 and Sch 8.

In the case of appeals to the Supreme Court, s 75A of the SCA applies. (See [5-0200], above, for a summary of the section.) Section 75A is subject to any other Act: s 75A(4). The statutes constituting appeals often include provisions (relating, for example, to the nature of the appeal or time for appeal) which then take priority.

Part 50 of the UCPR, Appeals to the Court, applies to appeals to the Supreme Court (other than appeals to the Court of Appeal) and to appeals to the District Court: r 50.1. The Part operates subject to any provision in any Act to the contrary: see the note in the UCPR following r 50.1.

Part 50 includes provisions relating to the following matters:

- time for appeal: r 50.3
- the required content of the summons initiating the appeal and of the separate statement of grounds of appeal: r 50.4 and Form 74
- parties: r 50.5
- the appeal does not operate as a stay: r 50.7
- security for costs: r 50.8
- cross-appeals: r 50.10
- notice of contention: r 50.11
- procedure concerning leave to appeal (r 50.12), and cross-appeal: r 50.13
- preparation, filing and service of the reasons for decision of the court below, transcript, exhibits etc: r 50.14
- if the decision under appeal has been given after a hearing, the appeal is by way of rehearing: r 50.16. See [5-0200], above, in relation to SCA s 75A(5),
- obligation on a defendant who objects to the competency of an appeal to apply for an order dismissing the appeal as incompetent: r 50.16A.

As in the case of appeals from an associate judge to a judge of the Supreme Court, the practice in the Supreme Court is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

Special provisions relating to appeals from the Local Court are reviewed below.

[5-0230] Sample orders

Appeal allowed/ dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0240] Appeals from the Local Court

As of right: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division, but only on a question of law: LCA s 39(1).

An appeal lies to the District Court against a judgment or order of the Local Court sitting in its Small Claims Division but only on the ground of lack of jurisdiction or denial or denial of procedural fairness: LCA s 39(2).

By leave of the Supreme Court: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division on a ground which involves a question of mixed law and fact (s 40(1)) or which is an interlocutory judgment or order, a consent judgment or order or an order for costs: s 40(2).

The Supreme Court may dispose an appeal under s 39(1) or s 40 by:

- varying the terms of the judgment or order
- setting aside the judgment or order
- setting aside the judgment or order and remitting the matter to the Local Court for determination in accordance with the Supreme Court directions,
- dismissing the appeal: s 41(1).

The District Court has similar powers in respect of appeals under s 39(2): s 41(2).

Appeal from the Local Court in its special jurisdiction: Section 70(1) LCA confers a right of appeal in respect of any order made in its special jurisdiction. Any appeal to the District Court is to be made in accordance with Pt 3 of the *Crimes (Appeal and Review) Act* 2001 (CARA Act) "in the same way as such an … appeal may be made in relation to a conviction arising from a court attendance notice" dealt with under Pt 2 of Ch 4 of the *Criminal Procedure Act 1986*: *Huang v Nazaran* [2021] NSWCA 243 at [22]–[24]. Section 70 is not to be construed as restricting or qualifying the subject matter of such an appeal so that it is limited to a conviction (or sentence) appeal: *Huang v Nazaran* at [21]. The right to appeal from any order is "by way of rehearing" in accordance with ss 18 and 19 of the CARA Act, the District Court relevantly having power in determining the appeal to exercise "any function that the original Local Court could have exercised in the original Local Court proceedings" (s 28(2)): *Huang* at [23]; see also *Lewis v Sergeant Riley* (2017) 96 NSWLR 274 at [12].

In *Huang*, the applicants were found to have a right of appeal to the District Court from an order of a magistrate dismissing their application for a noise abatement order, an order awarding costs and an order revoking a noise abatement order pursuant to s 268 of the *Protection of the Environment Operations Act* 1997.

[5-0250] Sample orders

Appeal allowed/ dismissed.

(If allowed) I vary the terms of the judgment/ order by deleting/ substituting/ adding …, or

I set aside the judgment/ order, or

I set aside the judgment/ order, or

I set aside the judgment/ order and remit the matter to the Local Court for determination in accordance with these reasons for judgment (or specifying directions as may be appropriate)…

Costs

[5-0255] Applications and appeals to the District Court and Local Court in federal proceedings

Federal proceedings are covered in Pt 3A of the *Civil and Administrative Tribunal Act* 2013. "Federal jurisdiction" (formerly referred to as "federal diversity jurisdiction") is defined in s 34A as "jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution".

The *Justice Legislation Amendment Act* 2018 (commenced 1 December 2018) amended Pt 3A of the *Civil and Administrative Tribunal Act* 2013 to enable persons to commence proceedings in the District or Local Court for the determination of original applications and external appeals that the NSW Civil and Administrative Tribunal (the Tribunal) cannot determine because they involve the exercise of federal jurisdiction.

These amendments were made in response to a series of cases concerned with whether the Tribunal could exercise federal jurisdiction. In *Burns v Corbett* (2018) 265 CLR 304, the High Court held that the Tribunal could not exercise jurisdiction of the kind referred to in ss 75 or 76 of the Constitution (Cth). A State law purporting to confer such jurisdiction is inconsistent with Ch III and therefore invalid. The High Court affirmed, for different reasons, the NSW Court of Appeal's decision that the Tribunal had no jurisdiction to determine matters between residents of different States: *Burns v Corbett* (2017) 96 NSWLR 247. It was common ground between the parties that the Tribunal was not a court of the State, so the High Court was not required to decide this issue.

Following these decisions, an Appeal Panel of the Tribunal determined that, in making orders under the *Residential Tenancies Act* 2010 (NSW) commenced between residents of different States, the Tribunal was exercising federal jurisdiction. Further, the Tribunal determined that the Tribunal was a court of the State within the meaning of s 39(2) of the *Judiciary Act* 1903 and s 77(ii) of the Constitution: *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45. The Court of Appeal, in a 5-judge decision, held that the Tribunal was not a court of the State for this purpose: *Attorney General for NSW v Gatsby* [2018] NSWCA 254.

A person with standing to make an original application or external appeal may, with the leave of an authorised court (the District Court or the Local Court), make the application or appeal to the court instead of the Tribunal: s 34B(1).

Leave may be granted only if the court is satisfied that the application or appeal was first made with the Tribunal (s 34B(2)(a)), that the Tribunal does not have jurisdiction to determine the matter because its determination involves the exercise of federal jurisdiction (s 34B(2)(b)), that the Tribunal would otherwise have jurisdiction to determine the matter (s 34B(2)(c)), and that substituted proceedings would be within the jurisdictional limit of the court: s 34B(2)(d).

The court may remit on application or appeal to the Tribunal if it is satisfied that the Tribunal has jurisdiction to determine it: s 34B(5).

The District Court may grant leave and then transfer proceedings to the Local Court in accordance with the provisions of Pt 9 Div 2 CPA.

For s 75(iv) of the Constitution to apply, the parties must have been residents of different States at the time of bringing the application: *Dahms v Brandsch* (1911) 13 CLR 336.

A company is not a resident for the purposes of s 75(iv): *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282.

The District Court or Local Court has, and may exercise, all of the jurisdiction and functions in relation to the substituted proceedings that the Tribunal would have had if it could exercise federal jurisdiction: s 34C(3).

Section 34C(4) makes a number of modifications as to functions of procedural matters in relation to the conduct of the proceedings.

[5-0260] Review of directions etc of registrars

Part 49 of the UCPR, Reviews and Appeals within the Court, includes provisions relating to the review of a registrar's directions, orders and acts.

These provisions do not apply to the judicial registrar of the District Court: r 49.14. Otherwise, they apply to registrars of the Supreme Court, District Court and Local Court.

A judge or magistrate of the Supreme Court, District Court or Local Court may, on application, review the direction, order or act of a registrar of the respective court, and may make such order by way of confirmation, variation, discharge or otherwise as is thought fit: r 49.19(1). However, decisions of the registrar of the court under cl 11(1) of the *Civil Procedure Regulation* 2017 are not reviewable by a court under Div 4, Pt 49 of the Rules: (r 49.19(2)).

Section 75A of the SCA, Appeal, does not apply to a review.

Prior to the amendment of r 49 on 7 September 2007, a line of authority had developed to the effect that a review was akin to an appeal of the kind provided for in the rules. Following the amendment it is clear that a review is not such an appeal: *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 (CA); *Liverpool City Council v Estephen* [2008] NSWCA 245 at [17].

In *Tomko v Palasty (No 2)*, above, at [52] Basten JA set out the correct approach to a review under r 49 as follows:

> (2) a review, unlike an appeal, does not require demonstration of error, nor is it restricted to a reconsideration of the material before the primary decision-maker;
>
> (3) authorities with respect to the conduct of appeals against the exercise of discretionary powers, such as *House v The King*, do not in terms apply to a review;
>
> (4) nevertheless, similar policy considerations may arise in relation to a review, including:
>
> (a) a court may be less inclined to intervene in relation to a decision concerned with the management of an on-going proceeding, as opposed to one which terminates the proceeding or prevents its commencement;
>
> (b) different factors may need to be addressed in relation to breach of time limits in relation to the commencement of proceedings, as compared with breach of time limits for steps to be taken in the course of proceedings properly commenced, and
>
> (c) a court may be more inclined to intervene on a review based on fresh evidence, changed circumstances or where error is demonstrated in the decision under review.

It should be noted that, whilst Hodgson and Ipp JJA agreed with this approach and that on such a review the court must exercise its own discretion, Ipp JA agreed with qualifications expressed by Hodgson JA at [7]–[9] which can be summarised as follows:

- A court's discretion extends to a discretion as to whether, and if so how, to intervene.
- There is an onus on a person seeking to have a court set aside or vary a registrar's decision to make a case that the court, in the interests of justice, should exercise its discretion to do so.
- In the case of a decision on practice or procedure, this will normally require at least demonstration of an error of law, or a *House v The King* (1936) 55 CLR 499 error, or a material change of circumstance or evidence satisfying the strict requirements of fresh evidence. Even then, the court may not think the interest of justice requires intervention. A court may be more willing to intervene in a decision which finally determines a party's rights or has a decisive impact upon them.

Following the amendment referred to above, Pt 49 now includes the following provisions:

- a review is instituted by notice of motion: r 49.20(1)
- time for review: r 49.20(2)–(5),
- exceptions to the foregoing subrules: r 49.20(6).

The amendment of r 49 repealed r 49.17 which provided that the institution of a review had no effect on the direction etc under review.

[5-0270] Sample orders

I order that the order/ direction/ act/ certificate of Registrar … made/ given/ done/ issued on … be confirmed/ varied by …/ discharged/ replaced with the following direction/ order/ act/ certificate, namely …

Costs

[5-0280] Mandatory order to a registrar or other officer

A judge or magistrate of the Supreme Court, District Court or Local Court, of his or her own motion or on application, may, by order, direct a registrar or other officer of the respective court to do or refrain from doing any act in any proceedings relating to the duties of his or her office: r 49.15.

The rule does not apply to the judicial registrar of the District Court: r 49.14.

[5-0290] Sample orders

I direct the Registrar (or other officer) to… / not to …

Legislation

- *Supreme Court Act* 1970, s 75A, Sch 8
- *Local Court Act* 2007, ss 39, 40, 41

Rules

- UCPR r 45.8, Pt 49, Pt 50

Further references

- *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40], [SCA s 75A.45]–[SCA s 75A.52]
- *Thomson Reuters* [SCA 75A.60]
- R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney
- R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87

[The next page is 5101]

Intentional torts

Acknowledgement: the Honourable A Whealy QC, former judge of the Supreme Court of NSW, prepared the following material. Commission staff are responsible for updating it.

[5-7000] Trespass to the person — the intentional torts

This chapter is concerned with the torts of assault, battery, false imprisonment and intimidation. Closely allied with these is a further tortious action, namely proceedings to recover damages for malicious prosecution.

The three torts that emerged from the concept of trespass to the person — assault, battery and false imprisonment are actionable per se — that is without proof of damage (although if the wrongful act, does result in injury, damages can be recovered for that injury as well). In malicious prosecution proceedings, however, it is necessary to assert and prove damage.

[5-7010] Assault

An assault is any direct and intentional threat made by a person that places the plaintiff in reasonable apprehension of an imminent contact with the plaintiff's person, either by the defendant or by some person or thing within the defendant's control: K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011 at 44 ("Barker et al").

The gist of assault has been stated in J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998 ("Fleming") as focusing on the apprehension of impending contact. Thus, the effect on the victim's mind created by the threat is the crux, not whether the defendant actually had the intention or means to follow it up. The intent required for the tort of assault is the desire to arouse an apprehension of physical contact, not necessarily an intention to inflict actual harm.

In *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, the plaintiff was an excluded gambler who had unlawfully returned to the casino to play roulette. Employees of the casino saw him and identified him as an excluded person. He was approached and accompanied to an "interview room" where he was required to remain until police arrived sometime later. Mr Rixon unsuccessfully sued for damages for assault, battery and false imprisonment. In relation to the assault issue, the facts were that a casino employee had placed his hand on the plaintiff's shoulder and, when he turned around, asked him: "Are you Brian Rixon?". These actions were central to the question as to whether Mr Rixon had been the victim of an assault and, in addition, a battery.

Sheller JA (with whom Priestley and Heydon JJ agreed) stressed the distinction referred to in Fleming set out above. His Honour said that, on the facts of the case, the primary judge had been correct to find that the employee did not have the intention to create in Mr Rixon's mind the apprehension of imminent harmful conduct. Moreover, the employee's placement of his hand on the plaintiff's shoulder did not constitute a battery. On the false imprisonment claim, the court found that the *Casino Control Act* 1992 and its regulations justified the plaintiff's detention for a short period of time until the arrival of the police.

In *State of NSW v Ibbett* (2005) 65 NSWLR 168 the Court of Appeal upheld the trial judge's factual findings while increasing the damages awarded. The circumstances of the case were that two policemen gave chase to Mr Ibbett, in the township of Foster, suspecting that he may have been involved in a criminal offence. They pursued him to a house where he lived with his mother, Mrs Ibbett. Without legal justification, one of the policemen entered the property and arrested Mr Ibbett. His mother came into the garage where these events occurred. The police officer produced a gun and pointed it at Mrs Ibbett saying, "Open the bloody door and let my mate in". Mrs Ibbett, who was an elderly woman, had never seen a gun before and was, not unnaturally, petrified.

The trial judge held that both police officers had been on the property without unlawful justification and, additionally, the confrontation between the police officer and Mrs Ibbett was more than sufficient to justify the requirements of an immediate apprehension of harm on her part, so as to amount to an assault. The Court of Appeal agreed with the trial judge as later did the High Court. See also Clarke JA in *Cowell v Corrective Services Commission (NSW)* (1988)13 NSWLR 714.

[5-7020] Conduct constituting a threat

Although threats that amount to an assault normally encompass words, they will not always do so. For example, actions may suffice if they place the plaintiff in reasonable apprehension of receiving a battery. As to words, in *Barton v Armstrong* [1969] 2 NSWR 451 a politician made threats over the telephone and these were held to be capable of constituting an assault. Given the explosion of modern methods of media communication, there is no reason why threats made in emails, text messages or on Facebook (so long as they satisfy the legal test) could not qualify. Importantly, the reasonable apprehension must relate to an imminent attack.

Note: the requirement is for an imminent battery, not an immediate one.

[5-7030] Reasonable apprehension

This requirement means that an assault cannot be proved if the plaintiff is not aware of the threat. Moreover, the apprehension must be a reasonable one. Thus, if an unloaded gun or a toy pistol is pointed at the plaintiff, the defendant will not be liable where the plaintiff knows or has reason to believe that the gun is not loaded or is a toy: *Logdon v DPP* [1976] Crim LR 121.

[5-7040] Battery

A battery is a voluntary and positive act, done with the intention of causing contact with another, that directly causes that contact: Barker et al at p 36. See *Carter v Walker* (2010) 32 VR 1 at [215] for a summary of the definition of "battery".

Battery cases (often wrongly referred to as "assault cases" — although the two often go hand in hand) are mainly heard in the Local Court. Inevitably, they involve difficult factual disputes requiring the resolution of widely conflicting versions as to what happened during a particular occasion or event, whether domestic or otherwise.

The requisite intention for battery is simply this: the defendant must have intended the consequence of the contact with the plaintiff. The defendant need not know the contact is unlawful. He or she need not intend to cause harm or damage as a result of the contact.

A person who pulls the trigger of a rifle believing it to be unloaded may be found to be negligent, but will not be liable in trespass, because they did not intend that the bullet from the rifle should strike the injured plaintiff. The requisite intention will have been absent.

In most cases, it will be apparent that an intention to make contact can simply be inferred from the nature and circumstances of the striking. If I strike someone with an axe, it will be apparent, except in the most unusual circumstances, that I intended to make contact with the injured person.

A defendant who directly causes physical contact with a plaintiff (including by using an instrument) will commit a battery unless the defendant proves the absence of intent and negligence on their part, that is, that the defendant was "utterly without fault": *Croucher v Cachia* (2016) 95 NSWLR 117. This case is also authority for the proposition that ss 3B(1)(a) and 21 of the *Civil Liability Act* 2002 (NSW) do not operate upon the particular cause of action pleaded, but instead upon the particular act which gives rise to the civil liability and the intent of the person doing that act. It is necessary to look at the character of the underlying conduct, rather than whether the claim is in respect of an "intentional tort".

[5-7050] Contact with the person of the plaintiff

Contact, as has been pointed out by academic writers (Barker et al at p 41), can take a variety of forms. Thus, spitting on a person, forcibly taking blood or taking finger prints would be regarded as contact. Similarly, shining a light into a person's eyes will be regarded as contact: *Walker v Hamm* [2008] VSC 596 at [307].

The modern position, however, is that hostile intent or angry state of mind are not necessary to establish battery: *Rixon v Star City Pty Ltd*, above, at [52]. It is for that reason that a medical procedure carried out without the patient's consent may be a battery.

On the other hand, it is not every contact that will be taken to be a battery. People come into physical contact on a daily basis. For example it is impossible to avoid contact with other persons in a crowded train or at a popular sporting or concert event. The inevitable "jostling" that occurs in these incidents in every day life is simply not actionable as a battery: *Rixon* at [53]–[54]; *Colins v Wilcock* [1984] 3 All ER 374 per Robert Goff LJ.

[5-7060] Defences

Defences to the trespass torts include necessity, for example, in the case of a medical emergency where a patient's life is at risk and the obtaining of consent is not possible (*Hunter New England Area Health Service v A* (2009) 74 NSWLR 88); self-defence (*Fontin v Katapodis* (1962) 108 CLR 177); and consent.

In the case of self-defence in NSW, however, see Pt 7 of the *Civil Liability Act* 2002. This applies to any kind of civil liability for personal injury. The legislation places a restriction on the damages which can be awarded for disproportionate acts of self-defence. Reasonable acts of self-defence against unlawful acts will not be actionable at all.

In *State of NSW v McMaster* [2015] NSWCA 228, the NSW Court of Appeal affirmed the availability of self-defence in the civil context. It will be made out if the defendant believed on reasonable grounds that what he did was necessary for the protection of himself, or another. The defendant's response to the threat is a factor to be taken into account but is not inherently determinative.

The court also held that the term "unlawful" in s 52 *Civil Liability Act* extends to tortious conduct such that the section may apply as a defence to liability for actions done in self-defence against the commission of a tort.

[5-7070] Consent

An interference or injury to which a person has consented cannot be wrongful. It is the responsibility of the defendant, however, to raise a defence of consent and to prove it: *Hart v Herron* [1984] Aust Torts Reports ¶80–201 at 67,814. If the defendant proves that the plaintiff has consented to the acts in question then a claim in assault, battery (or false imprisonment) will not succeed.

[5-7080] Medical cases

Medical practitioners must obtain consent from the patient to any medical or surgical procedure. Absent the patient's consent, the practitioner who performs a procedure will have committed a battery and trespass to the person. However, consent to one procedure does not imply consent to another. Subject to any possible defence of necessity, the carrying out of a medical procedure that is not the procedure, the subject of a consent, will constitute a battery.

In *Dean v Phung* [2012] NSWCA 223, the plaintiff was injured at work when a piece of timber struck him on the chin causing minor injuries to his front teeth. His employer arranged for him to see the defendant, a dental surgeon. Over a 12-month period, the defendant carried out root-canal therapy and fitted crowns on all the plaintiff's teeth at a cost of $73,640. In proceedings between the plaintiff and the dentist, the latter admitted liability but asserted that the damages were to be assessed

in accordance with the *Civil Liability Act* 2002 (NSW). The trial judge accepted that submission, noting that the dentist had admitted liability in negligence but had denied liability for trespass to the person. Accordingly, damages were calculated in accordance with the formula in the *Civil Liability Act* 2002.

On appeal, the plaintiff claimed the primary judge had not adequately addressed the issue of trespass to person. His case was that the dental treatment had been completely unnecessary to address the problem with his teeth; and the dentist must have known that when embarking on the treatment. Advice that the treatment was necessary must have been fraudulent, consequently the fraud vitiated any consent given to the procedure. Accordingly, the plaintiff argued, the dentist was liable for battery in treating him without a valid consent. The *Civil Liability Act* 2002 s 3B excludes "civil liability … in respect of an intentional act that is done … with intent to cause injury".

Basten JA (with whom Beazley JA agreed) held that "…the dentist probably did not believe at the time that he carried out the treatment that it was necessary…". His Honour conducted a detailed examination of consent to medical treatment, including consideration as to who bore the burden of negativing consent. Basten JA at [61]–[64] expressed four principles supported by the authorities he had examined:

1. Consent is validly given in respect of medical treatment where the patient has been given basic information as the nature of the proposed procedure. If however, it could be demonstrated objectively that a procedure of the nature carried out was not capable of addressing the patient's problem, there would be no valid consent.
2. It is necessary to distinguish between core elements of the procedure and peripheral elements, including risks of adverse outcomes. Wrong advice about the latter may involve negligence but will not vitiate consent.
3. The motive of the practitioner in seeking consent will be relevant to the question whether there is a valid consent.
4. Burden of proof will lie on the practitioner to establish the existence of a valid consent where that is in issue.

Applying these principles, Basten JA held that the dentist's concessions were sufficient to show that the appellant did not consent to the treatment because it was not necessary for his particular condition. As a result, the treatment constituted a trespass to the person and s 3B operated to exclude the defendant's liability from the operation of the Act.

If, however, some kind of fraud were required to vitiate consent, Basten JA considered that the dentist at the least had been reckless as to whether the treatment was either appropriate or necessary. Consequently, on either basis, the plaintiff was entitled to have his damages re-assessed and, in the circumstances, increased.

Macfarlan JA differed from Basten JA in only one respect. His Honour did not accept that the dentist's concessions that the treatments were unnecessary indicated of themselves that the treatment constituted a trespass to the person. However, Macfarlan JA accepted that the dentist had acted fraudulently in the sense that he was reckless as to whether the treatment was either appropriate or necessary. The practitioner had performed the treatment to generate income for himself. This enabled a conclusion that consent was vitiated and a trespass had occurred.

In *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 the court was confronted with a difficult choice. A young man — only a few months away from his 18th birthday — had refused to receive his own treated blood products. The treatment was necessary to preserve his life. He had provided cogent reasons for his refusal, based on his religious beliefs. His refusal was fully supported by his parents who were of the same religious persuasion.

The court, exercising its "parens patriae" jurisdiction, essentially overrode these genuine beliefs, holding that the welfare of the patient required that the primary judge make the order permitting

the treatment. The court acknowledged that, without the order, the proposed treatment would have constituted a battery upon the young man. The order was made, notwithstanding that in a few months time, the appellant would be, as an adult, entitled to refuse any further treatment for his condition.

[5-7100] False imprisonment

A false imprisonment is an intentional, total and direct restraint on a person's liberty: Barker et al at p 48. As in the case of trespass to the person, there is no requirement that the defendant intend to act unlawfully or to cause injury. In that regard, liability for the tort may be considered as strict liability: *Ruddock v Taylor* (2005) 222 CLR 612 at [140], per Kirby J.

For example, where a prisoner is held in detention beyond the terms of their sentence as a consequence of an honest mistake, the defendant will nonetheless be liable for false imprisonment: *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714.

[5-7110] What is imprisonment?

Traditionally the notion of false imprisonment related to arrest by police officers or other authorities. This is still a feature of the reported cases but the potential areas of "detention" have expanded remarkably, especially in recent times, not always however with success. The following cases provide a range of illustrations of this contemporary enlargement of the notion of "imprisonment".

Watson v Marshall and Cade: In *Watson v Marshall and Cade* (1971) 124 CLR 621, a police officer asked the plaintiff to accompany him to a psychiatric hospital. The plaintiff believed he would have been compelled to go along if he had refused. The High Court held that the plaintiff had a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go with the defendant. This restraint thereby imposed on the plaintiff amounted to imprisonment (per Walsh J at 625).

McFadzean v Construction, Forestry, Mining and Energy Union: In *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250, the appellants were a group of protesters who had engaged in a protest against logging in a Victorian forest area. The respondents imposed a picket near the site which made it impossible for the appellants to leave by the most direct route without permission. However, there was an alternative route available through the bush for exit purposes. There was also evidence that the protesters were anxious to remain at the site during the duration of the picket.

The Victorian Court of Appeal held that the appellants had remained in the forest, not primarily because of the respondents' actions but rather for their own reasons — to continue their protest in an endeavour to stop the logging. They remained at the site, independently of the respondents' conduct. Moreover, the court agreed with the trial judge that an alternative means of exit was both available and reasonable.

Whitbread v Rail Corporation of NSW: In *Whitbread v Rail Corporation of NSW* [2011] NSWCA 130, two brothers who were intoxicated and belligerent, attempted to travel from Gosford railway station in the early hours of the morning without tickets. There was an altercation between the two brothers and state rail transit officers. One of the transit officers was convicted of a criminal assault on one of the brothers. This assault occurred immediately before the officers made a so-called "citizen's arrest", the brothers were restrained by handcuffing and pinned to the ground until police arrived. The Court of Appeal agreed with the trial judge that the transit officers were entitled to "arrest" the brothers and that the degree of force used, and the duration of their being restrained, was not unreasonable. The brothers had been validly arrested and restrained because of their failure to comply with the transit officers' lawful directions to leave the railway station. See also *Nasr v State of NSW* (2007) 170 A Crim R 78 where the Court of Appeal examined the issue of the duration of detention.

Darcy v State of NSW: *Darcy v State of NSW* [2011] NSWCA 413 demonstrates the width of the concept of imprisonment. The plaintiff was a young woman with severe developmental disabilities. She lived in the community but in circumstances where she had been in trouble with the police on occasions. Ultimately, the Local Court ordered that she be taken to Kanangra, a residential centre which accommodates and treats persons with intellectual and other disabilities, located in Morisett. The order required Ms Darcy to be taken there "for assessment and treatment". The Department of Community Services intended that Ms Darcy should be returned to the community but difficulties of a bureaucratic and funding nature prevented this happening. Her case was an unusual one and, in the situation which developed, she remained at Kanangra for some six years before residential accommodation was arranged for her. The primary issue was whether the circumstances of her stay at Kanangra amounted to imprisonment. The secondary issue was whether the Public Guardian had consented to her remaining at the institution.

The Court of Appeal held that Ms Darcy had been detained at Kanangra. She did not wish to stay there and, while she had a relatively wide degree of freedom within the property, she was required to return there after any absence. The degree of latitude she had in being able to leave the premises, for example to visit her mother, was offset by the fact that she could only do so with permission, and on condition that she returned to the institute.

The court explored the issue of lawful justification for her detention at Kanangra. In this regard, the court, while acknowledging that the Public Guardian did not consent to Ms Darcy staying at the premises on a permanent basis, nevertheless consented tacitly to her remaining there while attempts were made to find her appropriate accommodation.

State of SA v Lampard-Trevorrow: In *State of SA v Lampard-Trevorrow* (2010) 106 SASR 331, the Full Court of the South Australian Supreme Court gave consideration to whether a member of the stolen generation, Bruce Trevorrow, had been falsely imprisoned. The circumstances were that, when he was about a year old, he was taken from hospital by an officer of the Aborigines Protection Board and later placed in long-term foster care without his parents knowing of the removal or the fostering. There was no maltreatment or issue of neglect or any other matter which justified the removal of the plaintiff from his family. The plaintiff lived in foster care until he was 10 years old. The Full Court unanimously held that, while neither the plaintiff nor his parents had consented to his foster placement, he was not falsely imprisoned during the period of his foster care. The fact that the plaintiff was an infant and needed care and nurture spoke against any finding of restraint. Any element of restraint, whilst he grew as a young child, was solely attributable to the obligation of his foster parents to care for him and also attributable to his immaturity. The court said:

> We do not think it realistic to describe the care and protection given by the carer of a child a restraint on the child, in the relevant sense of the term.

It is significant however that the plaintiff's claim of negligence against the State was upheld by the appeal court.

State of NSW v TD: In *State of NSW v TD* (2013) 83 NSWLR 566, the respondent was charged with robbery and assault with intent to rob. Her fitness to be tried was in doubt and a special hearing under the mental health legislation in New South Wales was held. A District Court judge found, on the limited evidence available, that she had committed the offence of assault with intent to rob. His Honour set a "limiting term" of 20 months and ordered that she be detained at Mulawa Correctional Centre. The Mental Health Review Tribunal determined that the respondent was suffering from mental illness. Accordingly, the District Court judge then ordered that the respondent be taken to and detained in a hospital. Contrary to this order, for some 16 days, the appellant was detained in a cell at Long Bay Gaol in an area which was not gazetted as a hospital.

The Court of Appeal had to determine whether she was entitled to damages for unlawful imprisonment. The court held that, as a consequence of the second order made, it became the only lawful authority for the continued detention of the respondent. In these circumstances, the State

could not justify her detention in the particular area of Long Bay Gaol where she had been held. The order required her to be detained in a hospital and this was the only relevant order which determined her place of detention. The mere fact that she could and should have been detained in another place did not prevent the detention being unlawful. Consequently, the necessary elements of the claim were established.

This decision may be contrasted with the decision of the House of Lords in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58. In that case, the House of Lords decided that prisoners lawfully committed to prison under the relevant legislation did not have a residual liberty which would entitle them to sue the Secretary of State for the Home Department or a governor of the prison if the prisoners were unlawfully confined in a particular area of the prison. However, in *State of NSW v TD*, the Court of Appeal held that the House of Lords' decision was principally based on the terms of the legislation under consideration.

State of NSW v Kable: In *State of NSW v Kable* (2013) 252 CLR 118, the High Court of Australia held that a detention order which had been made by the Supreme Court (but under legislation which was later held invalid) provided lawful authority for Mr Kable's detention. The trial judge had held that the detention order was valid until it was set aside. The High Court agreed that the original detention order provided lawful authority for the respondent's detention and allowed the appeal by the State against the orders made in the New South Wales Court of Appeal.

Hyder v Commonwealth of Australia: In *Hyder v Commonwealth of Australia* [2012] NSWCA 336, the judgment of McColl JA contains a valuable discussion of the meaning to be given to the phrase "an honest belief on reasonable grounds". The appellant had bought proceedings against the Commonwealth of Australia alleging that a federal police agent had arrested him without lawful justification and thereby falsely imprisoned him. There was no doubt that the police officer honestly believed that the respondent was a particular person of dubious background and that he had committed an offence for the purposes of the *Crimes Act* 1914 (Cth) s 3W. The critical issue at trial was whether the officer held this honest belief "on reasonable grounds". Basten JA did not agree with McColl JA's conclusion. However, Hoeben JA, the third member of the court, agreed with McColl JA that the officer's belief was held on reasonable grounds. See also **[5-7170] Justification**.

The critical question turned upon the evaluation of the complex and thorough material obtained by the Australian Tax Office. The police officer relied on this information to form his belief that the respondent had been engaged in a fraudulent scheme. Hoeben JA also placed reliance on the surrounding circumstances and the source of information on which the officer had relied. His Honour agreed that the primary judge had not erred in concluding that the officer had reasonable grounds for his belief for the purposes of the *Crimes Act* 1914 s 3W(1).

Haskins v The Commonwealth: In *Haskins v The Commonwealth* (2011) 244 CLR 22, the High Court held that a member of the defence force who had been convicted by a military court of disciplinary offences and sentenced to punishment, including detention, could not succeed in a claim for false imprisonment. This was so notwithstanding that the relevant provisions of the *Defence Force Discipline Act* 1982 subsequently had been held to be invalid. A majority of the High Court held that while serving members of the defence forces retained the rights and duties of the civilians, it did not follow that an action for false imprisonment would lie as between service members in respect of the "bona fide execution of a form of military punishment that could be lawfully imposed": at [57]. This is one of those rare cases where the court considered matters of public policy in deciding whether a cause of action for this tort would be available. The court said at [67]:

> To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force.

State of NSW v Le In *State of NSW v Le* [2017] NSWCA 290 the respondent was stopped by transport police at Liverpool railway station and asked to produce his Opal card. The card bore the

endorsement "senior/pensioner". He produced a pensioner concession card but could not supply any photo ID when asked. There was a brief interlude during which the officer checked the details over the radio. Mr Le was then told he was free to go. The respondent commenced proceedings in the District Court claiming damages for assault and false imprisonment. He was successful and the State sought leave to appeal in the Court of Appeal. The court held that all that was involved was "a brief interruption of the respondent's intended progress … a temporary detention". In this situation, the court's task is to "assess what a reasonable person … would have inferred from the conduct of the officer." In the circumstances, the court held that the officer was justified in detaining the respondent while the necessary checks were made. The appeal was upheld.

State of NSW v Exton In *State of NSW v Exton* [2017] NSWCA 294, the issue related to a police officer directing a young Aboriginal man to exit a motor vehicle. Eventually the young man was arrested and charged with assault and resist arrest. The trial judge awarded damages to the respondent, relying in particular on the police officer's direction "to exit the vehicle". The Court of Appeal disagreed with the trial judge's finding that the direction, without more, constituted the arrest of the respondent. In the circumstances, this finding was not open and should not have been made.

Lewis v ACT In *Lewis v ACT* [2020] HCA 26, the appellant was convicted and sentenced for recklessly or intentionally inflicting actual bodily harm, to be served by periodic detention rather than full-time imprisonment. The Supreme Court of the ACT found that he was unlawfully imprisoned in full-time detention for 82 days by reason of an invalid decision of the Sentence Administration Board to cancel his periodic detention after he failed to report on numerous occasions. He sought substantial damages to compensate him or "vindicatory damages". The primary judge assessed damages at $100,000 but ordered that only $1 be paid because the periodic detention order would have been inevitably cancelled. The Supreme Court and the High Court dismissed an appeal. Despite the unlawful detention, it was decided since the same imprisonment would have occurred lawfully even if the Board had not made an invalid decision, there was no loss for which to compensate the appellant. Two justices (Kiefel CJ and Keane J) considered that this particular appeal failed at a point anterior to the application of the compensatory principle because the appellant's right to be at liberty was already so qualified and attenuated, due to his sentence of imprisonment together with the operation of the Act, that he suffered no real loss. In separate reasons, Gageler, Gordon and Edelman JJ agreed that while the imprisonment was unlawful, the appellant was not entitled to compensation. The court also held there is no basis in principle or practice for the development of a new head of "vindicatory damages" separate from compensatory damages.

[5-7120] Malicious prosecution

The tort of malicious prosecution is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another. At the heart of the tort is the notion that the institution of proceedings for an improper purpose is a "perversion of the machinery of justice": *Mohamed Amin v Jogendra Bannerjee* [1947] AC 322.

The tort is, in forensic terms, quite difficult to prove. Its constituent elements were stated by the plurality of the High Court in an extensive decision on the topic in *A v State of NSW* (2007) 230 CLR 500 at [1]. These were succinctly reformulated by the High Court in *Beckett v NSW* (2013) 248 CLR 432 at [4] as follows:

> …the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.

Beckett, above, has laid to rest an anomaly which had existed in Australian law since 1924. In *Davis v Gell* (1924) 35 CLR 275, the High Court stated that where proceedings have been brought to a close by the Attorney-General's entry of a nolle prosequi, the plaintiff in a subsequent malicious prosecution case, is required to prove his or her innocence. The High Court, in *Beckett*, refused to

follow *Davis*. The result is that, in all malicious prosecution cases, the plaintiff's guilt or innocence of the criminal charge is not now an issue. All that must be shown is that the proceedings terminated favourably to the plaintiff, for example, where proceedings were terminated by the entry of a nolle prosequi or by a direction from the Director of Public Prosecutions under his statutory powers.

It might be noted that in *Clavel v Savage* [2013] NSWSC 775, Rothman J held that where a charge had been dismissed, without conviction, under the *Crimes (Sentencing Procedure) Act* 1999 s 10, this did not constitute a "termination of proceedings favourably to the plaintiff". This was because the ultimate order had been preceded by a finding of guilt. See also *Young v RSPCA NSW* [2020] NSWCA 360, where it was found a s 32 order under the *Mental Health (Forensic Provisions) Act* 1990 (now repealed) did not constitute a finding that the charges were proven. A plaintiff must show the prosecution ended in favour of the plaintiff. If it did, it does not matter how that came about: at [76]. It is sufficient if the plaintiff can demonstrate the absence of any judicial determination of his or her guilt: at [77].

In *HD v State of NSW* [2016] NSWCA 85, the CA had under consideration a case where an interim ADVO was obtained by police against a father on behalf of his daughter. The evidence of a physical assault was reported to a friend, to a school teacher and the daughter was taken to hospital by ambulance and treated by doctors and social workers. Later she attended the local police station but denied she had been hit by her father. Nevertheless, the police initiated a serious assault charge against the father. The charge was dismissed in the Local Court, whereupon the father instituted proceedings for unlawful arrest and malicious prosecution. The trial judge dismissed all the father's claims.

This decision was upheld by the CA. The prosecution was not activated by malice. Indeed the prosecution had no personal interest in the outcome and had been exercising a public duty. Secondly the trial judge had not erred in finding that the investigating police honestly concluded that the evidence warranted the institution of proceedings against the father. Thirdly, the whole of the circumstances demonstrated that this was not a case where there was an absence of reasonable and probable cause. This was not a case where a reasonable prosecutor would have concluded that the prosecution could not succeed. Reference was made to Gyles AJA's decision in *Thomas v State of NSW* (2008) 74 NSWLR 34 which emphasised that a reasonable basis for a decision by an investigating officer to lay a charge is not to be equated with a magistrate's decision or a judge's ruling. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law.

In 2008 Gordon Woods was convicted of the murder of Caroline Byrne. He served a number of years in prison before the NSW Court of Appeal acquitted him on the murder charge. The court found that the verdict had been unreasonable. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown's expert witness.

The plaintiff brought proceedings for damages on the basis of malicious prosecution. (See *Wood v State of NSW* [2018] NSWSC 1247.) He argued that the proceedings had been maintained without reasonable and probable cause and that the prosecution had been brought "with malice for an ulterior purpose". The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor.

Fullerton J agreed with the plaintiff's contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause.

Central to the Crown case had been the expert witnesses evidence that the deceased must have been thrown from the cliff to land where her body had been located. However, the theory and conclusion had been fundamentally flawed and left open the reasonable possibility of suicide. After an exhaustive analysis, Fullerton J concluded that neither the lead detective nor the expert witness could properly be categorised as "prosecutors".

The primary judge was trenchantly critical of the Crown Prosecutor. She found that he had a profound lack of insight into the flawed approach he took to the plaintiff's prosecution and that this

caused great unfairness in the trial. Nevertheless, she dismissed the plaintiff's case on the basis that the prosecutor's failures, extensive though they were, were not driven by malice. An appeal to the Court of Appeal was dismissed: see *Wood v State of NSW* [2019] NSWCA 313.

[5-7130] Proceedings initiated by the defendant

Who is the prosecutor? Identification, for the purposes of the first element of the tort, of the proper defendant ("the prosecutor") in a suit for malicious prosecution is not always straightforward. It is necessary that the plaintiff show that the named defendant played "an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion": *A v State of NSW* (2007) 230 CLR 500 at [34]: *Stanizzo v Fregnan* [2021] NSWCA 195 at [170]. Neither providing a statement in corroboration of events nor providing a witness statement (of itself) is playing an active role in the conduct of proceedings. Significantly more than that is required: *Stanizzo v Fregnan* at [224].

In *A v State of NSW*, the plurality of the High Court gave a detailed and historical narrative of the development of the tort of malicious prosecution. In the past, informations were laid privately, whereas in modern times prosecutions are generally in the hands of the police and subsequent prosecuting authorities, such as the Director of Public Prosecutions.

There is a "large question" as to whether the tort of malicious prosecution extends to the commencement and carrying on of civil proceedings. In *A v State of NSW*, above, the High Court expressed the first element of the tort as being "that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant". See also *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2019] NSWCA 10 at [16] in which an appeal against the dismissal of an action for malicious prosecution in civil proceedings was refused.

The present position may be best comprehended by contrasting the situation in that case (*A v State of NSW*) with the facts in *Coles Myer Ltd v Webster* [2009] NSWCA 299 (although the latter case was concerned with wrongful imprisonment). In *A v State of NSW*, as is most often the case, it was a police officer who was the informant who laid charges against the defendant. It was his conduct and his state of mind at the relevant time that formed the basis of the plaintiff's case against the State. On the other hand, in the *Coles Myer* case, the police had acted lawfully in detaining two men identified by a store manager as acting fraudulently in a department store. It was held that the store manager, however, had acted maliciously and had, without reasonable cause, procured, and brought about the arrest by involving the police. (See also *Martin v Watson* [1996] AC 74 at 86–7.) Consequently, the manager's employer was vicariously responsible for the wrongful detention.

Generally, however, a person who provides the police with information, believing it to be true, will be held not to have initiated the proceedings. Rather, the proceedings will be regarded as instituted by and at the discretion of an independent prosecuting authority: *Commonwealth Life Assurance Society Limited v Brain* (1935) 53 CLR 343, at 379 per Dixon J.

A number of cases have held, or at least assumed, that an application for an ADVO is in the class of civil proceedings that may found a claim for malicious prosecution: *HD v State of NSW* [2016] NSWCA 85 at [69]; *Rock v Henderson* [2021] NSWCA 155 at [34]; [110]. See also *Li v Deng (No 2)* [2012] NSWSC 1245 at [169]; *Clavel v Savage* [2013] NSWSC 775 at [43]–[45].

[5-7140] Absence of reasonable and probable cause

This, together with the concept of malice, are the components of the tort most difficult to prove. This is especially so where a member of the public has given apparently credible information to the police and the police have then charged the plaintiff with a criminal offence. The question arises: how does a plaintiff go about establishing the negative — an absence of reasonable and probable cause?

Prior to illustrating the answer to this question by reference to decided cases, it is necessary to emphasise the High Court's general strictures on the subject (*A v State of NSW* (2007) 230 CLR 500):

- the question of reasonable and probable cause has both a subjective and an objective element
- if the defendant did not subjectively believe the prosecution was warranted — assuming that could be proved on the probabilities — the plaintiff will have established the negative proposition,
- however, even when the prosecutor did believe the prosecution was justified, the plaintiff may yet succeed if it can be shown that, objectively, there were no reasonable grounds for the prosecution.

As has been pointed out (Barker et al p 91) there is an important temporal element in determining whether the defendant commenced or maintained the proceeding without reasonable or probable cause. This will first focus on the matters known at the time of institution of the proceedings, and then subsequently on fresh matters known as the proceedings continue. A prosecutor who learns of facts only after the institution of proceedings which show that the prosecution is baseless may be liable in malicious prosecution for continuing the proceedings: *Hathaway v State of NSW* [2009] NSWSC 116 at [118] (overruled on appeal [2010] NSWCA 184, but not on this point); *State of NSW v Zreika* [2012] NSWCA 37 at [28]–[32].

[5-7150] Some examples

In *State of NSW v Zreika*, above, the plaintiff succeeded in assault, wrongful arrest and malicious imprisonment claims against police. There had been a shooting at a home unit in Parramatta. Shortly after the shooting, the plaintiff was reported as having made some bizarre remarks at a nearby service station. The police officer investigating the shooting, when informed of this, became convinced that the plaintiff was the shooter and, five days later, arranged for his arrest and charging. However, a description of the shooter and his vehicle could not conceivably have matched the plaintiff. After the arrest, police learned the plaintiff had a credible alibi and that a witness had taken part in a "photo array" but had not identified the plaintiff. Despite all this, the plaintiff was refused bail (on the application of the police) and remained in custody for two months before the Director of Public Prosecutions withdrew all charges against him.

In *A v State of NSW*, the plaintiff had been arrested and charged with sexual offences against his two stepsons. The High Court agreed with the trial judge that the evidence demonstrated that the plaintiff had shown an absence of probable belief in the case of the charge relating to the younger child but had failed to do so in the case of the older boy. In the first situation, the police officer did not form the view that the material he possessed warranted laying the charge; or, alternatively, if he had in fact formed that view, there was no sufficient basis for his doing so. The evidence suggested a strong possibility that the younger boy was "making up" a story to support his older brother in circumstances where there was substantial animosity on the part of the older boy towards the plaintiff.

Finally, as the High Court pointed out in *A v State of NSW*, there is a need for the court to decide "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause." (*Commonwealth Life Assurance Society Limited v Brain*, above, at 74 per Dixon J.)

This may often require the court to consider the proper response of the "ordinarily prudent and cautious man, placed in the position of the accuser," to the conclusion that the person charged was probably guilty. The enquiry is to an "objective standard of sufficiency".

In this regard, it is not enough to show the prosecutor could have made further or different enquiries. His duty is "not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution": *Herniman v Smith* [1938] AC 305 at 319 per Lord Atkin.

[5-7160] Malice

In *A v State of NSW*, the plurality examined the types of "extraneous purpose" that will suffice to show malice in malicious prosecution proceedings. They approved a general statement in Fleming at 685:

> At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.

The plurality instanced cases of spite and ill-will; and cases where the dominant motive was to punish the alleged offender. Generally, there must be shown a purpose other than a proper purpose. However, strict proof will be required, not conjecture nor mere suspicion. The tort "is available only upon proof of absence of reasonable and probable cause and pursuit by the prosecutor of some illegitimate or oblique motive": *A v State of NSW* at [95].

The plaintiff succeeded in *A v State of NSW* (on the malice issue) because he was able to show that the proceedings were instituted by the police officer essentially because he had been under extreme pressure from his superiors to do so, not because he wished to bring an offender to justice. In *State of New South Wales v Zreika*, the police officer was motivated by an irrational obsession with the guilt of the plaintiff, despite all the objective evidence pointing to his innocence.

However, it is necessary to stress that the presence of malice will not of itself be sufficient to establish the tort, there must also be an absence of reasonable and probable cause. See also, *HD v State of NSW* [2016] NSWCA 85 at [5-7120].

Note: a comprehensive and practical summary of all the relevant legal principles stated in *A v State of NSW* is to be found in the judgement of Tobias AJA in *State of NSW v Quirk* [2012] NSWCA 216 at [69]–[70].

[5-7170] Justification

In proceedings for false imprisonment, it is necessary to consider first whether the plaintiff was detained; and second, if so, whether there was a justification for the detention. The two issues need to be addressed separately. The burden of demonstrating justification falls on the defendant: *Darcy v State of NSW* [2011] NSWCA 413 at [141]–[148].

Where there is a requirement for a detaining officer or person to have "reasonable grounds" for suspicion or belief, there must be facts sufficient to induce that state of mind in a reasonable person: *George v Rockett* (1990) 170 CLR 104 at [112]. In addition, there must be some factual basis for either the suspicion or belief. The state of mind may be based on hearsay materials or materials which may otherwise be inadmissible in evidence. "[T]he assent of belief is given on more slender evidence than proof": *George v Rockett* at [112].

What constitutes reasonable grounds for forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor* (2005) 222 CLR 612 at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ. In that sense, the criterion has an objective element to it: *Anderson v Judges of the District Court of NSW* (1992) 27 NSWLR 701 at 714.

The question of identifying the material sufficient to support an objective finding that an arresting officer had reasonable grounds for his or her belief has to be approached with practical considerations as to the nature of criminal investigations in mind: *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571 at [18]–[19] per McColl JA.

An example of wrongful arrest appears in *State of NSW v Smith* (2017) 95 NSWLR 662. Two police officers had arrested the respondent at his home, asserting that he had committed a "domestic incident". The respondent was taken to the police station and retained there until his release on bail.

The State of NSW relied on two critical defences. The Court of Appeal agreed with the trial judge that neither of these defences had been made out. The first issue related to the police officer's failure to state adequately the reason for the arrest. To describe the reason as "a domestic incident" was insufficient. This constituted a breach of *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) s 201.

The second issue concerned a breach of s 99(3) LEPRA, as it then was, which required the police officer to suspect "on reasonable grounds" that it was necessary to arrest the person to achieve the purposes listed in s 99(3). There had been no basis to suspect, on reasonable grounds, that the arrest was necessary. In this regard the court accepted that the police officer's decision to arrest the respondent was made essentially — for reasons of "administrative convenience" — namely to facilitate the process of issuing an AVO.

In *State of NSW v Robinson* [2016] NSWCA 334, the Court of Appeal held that for an arrest to be lawful, a police officer must have honestly believed the arrest was necessary for one of purposes in s 99(3) (repealed) and the decision to arrest must have been made on reasonable grounds: at [27], [44]. The word "necessary" means "needed to be done", "required" in the sense of "requisite", or something "that cannot be dispensed with": at [43]. Although s 99(3) has since been repealed, the primary judge misconstrued important legislation which governs the circumstances in which people are lawfully arrested.

In construing s 99 LEPRA as it now stands, see *New South Wales v Robinson* [2019] HCA 46. In confirming the Court of Appeal's decision (*Robinson v State of NSW* (2018) 100 NSWLR 782), the High Court held by majority, that an arrest under s 99 of LEPRA can only be for the purpose, as soon as reasonably practicable, of taking the arrested person before a magistrate and that the arrest in this case was unlawful. The arresting officer must form an intention at the time of the arrest to charge the arrested person. The majority in *Robinson* held that arrest cannot be justified where it is merely for the purpose of questioning. An arrest can only be for the purpose of taking the arrested person before a magistrate or other authorised officer to be dealt with according to law to answer a charge for an offence and nothing in LEPRA or any previous legislative amendment displaces that single criterion: at [63], [92]–[94], [109]–[111], [114]. See also *Owlstara v State of NSW* [2020] NSWCA 217 at [8], [65], [122].

[5-7180] Intimidation

The elements of the tort of Intimidation were identified in *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assoc of Australia* [1971] 1 NSWLR 760. These were identified as:

1. A intends to injure C
2. A gives effect to his intention by threatening B that A will commit an unlawful act as against B
3. The unlawful act is threatened, unless B refrains from exercising his legal right to deal with C, and
4. B is thereby induced to refrain from exercising his legal right to deal with C.

In *Uber BV v Howarth* [2017] NSWSC 54, Slattery J issued a permanent injunction to restrain a litigant in person who had engaged in the unusual tort of intimidation. His actions were made against Uber and consisted of a series of "citizens arrests".

[5-7185] Collateral abuse of process

The tort of collateral abuse of process was discussed by the High Court in *Williams v Spautz* (1992) 174 CLR 509. The tort has not established a large foothold in the jurisprudence of Australia or England, and examples of parties succeeding on the basis of the tort are rare: see *Williams v Spautz*

at 553 for examples and the discussion in *Burton v Office of DPP* (2019) 100 NSWLR 734 at [14]–[42]; [48]–[49], [60]; [124]. The exact shape of th tort remains uncertain and even its existence has been viewed with scepticism: A Burrows, *Oxford Principles of English Law: English Private Law*, 2nd edn, cited in *Burton v DPP* [2019] NSWCA 245 at [17].

The tort was established in *Grainger v Hill* (1838) 132 ER 769. That case "has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution": *Willers v Joyce* [2018] AC 779 at [25]. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: a) that the initial proceedings has terminated in his or her favour; and b) want of reasonable and probable cause for institution of the initial proceedings. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. While an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process: *Williams v Spautz*, above at 520, 522-523 citing *Grainger v Hill*. See also *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 123.

The majority in *Burton v Office of DPP*, above, found it unnecessary to decide on an authoritative formulation of the elements of the tort (cf Bell P at [42]) in what was an appeal from the summary dismissal of proceedings seeking damages for breach of the tort. The matter was remitted to the District Court as the appellant's claim ought not to have been summarily dismissed because it was arguable he had an underlying cause of action, albeit one that has not been sufficiently pleaded.

[5-7188] Misfeasance in public office

The tort of misfeasance in public office has a "tangled" history and its limits are undefined and unsettled. Aronson suggests that what has emerged over the last 50 or so years is in reality nothing less than a new tort to meet the needs of people living in an administrative State. Most of the modern changes to the tort have occurred through a series of cases in which judges have diluted the requirement of malice at the same time as they have expressed confidence that their changes leave sufficient protection for public officials against liability to an indeterminate class to an indeterminate extent: M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427.

Only public officers can commit the tort, and only when they are misusing their public power or position. It is an intentional tort: it is not enough to prove gross incompetence, neglect, or breach of duty.

In *Northern Territory v Mengel* (1995) 185 CLR 307, Deane J summarised the elements of the tort as:

(i) an invalid or unauthorised Act;

(ii) done maliciously;

(iii) by a public officer;

(iv) in the purported discharge of his or her public duties;

(v) which causes loss or damage to the plaintiff.

The authorities to date have not elucidated the boundaries of Deane J's fourth element of the tort: *Ea v Diaconu* [2020] NSWCA 127 per Simpson JA at [147], [153].

The principles regarding the tort emerge from a number of decisions from Australia, the UK and New Zealand; see particularly: *Northern Territory v Mengel*, above; *Sanders v Snell* (1998) 196

CLR 329; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263; *Sanders v Snell* (2003) 130 FCR 149 ("*Sanders No 2*"); *Commonwealth of Australia v Fernando* (2012) 200 FCR 1; *Emanuele v Hedley* (1998) 179 FCR 290; *Nyoni v Shire of Kellerberrin (No 6)* (2017) 248 FCR 311: *Hamilton v State of NSW* [2020] NSWSC 700.

Regarding the meaning of a "public officer" for the purpose of misfeasance, Bathurst CJ stated in *Obeid v Lockley* (2018) 98 NSWLR 258 at [103]:

> The review of the Australian authorities demonstrates two matters. First, the tortfeasor must be a "holder of a public office". Second, the act complained of must be the exercise of a public power. However, the cases provide no clear statement of what constitutes the "holding of a public office", or whether the power exercised has to be "attached" to the public office, or whether it is sufficient that the public officer by virtue of their position is entitled or empowered to perform the public acts in question. However, in my view, the power does not have to be expressly attached to the office.

It is also necessary to identify any public power or duty invoked or exercised by the public officer. In *Ea v Diaconu* [2020] NSWCA 127, the applicant claimed the first respondent (an officer of the Australian Federal Police) committed misfeasance in public office by reason of her conduct in the court public gallery in view of the jury during his trial, including laughing, gesturing, rolling her eyes and grinning, which attempted to influence the outcome of the proceedings. As White JA held in *Ea v Diaconu*, the respondent's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence: at [76]. It is arguable that the abuse of de facto powers, ie the capacity to act, derived from the conferral of powers that make the office a public office, are within the scope of the tort: at [127].

Further, as *Mengel* made clear, the tort is one for which a public officer is personally liable. Before one reaches the issue of the vicarious liability of the State, it is necessary for the plaintiff to identify which individual officer or officers performed the unauthorised act: *Doueihi v State of NSW* [2020] NSWSC 1065 at [32]. Damage is an essential element of the tort. It may be reputational harm as in *Obeid v Lockley* at [153].

Misfeasance in public office was made out in *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732. Minister for Agriculture, the Hon Joe Ludwig MP, made a control order in June 2011 that Australian cattle could not be exported to various Indonesian abattoirs that had been engaging in inhumane practices, unless the abattoir satisfied the Minister that its practices met internationally recognised animal welfare standards ("**First Order"**). Political pressure led to the Minister making a second control order that banned the export of livestock to Indonesia for a period of 6 months ("the Ban**"**). There was no "exceptions power" which would allow the Minister to make an exception if needed. Brett Cattle Company Pty Ltd ("BCC") was a cattle exporter affected by the Ban. BCC claimed it lost the opportunity to sell more than 2,700 head of cattle into Indonesia in 2011 because of the Ban, and suffered losses of $2.4 million. BCC was the representative in a class action against the Minister. Both the First Order and the Ban were enacted under delegated legislation pursuant to s 7, *Export Control Act* 1982 (Cth).

Rares J held that the Ban was invalid as an absolute prohibition was not necessary nor reasonably necessary and it imposed unnecessary limitations on the common law right of persons to carry on their lawful business: at [329], [348]–[354], [358]-[361]. Rares J further held the Minister committed misfeasance in public office as he was recklessly indifferent as to: (i) the availability of his power to make the control order in its absolutely prohibitory terms without providing any power of exception, and (ii) the injury which the order, when effectual, was calculated to produce: at [373]–[386], [391]–[395]. To satisfy the test for the tort of misfeasance in public office, the office holder must have known, or been recklessly indifferent to, the fact that the plaintiff/applicant was likely to suffer harm. It does not suffice that there is only a foreseeable risk of harm. In addition, a finding that a

Minister has committed misfeasance in public office should only be reached having regard to the seriousness of such a finding based on evidence that gives rise to a reasonable and definite inference that he or she had the requisite state of mind: at [280]–[284].

[5-7190] Damages including legal costs

As has been said, proof of damage is not an element of the three "trespass to the person" torts. However, specific damage or loss may be claimed and, if proven, damages will be awarded. These torts allow for the amount of aggravated damages and, where appropriate, exemplary damages: *State of NSW v Ibbett* (2005) 65 NSWLR 168.

Where a party claims damages for harm suffered due to an intentional tort, the loss must be the intended or natural and probable consequence of the wrong: *State of NSW v Cuthbertson* (2018) 99 NSWLR 120 at [40]; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; *TCN Channel Nine v Anning* (2002) 54 NSWLR 333 at [100].

In *Lewis v ACT* [2020] HCA 26, regarding a claim for false imprisonment, the High Court held that an independent species of "vindicatory damages", or substantial damages merely for the infringement of a right, and not for other purposes including to rectify the wrongful act or compensate for loss, is unsupported by authority or principle. The notion that "vindicatory damages" is a species of damages that stands separately from compensatory damages draws no support from the authorities and is insupportable as a matter of principle: at [2]; [22]; [51]; [98].

The legal costs incurred in defending a charge of resisting an officer in the course of duty are not the "natural and probable consequence" of the tortious conduct of wrongful arrest. Although harm suffered in resisting arrest, such as physical injury or property damage, is a natural and probable consequence of the wrong, the resistance being directly related or connected to wrongful arrest, the costs incurred in what ultimately turns out to be a failed prosecution are not: *State of NSW v Cuthbertson*, above at [44]–[45]; [135]. The costs of successfully defending a criminal proceeding can only be recovered in a proceeding which alleges that the laying of a charge was an abuse of process: *Berry v British Transport Commission* [1962] 1 QB 306 at 328.

Traditionally, damages for malicious prosecution have been regarded as confined to:

1. … damage to a man's fame, as if the matter whereof he is accused be scandalous …

2. … such [damages] as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty … 3. Damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused." *Savile v Roberts* (1698) 1 LdRaym 374 at 378, cited in *Rock v Henderson* [2021] NSWCA 155 at [13].

However, once damage under any of those three heads is proved, the award of damages is at large, subject to the limitation that they must not be unreasonably disproportionate to the injury sustained. Consequential economic loss is recoverable if not too remote, as are damages for mental distress (as where occasioned by a serious criminal charge). Aggravated and exemplary damages may be awarded: *Rock v Henderson* at [14]. A successful plaintiff in a malicious prosecution suit can recover as damages the costs of defending the original proceedings the incurring of which is the direct, natural, and probable consequence of the malicious bringing of those proceedings, and which is conventionally one of the heads of actionable damage required to found a claim for malicious prosecution: *Rock v Henderson* at [19]. Costs may be recovered as damages even where the court in which the original proceedings were brought has no power to award costs: *Coleman v Buckingham's Ltd* (1963) 63 SR (NSW) 171 at 176; *Rock v Henderson* at [20].

The legislative scheme in NSW for the award of costs in criminal proceedings is provided for by s 70, *Crimes (Appeal and Review) Act* 2001. Section 70 limits the circumstances in which costs in favour of a party who successfully appeals a conviction may be ordered and for the appeal to be

the forum in which that determination is made. A party cannot avoid the constraints of s 70 by later claiming costs incurred in conducting a criminal appeal in later civil proceedings: *State of NSW v Cuthbertson* at [63]–[67]; [114]; [144]–[145]; [161].

Legislation

- *Casino Control Act* 1992
- *Civil Liability Act* 2002, Pt 7, s 52
- Crimes Act 1914 (Cth) s 3W
- *Crimes (Sentencing Procedure) Act* 1999 s 10
- *Defence Force Discipline Act* 1982
- *Law Enforcement (Powers and Responsibilities) Act* 2002 ss 99(3), 201
- *Migration Act* 1958 (Cth) s 5, s 233C(1)

Further References

- M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427
- J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998
- K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011

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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 October 2021. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act* 1987, Div 6–6B, Pt 3.

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]

In the NSW workers' compensation scheme, where a person is injured or killed arising out of or in the course of his or her work employment, that person and his or her dependants can claim compensation which will be funded though 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 (first entitlement period)
  - payments of up to 80% of their pre-injury average weekly earnings for weeks 14 to 130 (second entitlement period).
- for workers with current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings less current weekly earnings for the first 13 weeks (the first entitlement period)
  - payments of up to 95% of pre-injury average weekly earnings less current weekly earnings for weeks 14 to 130 (second entitlement period) provided worker has returned to work for not less than 15 hours per week
  - those workers who are working less than 15 hours per week or have not returned to work are entitled to payments of up to 80% of their pre-injury average weekly earnings less current weekly earnings.
- after the second entitlement period (130 weeks) workers' entitlements to weekly benefits continue if they have no current work capacity or they have achieved an actual return to employment for at least 15 hours per week earning at least $202 per week.
- workers with current work capacity (other than a worker with high needs) 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 high needs (defined as a worker with more than 20% permanent impairment), 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 $871 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.
- weekly payments are capped at the maximum amount of $2282.90.

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 $2282.90 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 $536.90, depending on the level of the worker's disability, as well as additions for a dependent spouse or child.[5]

[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.

- the *Workers Compensation Act* 1987 provides the following further benefits for workers and exempted workers
  - the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services[6]
  - lump sum permanent impairment payments dependent on the degree of the impairment, that are limited to a maximum award of $231,000[7]
  - lump sum payments for pain and suffering if the claimant has at least a 10% impairment, limited to a maximum award of $50,000 (exempted workers only)[8]
  - the commercial cost of any reasonably necessary domestic assistance[9]
  - compensation, in some circumstances, for gratuitous domestic assistance provided to the victim, and[10]
  - compensation for property damage.[11]

In situations where a worker dies as the result of an accident or disease associated with his or her employment, the Act also provides for a lump sum death benefit.[12] This is currently $849,300, and is to be apportioned between dependents,[13] or otherwise paid to the legal personal representative of the worker.[14] Provision is also made for weekly payments for dependent children[15] and funeral expenses.[16]

This compensation scheme is regulated by State Insurance Regulatory Authority.[17] Insurance and Care NSW (icare)[18] acts on behalf of the Workers Compensation Nominal Insurer, the statutory insurer in NSW.[19]

The Personal Injury Commission resolves disputes in relation to workers compensation statutory entitlements.

[6-1020] Dust disease workers

Separate provision is made for dust diseases victims, whose total or partial disablement for work was reasonably attributable to the exposure to dust, in the course of their work. The applicable no fault statutory scheme is established under the *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) (the "1942 Act"), which is administered by the icare dust diseases care and also known as the Dust Diseases Authority ("DDA").[20]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[21] by the Medical Assessment Panel, which is also established under the 1942 Act. Decisions of the Medical Assessment Panel and of the DDA are subject to appeal to the District Court.[22]

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[6]*Workers Compensation Act* 1987 (NSW) s 60.
[7]*Workers Compensation Act* 1987 (NSW) s 66.
[8]*Workers Compensation Act* 1987 (NSW) s 67.
[9]*Workers Compensation Act* 1987 (NSW) s 60AA.
[10]*Workers Compensation Act* 1987 (NSW) s 60AA(3).
[11]*Workers Compensation Act* 1987 (NSW) Div 5 Pt 3.
[12]See generally *Workers Compensation Act* 1987 (NSW) Pt 3 Div 1.
[13]*Workers Compensation Act* 1987 (NSW) s 25(1)(a).
[14]*Workers Compensation Act* 1987 (NSW) s 25(1).
[15]*Workers Compensation Act* 1987 (NSW) s 25(1)(b) which sets a sum of $66.60 subject to indexation in accordance with *Workers Compensation Act* 1987 (NSW) Pt 3 Div 6.
[16]*Workers Compensation Act* 1987 (NSW) s 26.
[17]*State Insurance and Care Governance Act* 2015, Pt 3.
[18]*State Insurance and Care Governance Act* 2015, Pt 2.
[19]*Workers Compensation Act* 1987 (NSW), Div 1A Pt 7.
[20]*Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 5.
[21]*Workers' Compensation (Dust Diseases) Act* 1942 (NSW) ss 7–8.
[22]*Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8I.

The benefits available under the dust diseases workers' compensation scheme similarly include:

- indexed weekly payments where a worker is rendered totally or partially disabled due to a dust disease, paid at the rate of the worker's current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of $536.90 per week, depending on the extent of the disability;[23]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[24]
- payment for the commercial provision of domestic assistance;[25] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[26]

Where a worker dies as a result of a dust disease that was reasonably attributable to exposure to dust in the course of his or her work, those who were wholly dependent on that worker are entitled to compensation as follows:

- an indexed lump sum payment which is presently $380,050; and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $313.40 per week,[27] which continues until re-marriage or the commencement of a de facto relationship,[28] or until the death of the spouse; and a[29]
- weekly payment to each surviving dependent child, currently payable at $158.40 per week,[30] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[31]

It is noted that, although the lump sum death benefit payable under the 1987 Act is greater than that payable under the 1942 Act, the surviving dependent spouse is entitled to weekly compensation benefits under the 1942 Act, but not under the 1987 Act.

Unlike the general workers' compensation scheme, there is no compensation payable under the dust diseases workers' compensation scheme for permanent impairment, nor for pain and suffering. Such damages must be recovered in dust diseases cases through a common law action brought in the Dust Diseases Tribunal of New South Wales ("DDT").

The 1942 Act provides the DDA with mechanisms for reducing payments made to an eligible claimant in certain circumstances. If a worker or a worker's spouse is qualified to receive a government pension, the board can adjust the weekly payments to ensure they will still be entitled to receive that pension.[32] Additionally, where the claimant is entitled to receive compensation from another source, the board can require a person to take all appropriate and reasonable steps to claim compensation from that other source and, if he or she fails to do so, it can reduce the dust disease compensation that would otherwise be payable.[33] It is an offence to fail to inform the DDA that a person is receiving compensation under another Act, ordinance, or law of the Commonwealth, or of another State or Territory or of another country.[34]

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[23] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2).
[24] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[25] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[26] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d). Damages for gratuitous provision of attendant care services are also recoverable via common law action: *Civil Liability Act* 2002 (NSW) s 15A.
[27] *Workers' Compensation (Dust Diseases) Act*1942 (NSW) s 8(2B)(b)(ii) which sets an amount of $137.30 per week subject to indexation in accordance withs 8(3)(d).
[28] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(bb).
[29] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(ii).
[30] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(iii) which sets an amount of $69.40 per week subject to indexation in accordance with s 8(3)(d).
[31] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(ba) .
[32] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8A.
[33] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[34] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(3).

There are cases where a person who contracted a dust disease, including an asbestos-related disease, in the course of his or her work, will not receive workers' compensation benefits. Such people include employees whose employers did not make contributions to the NSW workers' compensation scheme (such as Commonwealth employees[35]) or independent contractors who were not covered by the workers' compensation scheme.[36] In such cases their dependants will similarly be unable to receive the statutory benefits that are available upon the victim's death.

Persons whose exposure to dust was not work-related are ineligible for compensation under the 1942 Act.

Common law damages—fault-based liability

[6-1030] Common law damages—fault-based liability [introduction]

In NSW, the recovery of common law damages for personal injury or death is subject to a different regime, depending on the circumstances in which the injury or death was caused. Separate provisions apply in relation to:

- injuries at work, workers have an entitlement to recover modified common law damages subject to the provisions of the 1987 Act;
- persons who have contracted a dust disease;
- personal injury or death occurring in a motor vehicle accident, or arising out of the use of a motor vehicle and whose claim for damages is subject to the *Motor Accidents Compensation Act* 1999 (NSW) or *Motor Accident Injuries Act* 2017; and
- those whose injuries or death arose as the result of a breach of the duty of care owed by health professionals, occupiers, and others and whose claim for damages is subject to the *Civil Liability Act* 2002 (NSW).

The application of these separate regimes can result in material differences in the outcome of damages claims for comparable levels of incapacity and loss.

Moreover there is a difference in the jurisdictions in which awards of "common law damages" are made. Claims subject to the *Motor Accidents Compensation Act* 1999 (NSW), *Motor Accident Injuries Act* 2017, the *Civil Liability Act* 2002 (NSW) and the modified provisions of the *Workers Compensation Act* 1987 (NSW), are brought in the District and Supreme Courts, from which appeal lies to the Court of Appeal. The jurisdiction to award "common law damages" in relation to dust diseases is vested in the DDT, from which appeal lies to the Court of Appeal.

See further H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021.

[6-1040] Claims subject to the Motor Accidents Compensation Act 1999

The recoverability of "common law damages", in respect of fault-based motor accident injuries is currently subject to the limitations arising from the *Motor Accidents Compensation Act* 1999 (NSW). That Act imposes:

- a ceiling on the calculation of damages for past and future economic loss by a requirement to disregard any amount by which the victim's net weekly earnings would have exceeded a sum currently fixed at $5461;[37]

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[35] *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60.

[36] Although, see *Workers Compensation Act* 1987 (NSW) s 20.

[37] *Motor Accidents Compensation Act* 1999 (NSW) s 125; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 3.

- a threshold on the recoverability of damages for non-economic loss (that is compensation for the victim's pain and suffering, loss of bodily function, loss of enjoyment of life, loss of expectation of life, and disfigurement), dependent on the presence of a permanent impairment of the injured person that is greater than 10%;[38]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[39]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[40]
- an exclusion of the damages payable for the loss of the services of a person;[41]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[42] in place of the 3% discount previously applicable at common law;
- an exclusion of the recovery of interest on damages awarded for non-economic loss and attendant care services, and a qualified right to interest in relation to other damages awards;[43] and
- an exclusion of the award of exemplary or punitive damages.[44]

The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim resolution,[45] and that provide for an assessment process as a precondition to commencement of court proceedings.[46]

Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or where the injury or death arose as the result of a blameless accident.[47] In these cases the accident is deemed to have been caused by the fault of the owner or driver of the relevant vehicle, provided it was the subject of motor accident insurance cover.

In addition, the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) has established a statutory compensation scheme that provides compensation for severe motor accident injury victims and that applies regardless of fault.[48] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[49]

[6-1045] Claims subject to the Motor Accident Injuries Act 2017

Claims for damages arising from motor accidents occurring after 1 December 2017 are the subject of the 2017 Act.

The Act provides for the payment of no fault statutory benefits for persons injured in a motor accident as defined in s 1.4, however those benefits are restricted for persons at fault. The statutory

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[38]*Motor Accidents Compensation Act* 1999 (NSW) s 131.

[39]*Motor Accidents Compensation Act* 1999 (NSW) s 134; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 4.

[40]*Motor Accidents Compensation Act* 1999 (NSW) s 128. No compensation is to be paid unless services were, or will be, provided for at least 6 hours per week, and for a period of at least 6 consecutive months, and the amount of compensation awarded for attendant care services must not exceed the average weekly total earnings in NSW.

[41]*Motor Accidents Compensation Act* 1999 (NSW) s 142.

[42]*Motor Accidents Compensation Act* 1999 (NSW) s 127(2).

[43]*Motor Accidents Compensation Act* 1999 (NSW) s 137. Interest is not payable unless the defendant has been given sufficient information to enable a proper assessment of the claim and the defendant has had a reasonable opportunity to make an offer of settlement, but has not done so, and in some other specific circumstances involving settlement offers.

[44]*Motor Accidents Compensation Act* 1999 (NSW) s 144.

[45]*Motor Accidents Compensation Act* 1999 (NSW) Pt 4.3.

[46]*Motor Accidents Compensation Act* 1999 (NSW) s 108. See Pt 4.4 for details of the claims assessment process.

[47]*Motor Accidents Compensation Act* 1999 (NSW) Pt 1.2.

[48]*Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 4.

[49]See *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 58; Lifetime Care and Support Guidelines 2010—Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme <http://www.lifetimecare.nsw.gov.au/FileHandler.ashx?name=Guidelines for Professionals/LTCS Guidelines/Part_1___Guidelines_Oct_2010_pdf[doc]>.

benefits include weekly compensation and treatment and care costs for varying periods, depending on whether the person was at fault and the extent of the impairment suffered. Statutory benefits are not payable if compensation under the *Workers Compensation Act* 1987 is payable in respect of the injuries.[50] Statutory benefit payments are reduced after 26 weeks for contributory negligence, if applicable. A claim for statutory payments must be made within 3 months of the motor accident.

Damages are payable for persons who were not at fault and have more than minor injuries. "Minor injuries" are defined as soft tissue injury and minor psychological or psychiatric injury.[51] Damages are restricted to past and future economic loss unless the permanent impairment as a result of the injuries suffered is more than 10% and then non-economic loss damages to compensate pain and suffering and loss of amenities of life are available up to a maximum of $595,000.[52]

A claim for damages cannot be made until 20 months after the motor accident, unless the claim relates to a death or where the extent of permanent impairment is greater than 10% and all claims for damages must be made within 3 years of the motor accident. A claim for damages cannot be settled within 2 years of the motor accident unless the extent of permanent impairment is greater than 10%, and the claimant must be represented by an Australian legal practitioner or the settlement is approved by the Personal Injury Commission. If damages are payable the award will be reduced by the amount of the weekly payments received and there is no entitlement to future statutory payments.

If there is a dispute as to the extent of a person's permanent impairment a court or Member of the Personal Injury Commission may refer a claimant for assessment by a medical assessor. The certificate of a medical assessor is prima facie evidence of the extent of permanent impairment of earning capacity as a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[53] A court can reject the contents of a certificate on the grounds of denial of procedural fairness but only if the admission of the certificate would cause substantial injustice.

When assessing damages consideration must be given to the steps taken by the claimant to mitigate their loss and any other reasonable steps that could have been taken, including by undergoing treatment and undertaking rehabilitation.[54] Contributory negligence applies to the assessment of damages, which must be found where drugs, alcohol or the failure to wear a seatbelt or helmet have been a factor in the accident or injury.

A claimant is not entitled to commence court proceedings until the claim has been assessed by a Member of the Personal Injury Commission, or the Member has issued a certificate that the claim is exempt.[55] Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[56] An insurer may require a claimant to commence proceedings and the claimant must do so within 3 months of the notice, or the claim is deemed to have been withdrawn.[57] A court may grant leave to reinstate the claim if the claimant provides a full and satisfactory explanation for the delay in commencing the proceedings. If a claimant provides significantly new evidence in court proceedings, the claim must be referred back to the claims assessment process and the proceedings adjourned until it is complete.[58]

Legal costs are capped and costs are not recoverable for the claims assessment process unless they are included in the assessment.

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[50]Note that journey claims were removed by the 2012 workers' compensation amendments.
[51]*Motor Accidents Injuries Act* 2017 (NSW) s 1.6, "soft tissue injury" is separately defined.
[52]*Motor Accidents Injuries Act* 2017 (NSW) s 4.11.
[53]*Motor Accidents Injuries Act* 2017 (NSW) s 7.23.
[54]*Motor Accidents Injuries Act* 2017 (NSW) ss 4.11 and 4.13.
[55]*Motor Accidents Injuries Act* 2017 (NSW) s 6.31.
[56]*Motor Accidents Injuries Act* 2017 (NSW) s 6.32.
[57]*Motor Accidents Injuries Act* 2017 (NSW) s 6.33.
[58]*Motor Accidents Injuries Act* 2017 (NSW) s 6.34.

[6-1050] Claims subject to the Civil Liability Act 2002

Claims under this Act for "common law damages" arising out of other forms of fault-based liability, are also subject to limitations. For example:

- damages for economic loss (past and future loss of earnings or of earning capacity) and loss of expectation of financial support are capped, with the maximum net weekly earnings that may be recovered currently being three times average weekly earnings;[59]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[60]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[61]
- damages for loss of employer superannuation contributions are limited to the relevant percentage of the damages payable for the deprivation and impairment of the plaintiff's earning capacity on which the entitlement to those contributions is based;[62]
- damages for non-economic loss can only be awarded if the severity of the non-economic loss is at least 15% of the most extreme case; and where the non-economic loss is equal to or greater than 15% of a most extreme case, damages are to be awarded in accordance with a table to a maximum award of $693,500;[63]
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[64]
- interest cannot be awarded on damages for non-economic loss, gratuitous attendant care services or loss of capacity to provide gratuitous domestic services to the plaintiff's dependants;[65] and
- exemplary, punitive or aggravated damages cannot be awarded.[66]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[67] Damages cannot be recovered for pure mental harm, arising from mental or nervous shock in connection with another person's death or injury, unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim.[68]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[69]

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[59] *Civil Liability Act* 2002 (NSW) s 12, (approximately $3,617).

[60] *Civil Liability Act* 2002 (NSW) s 15. No damages may be awarded unless the gratuitous attendant care services were, or will be, provided for at least 6 hours per week and for a period of at least 6 consecutive months: s 15(3). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30), up to a maximum of 40 hours per week: ss 15(4), 15(5).

[61] *Civil Liability Act* 2002 (NSW) s 15B. No damages for loss of a person's capacity to provide services unless there is a reasonable expectation that the claimant would have provided those services to his or her dependants for at least 6 hours per week, and for a period of at least 6 consecutive months: s 15B(2)(c). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30): s 15B(4).

[62] *Civil Liability Act* 2002 (NSW) s 15C.

[63] *Civil Liability Act* 2002 (NSW) s 16; Civil Liability (Non-economic Loss) Order 2010 (NSW) O 3.

[64] *Civil Liability Act* 2002 (NSW) s 14.

[65] *Civil Liability Act* 2002 (NSW) s 18. See also s 11A(3)—interest on damages cannot be awarded contrary to the provisions in Pt 2 of the Act, which includes s 18.

[66] *Civil Liability Act* 2002 (NSW) s 21.

[67] *Civil Liability Act* 2002 (NSW) s 29.

[68] *Civil Liability Act* 2002 (NSW) s 30.

[69] *Civil Liability Act* 2002 (NSW) s 31; and see also s 33 in relation to a similar requirement for the recovery of economic loss for consequential mental harm. The Act also provides that a defendant will only owe a duty of care to a plaintiff in regards to nervous shock if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken: s 32.

There are no provisions comparable to those that were introduced in relation to the Motor Accidents Scheme, that allow recovery for blameless injuries or injuries occasioned to children.

[6-1060] Claims by injured workers—general

In addition to the entitlement for workers' compensation outlined above, an injured worker is also entitled to pursue common law damages, as modified by the 1987 Act against the party whose negligence or other wrongful act or omission led to the injury.[70]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[71]

The worker's claim for loss of economic capacity is confined to the recovery of past lost earnings and future loss due to the deprivation or impairment of the worker's earning capacity.[72]

Future losses are currently calculated according to the 5% actuarial discount rate.[73]

In awarding such damages, the court is required to disregard the amount (if any) by which the worker's net weekly earnings would have exceeded the amount that is the maximum amount of weekly statutory compensation payable in respect of total or partial incapacity, currently $2282.90.[74]

Common law damages are not available in respect of the victim's non-economic loss, the recovery of which is confined to the statutory no fault lump sum benefits that are available to the claimant for such losses.

Interest on damages is not payable unless certain conditions are satisfied.[75]

If a worker sues an employer at common law, and receives damages, these will have an impact on the statutory compensation that he or she can receive. For example, an award of damages in a common law action will mean that:

- the worker ceases to be entitled to any further compensation under the 1987 Act in respect of the relevant injury including compensation that has not yet been paid;[76]
- any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is to be paid or credited to the person who paid the compensation;[77] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[78]

[6-1070] Claims by dust disease workers and other dust disease victims

During his or her lifetime, a person who suffers a dust disease can sue a person, whose wrongful act or omission caused or contributed to that injury, to recover damages of the kind that were previously available under the common law. They include, accordingly:

1. Damages in respect of:
   - past and future medical, hospital, rehabilitation and related expenses;
   - any paid and gratuitous attendant care services that are received by the plaintiff consequent upon the injury;[79]

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[70] *Workers Compensation Act* 1987 (NSW) s 151E.
[71] *Workers Compensation Act* 1987 (NSW) s 151H.
[72] *Workers Compensation Act* 1987 (NSW) s 151G.
[73] *Workers Compensation Act* 1987 (NSW) s 151J.
[74] *Workers Compensation Act* 1987 (NSW) s 151I.
[75] *Workers Compensation Act* 1987 (NSW) s 151M.
[76] *Workers Compensation Act* 1987 (NSW) s 151A(1)(a).
[77] *Workers Compensation Act* 1987 (NSW) s 151A(1)(b). The position in relation to estate actions and dependency actions is considered later: para 4.48–4.51 and para 4.57–4.58.
[78] *Workers Compensation Act* 1987 (NSW) s 151A(1)(c).
[79] *Civil Liability Act* 2002 (NSW) ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.

- any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[80]
- any loss of the plaintiff's earnings to the date of trial; and
- any loss of future earning capacity.

2. Damages for non-economic loss—including pain and suffering, loss of amenities and loss of expectation of life.
3. Interest—on past losses to the time of judgment or settlement.[81]

Successfully completing such an action, either by settlement or by judgment, during the plaintiff's lifetime, extinguishes the possibility of common law claims being brought after death, including claims by that person's estate, or by his or her dependants.[82] It does not, however, bar dust diseases victims or their dependants from claiming statutory dust diseases workers' compensation benefits, where the victim's disease was work related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,[83] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, and non-exclusive jurisdiction in proceedings for contribution between defendants, and questions arising under relevant policies of insurance.[84] It has jurisdiction over any injuries caused by a "dust-related condition", which is defined in the *Dust Disease Tribunal Act* 1989 (NSW) as meaning:

- a disease specified in Schedule 1, or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.[85]

Schedule 1 to the *Dust Disease Tribunal Act* 1989 (NSW) now lists, for the purposes of that Act, 14 dust diseases:

- aluminosis;
- asbestosis;
- asbestos induced carcinoma;
- asbestos-related pleural diseases;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;

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[80]*Civil Liability Act* 2002 (NSW) s 15B. These are also known as *Sullivan v Gordon* damages.
[81]See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
[82]See, eg, *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.
[83]*Workers Compensation Act* 1987 (NSW) s 151A(1)(a). See above, para 1.54.
[84]*Dust Diseases Tribunal Act* 1989 (NSW) s 10.
[85]*Dust Diseases Tribunal Act* 1989 (NSW) s 3. For example occupational asthma caused by a dust capable of causing dust disease: *Manildra Flour Mills v Britt* [2007] NSWCA 23.

- silicosis;
- silico-tuberculosis; and
- talcosis.

Pneumoconiosis is any "disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis".[86] The DDT's jurisdiction, therefore, includes diseases caused by asbestos dust, as well as a range of other diseases and conditions caused by exposure to industrial dusts.

In a number of respects differences exist in relation to the recoverability of "common law damages" in, and the procedures followed by, the DDT when compared with the recovery of such damages in accordance with the other schemes outlined above. They include, for example:

- the use, by leave, of historical and general medical evidence admitted in other cases;[87]
- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;[88]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[89]
- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;[90]
- the calculation of future losses by reference to a 3% actuarial discount table;[91]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[92]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[93] and
- s 13(6) of the *Dust Diseases Tribunal Act* 1989 (NSW) which provides:

> Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.[94]

There are also two substantive law differences:

- general damages survive the death of the claimant and may be recovered by the person's legal personal representative; and[95]

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[86]A R Gennaro, A H Nora, J J Nora, R W Stander and L Weiss (ed), *Blakiston's Gould Medical Dictionary*, 4th edn, McGraw-Hill, 1979, p 1068.
[87]*Dust Diseases Tribunal Act* 1989 (NSW) s 25(3).
[88]*Dust Diseases Tribunal Act* 1989 (NSW) s 25A.
[89]*Dust Diseases Tribunal Act* 1989 (NSW) s 25B.
[90]*Dust Diseases Tribunal Act* 1989 (NSW) s 41.
[91]No discount rate is provided for in any relevant legislation, therefore the common law rate of 3% applies: *Todorovic v Waller* (1981) 150 CLR 402.
[92]*Dust Diseases Tribunal Act* 1989 (NSW) s 12A.
[93]See *Civil Liability Act* 2002 (NSW) ss 15A and 15B. Although damages for loss of capacity to provide domestic services are available in both dust diseases cases and actions under the *Civil Liability Act*, there are some restrictions imposed on recovery of such damages in motor accidents claims: ss 15B(8), (9). Additionally, while damages for gratuitous domestic assistance are limited to recovery for 40 hours per week of care (s 15(4)), there is no equivalent maximum number of hours in dust diseases cases (see s 15A(2)).
[94]*Dust Diseases Tribunal Act* 1989 (NSW) s 13(6). Although the occasion for its application will only arise in exceptional circumstances: *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 and *Browne v Cockatoo Dockyard Pty Ltd* (1999) 18 NSWCCR 618.
[95]*Dust Diseases Tribunal Act* 1989 s 12B

- the ability to award provisional damages in relation to an established dust-related condition, reserving the right to claim, additional damages, if the claimant later develops another dust-related condition. This is an exception to the usual principle that damages are awarded on a "once and for all" basis.[96]

The recovery by a worker of compensation from one source may affect his or her ability to recover from another source. A recipient of benefits under the dust diseases workers' compensation scheme cannot be required to repay anything to the DDA if he or she also receives compensation benefits for the same injury from another source.[97] In this respect, the dust diseases workers' compensation scheme is unlike the general workers' compensation scheme where repayment can be required if, for example, the injured worker recovers common law damages for the same injury.[98] In addition, unlike the general workers' compensation scheme,[99] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[100]

If a worker has received workers' compensation benefits prior to judgment in a common law action, any weekly benefits that have been received are to be taken into account and deducted from the common law damages for loss of earning capacity or economic loss recovered by the injured person or his or her estate.[101] In addition, where a worker has an entitlement to statutory workers' compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[102]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[103]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[104] Such cases are likely to be determined according to the common law principles, unaffected by Pt 3 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), which has been repealed and only replaced for proceedings subject to the *Civil Liability Act* 2002 (NSW).[105]

Post-death claims

[6-1080] Estate actions

The legal personal representative of the estate of a deceased person who was injured as the result of the wrongful act of another, can bring an action to recover common law damages on behalf of the estate, or continue an action already commenced by the deceased, provided the deceased had a cause of action. Such an estate action is not, however, available if the deceased commenced and completed an action for the recovery of such damages before dying.

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[96] *Dust Diseases Tribunal Act* 1989 (NSW) s 11A.
[97] See *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[98] *Workers Compensation Act* 1987 (NSW) s 151A(1)(b).
[99] See *Workers Compensation Act* 1987 (NSW) s 151A(1)(a).
[100] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8E.
[101] *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.
[102] See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.
[103] *Dust Diseases Tribunal Act* 1989 (NSW) s 12D.
[104] *Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.
[105] *Civil Liability Act* 2002 (NSW) Pt 3. It is also noted that, as a consequence of *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97, such damages are not recoverable from the Asbestos Injuries Compensation Fund, which is established to fund the liabilities of former James Hardie subsidiaries (see para 2.106–2.107). This does not, however, preclude proceedings against employers or insurers or other co-defendants.

This type of action is based on the survival of causes of action legislation that was introduced in NSW by the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) (the "1944 Act").[106] Similar provisions exist in other common law jurisdictions. Prior to its introduction any cause of action that was vested in the deceased died with that person.[107]

In an estate action, the economic loss damages recoverable comprise:[108]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[109] and provided by, the deceased to other people, prior to death;[110]
- the loss of the deceased's earning capacity to the date of death; and
- funeral expenses.[111]

The damages recoverable by the estate, in an estate action, do not include any damages for the loss of the deceased's earning capacity past the date of his or her death, (that is, during the "lost years"),[112] nor do they include exemplary damages.[113]

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[114]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[115] including damages for the loss of the deceased's expectation of life, can be awarded, but only if proceedings for damages had been commenced by the injured person during his or her lifetime.[116] There is no restriction on the award of interest on damages for past economic loss. The entitlement to interest in such cases differs from that applicable to claims under the other compensation schemes.[117]

[6-1090] Dependency actions

The legal personal representative of a deceased person can also bring an action under the 1897 Act, on behalf of specified family members,[118] for compensation for the loss of support that they sustain, consequent upon the death of a person who died as the result of the wrongful act of another.[119] Only one such dependency action can be brought.[120]

The damages recoverable in such an action, for the benefit of any eligible claimant, are limited to the loss of that dependant, that arose from the loss of the expectation of the deceased's financial

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[106]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(1).

[107]The rule has been traced as far back as 1611: *Pinchon's Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860, although various statutory and common law exceptions were created in the intervening years. For the history of the common law with respect to fatal accidents and the survival of causes of action, see: P H Winfield, "Death as Affecting Liability in Tort" (1929) 29 *Columbia Law Review* 239. See also: England and Wales, Law Revision Committee, Interim Report (1934).

[108]See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.

[109]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.

[110]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.

[111]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(c).

[112]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(ii).

[113]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(i).

[114]The rationale for the non-survival of damages for non-economic loss in estate actions is that the estate, as an "impersonal body", ought not receive damages for the pain and suffering of the deceased: NSW, Legislative Assembly, *Parliamentary Debates*, 18 October 1944,p 523 (V Treatt).

[115]See, eg, *Novek v Amaca Pty Ltd* [2008] NSWDDT 12 [53], where such interest was awarded in an estate action. Interest on non-economic loss damage is not available in proceedings under the civil liability, motor accidents and non-dust workers' compensation schemes.

[116]*Dust Diseases Tribunal Act* 1989 (NSW) s 12B.

[117]*Motor Accidents Compensation Act* 1999 (NSW) s 137(4); *Workers Compensation Act* 1989 (NSW) s 151M(4); *Civil Procedure Act* 2005 (NSW) s 100(4).

[118]*Compensation to Relatives Act* 1897 (NSW) s 4.

[119]The rights conferred under the *Law Reform (Miscellaneous Provisions) Act* for the benefit of the estate of a deceased person operate in addition to, not in derogation of, any rights conferred under the *Compensation to Relatives Act* 1897 (NSW): *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(5).

[120]*Compensation to Relatives Act* 1897 (NSW) s 5.

support,[121] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[122] Although the relevant provision does not explicitly limit the damages recoverable in this way,[123] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[124] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[125]

The measure of damages available is the extent of the support that is lost by the dependant from the time of death, reduced by benefits obtained by the dependant as a consequence of the death, other than those benefits that are specifically excluded under s 3(3) of the 1897 Act.

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[126] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[127]

Dependency actions are available in relation to each of the categories of liability previously mentioned. Once again, such proceedings are determined by the Supreme or District Courts, save for dust disease dependency actions which are determined in the DDT.

The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.[128]

Proceedings under the 1897 Act brought in the DDT are subject to the unmodified common law and, as a consequence, it has been accepted that damages for the dependant's future loss of support are calculated by reference to the 3% actuarial tables rather than the 5% tables that are applied in relation to claims by dependants under the other schemes.[129]

[The next page is 7001]

[121] *De Sales v Ingrilli* (2002) 212 CLR 338 at [91].
[122] *Compensation to Relatives Act* 1897 (NSW) s 3(2).
[123] *Compensation to Relatives Act* 1897 (NSW) s 3(1).
[124] For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.
[125] *Compensation to Relatives Act* 1897 (NSW) s 4(1).
[126] *Compensation to Relatives Act* 1897 (NSW) s 3(1).
[127] *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.
[128] *Walden v Black* [2006] NSWCA 170 at [96].
[129] See *Civil Liability Act* 2002 (NSW) s 11A(1), 11A(2), 14; *Motor Accidents Compensation Act* 1999 (NSW) ss 127(1)(b), 127(1)(c); *Workers Compensation Act* 1987 (NSW) ss 151E(1), 151E(3), 151J.

Contempt generally

Nature of contempt

[10-0300] Civil and criminal contempt

Contempts of court still fall to be classified as civil or criminal. Contempt by breach of an order or undertaking is regarded as a civil contempt unless "it involves deliberate defiance or, as it is sometimes said, if it is contumacious": *Witham v Holloway* (1995) 183 CLR 525 at 530. See *He v Sun* [2021] 104 NSWLR 518 as to "contumacious disregard of orders".

The distinction has been described as "unsatisfactory" in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109, and in *Witham v Holloway*, above, the High Court held that the criminal standard of proof applies to all contempts (cf *ASIC v Sigalla (No 4)* [2011] NSWSC 62 at [92]–[94]). However, the distinction remains for some purposes. For example, an appeal may be brought against acquittal on a charge of civil contempt: see s 101(6) of the SCA and *Hearne v Street* (2008) 235 CLR 125. For discussions of the distinction see *Matthews v ASIC* [2009] NSWCA 155 and *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69.

Civil contempts are normally left to the offended party to enforce, whereas the Attorney General or the court has a more clearly defined role in the prosecution of criminal contempts since these more directly involve interference with the administration of justice.

In *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89, *Witham v Holloway* (1995) 183 CLR 525 at 534 and *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at [35] the High Court held that while contempt of court may be criminal in nature, proceedings for punishment of contempt were brought in the civil jurisdiction of the court and were "civil proceedings". Hence, where a charge of criminal contempt is brought in the Supreme Court by motion in "civil proceedings", as defined in the CP Act, s 3(1), that Act and the UCPR apply: CPA, s 4(1), Sch 1; UCPR, r 1.5(1), Sch 1: *Kostov v YPOL Pty Ltd* [2018] NSWCA 306 at [16], [17].

The power to punish for contempt in civil proceedings is not fettered by criminal law statutes relating to procedure and sentencing: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; at [43]–[45]; *He v Sun* [2021] 104 NSWLR 518 at [66]. The *Crimes (Sentencing Procedure) Act* 1999 does not apply to sentence proceedings for contempt in the court's civil jurisdiction: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [12], [57]–[58]; *He v Sun* [2021] NSWCA 95 at [38]; [62]. The power to suspend a sentence, although no longer available under the *Crimes (Sentencing Procedure) Act* 1999, survives in cases of contempt by virtue of Pt 55 r 13 of the Supreme Court Rules. Rule 13(3) relevantly provides that the court may make an order for punishment on terms, including a suspension of punishment: *He v Sun* at [39]–[40]; [66]. In committing a person to prison for contempt in civil proceedings, while the court may apply general law protections afforded to persons accused of a criminal offence, the court is nevertheless operating in its civil jurisdiction and criminal statutes are not engaged: *Dowling* at [46], [57]–[58]; [139];

Section 101(5) of the *Supreme Court Act* 1970 provides that the Court of Appeal, rather than the Court of Criminal Appeal, has jurisdiction to hear and determine an appeal from a judgment or order of the Supreme Court in proceedings relating to contempt of court. Note also that the *Mental Health (Forensic Provisions) Act* 1990 (rep) has been held not to apply to criminal contempt proceedings: *Prothonotary of the Supreme Court of NSW v Chan (No 15)* [2015] NSWSC 1177; *Kostov v YPOL Pty Ltd* at [19]. Note: the 1990 Act has been replaced by the *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020 (commenced 27 March 2021).

The common-law requirement that a criminal trial not proceed unless the accused is fit to plead is a safeguard applicable to civil proceedings for criminal contempt: *Kostov v YPOL*, at [18], [19].

Contempt by publication

[10-0310] Time at which the law of contempt commences

For the purposes of sub judice contempt, the law of contempt does not begin to operate until proceedings are pending in a court. It is not sufficient that proceedings be imminent: *James v Robinson* (1963) 109 CLR 593.

[10-0320] Test for contempt

To amount to a sub judice contempt of court, a publication must have, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: *John Fairfax & Sons Pty Ltd and Reynolds v McRae* (1955) 93 CLR 351. The tendency to prejudice proceedings must be clear, or "real and definite". There should be a substantial risk of serious interference: *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [76]–[78], [84].

The tendency of a publication to prejudice proceedings is to be determined objectively having regard to the nature of the material published and the circumstances existing at the time of publication: *Attorney General v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 386; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626. As to the time at which an internet publication takes place, see *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [145].

[10-0330] Intention

While the act of publication must be intentional, an intention to prejudice the due administration of justice is not an element of contempt: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371.

[10-0340] Relevant considerations

Factors to be considered in determining whether a publication has the necessary tendency to cause serious prejudice to a trial include (per Mason CJ in *Hinch*, above, at 28):

- the nature and the extent of the publication
- the mode of trial (whether by judge or jury), and
- the time which will elapse between publication and trial.

The practical tendency of a publication to endure and influence prospective jurors must be viewed against its background of pre-existing legitimate publicity: *Attorney General v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695 at 711.

The likely delay between the date of publication and the commencement of the subject proceedings is an important consideration. It is also appropriate to take into account that, during this period, jurors will be assailed by the media with sensational reports of other events: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 136; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, per Spigelman CJ at [100].

[10-0350] Influencing the tribunal of fact

The most common and obvious form of media contempt is influencing the tribunal of fact. There will generally not be a danger of this in civil proceedings, where no jury will usually be present. It is

essentially established that a publication or broadcast will not be regarded as presenting a substantial risk of prejudice by influencing a judge: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation*, above, at 58.

The same principle has been extended to magistrates: *Attorney General v John Fairfax & Sons Ltd and Bacon*, above.

[10-0360] Influencing witnesses

Contempt may be committed by publications that have a real tendency to influence the evidence of witnesses or to deter them from attending. Publication of photographs may risk contamination of identification evidence: *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598.

The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses: see *Attorney General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374.

[10-0370] Influencing parties

Improper public pressure upon litigants, which has a real tendency to deter or influence them in relation to proceedings, may amount to contempt: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27.

[10-0380] Fair and accurate report of proceedings permitted

A fair and accurate report of judicial proceedings may be published in good faith notwithstanding that it may present a risk of prejudice to pending proceedings: *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 257.

[10-0390] Public interest in publication

No contempt will be established unless it can be demonstrated that the risk of prejudice to the administration of justice, is not outweighed by the public interest in freedom of discussion on matters of public concern: *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249; *Hinch* per Mason CJ at 27, Wilson J at 43 and Deane J at 51; *Attorney General v X* (2000) 49 NSWLR 653.

[10-0400] Contempt by prejudgment

There is an arguable basis of contempt by prejudgment in that, even if the tribunal of fact is unlikely to be influenced, such as when it is constituted by a judge only, prejudgment by the media may undermine public confidence in the administration of justice. The principle has been doubted in Australia: *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 553–560, 570, 571.

[10-0410] Scandalising contempt

Scurrilous, unjustified criticism of the court may amount to contempt by having a real tendency to undermine public confidence in the administration of justice: *The King v Dunbabin, Ex parte Williams* (1935) 53 CLR 434 at 442. For more recent consideration, see *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; *State Wage Case (No 5)* [2006] NSWIRComm 190; *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219; *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [193] et seq, and *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 per Simpson JA at [170]–[244].

Misconduct in relation to parties, witnesses, etc

[10-0420] Misconduct in relation to pending proceedings

Conduct that has a real tendency to improperly influence or deter a witness, judicial officer, juror, party or other person having a role in judicial proceedings may amount to contempt.

The test at common law is whether the action taken against the person had a tendency to interfere with the administration of justice: In the matter of *Samuel Goldman, Re; sub nom Re Goldman* [1968] 3 NSWR 325 at 327, 328. It is not necessary to show actual interference: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 29.

Cases involving pressure upon parties to proceedings will often require an assessment of whether that pressure was improper: *Bhagat v Global Custodians Ltd* [2002] NSWCA 160, per Spigelman CJ at [35]. The mere fact that something that is lawful is threatened does not mean that the pressure is necessarily proper: *Harkianakis*, above, at 30. Contempt by improper pressure on a party or witness may derive from misuse of the court's processes, such as by filing, or threatening to file, defamatory material by affidavit: eg *Y v W* (2007) 70 NSWLR 377.

As to threats to seek costs, including costs against lawyers, see *Nuclear Utility Technology & Environmental Corp Inc (Nu-Tec) v Australian Broadcasting Commission (ABC)* [2009] NSWSC 78. As to inappropriate use of statutory powers to gain an advantage, see *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 cf *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10.

In *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [77], the court noted the distinction to be drawn between a contempt arising from conduct that interferes with the administration of justice in a particular case and interference with the administration of justice generally. In the former case, no contempt will have been committed unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. In *The Prothonotary v Collins* (1985) 2 NSWLR 549, McHugh JA observed, at 567:

> Time and again the courts have said that there can be no contempt unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. Cases of interference with the administration of justice as a continuing process are no doubt an exception to this rule. Their rationale is different from publications which interfere with particular proceedings. They rest on the need to protect the courts and the whole administration of justice from conduct which seeks to undermine the authority of the courts and their capacity to function.

See also *Mirus Australia Pty Ltd v Gage* [2017] NSWSC 1046 per Ward CJ in Eq at [130]ff.

Improper pressure on prospective parties, before any proceedings have been commenced, can constitute a contempt. This is upon the basis that it represents an interference with the administration of justice generally: *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759.

[10-0430] Reprisals

Liability for misconduct in relation to those discharging a role in judicial proceedings is not confined to something said or done while the proceedings are pending, or even in the course of being heard. Reprisals may influence or deter the person affected, and persons generally, in relation to access to the courts (in the case of parties), or the performance of such roles. See *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 (witness); *Prothonotary v Wilson* [1999] NSWSC 1148 at [21(c)] (judge); *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354 (party); *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506 at [20] (counsel); *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389 (juror); *Tate v Duncan-Strelec* [2014] NSWSC 1125.

Temporal and geographical elements may be relevant, but it is immaterial whether the conduct was committed in or outside the court so long as it is an interference with the administration of justice.

[10-0440] Intention

An intention to interfere with the administration of justice is not an element of contempt of court: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371; *Harkianakis* at 28. However, intention is relevant and sometimes important: *Lane v Registrar of the Supreme Court of NSW* (1981) 148 CLR 245 at 258.

What needs to be established is an intention to do an act that has a clear objective tendency to interfere with the administration of justice: *Principal Registrar v Katelaris*, above, at [23].

If the likely effect of the conduct is not self-evident (for example, if it is not clear whether the action has been taken to influence a person in relation to proceedings, or as a reprisal arising from proceedings) further inquiries may be made regarding motive, in order to demonstrate a nexus to the subject person's role in the legal proceedings, see *Registrar of the Supreme Court of NSW (Equity Division) v McPherson* [1980] 1 NSWLR 688 at 699, and, on appeal, *Lane*, above, reviewed in *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at [54].

If intention to influence or deter can be proved, that is usually sufficient to establish liability: *Harkianakis* at 28.

[10-0450] Statutory offences

Part 7 Div 3 of the *Crimes Act* 1900 contains offences relating to threats to or reprisals against, judicial officers, witnesses, jurors, etc.

Breach of orders or undertakings

[10-0460] Validity of orders

An order made by an inferior tribunal is invalid if made without jurisdiction. It is regarded as a nullity and breach of it will therefore not constitute a contempt: *Attorney General v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [27]. The situation is otherwise in respect of the order of a superior court of record, which is taken to be valid until set aside: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620; see also *Papas v Grave* [2013] NSWCA 308 and *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506.

As to the validity of suppression orders see [1-0410].

[10-0470] Construction of orders

As to the construction of court orders (including the relevance of the context in which the order was made), see *Athens v Randwick City Council* (2005) 64 NSWLR 58. Hodgson JA observed at [27] that:

> [t]he construction of an order in respect of which a finding of contempt is sought may involve two inter-related questions. First, what does the order require, on its true construction? And second, is this sufficiently clear to the person affected by the order to support enforcement of that order against that person?

In order to support a prosecution for contempt, an order must be clear in its terms, but if it is, it is no defence that the contemnor may have been mistaken as to its effect: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483.

For recent judicial consideration, see *City of Canada Bay v Frangieh* [2020] NSWLEC 81 at [61]; see also *Rafailidis v Camden Council* [2015] NSWCA 185 and *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717.

[10-0480] Breach of orders and undertakings

Wilful (rather than casual, accidental or unintentional) breach of an order or undertaking by which a person is bound and of which the person has notice, will amount to contempt: *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*, above. It is not necessary to prove a specific intention to disobey the court's order: *Anderson v Hassett* [2007] NSWSC 1310. For a review of applicable principles, see *Doe v Dowling* [2017] NSWSC 202 at [39]–[50].

As to the requirement for notice of orders, see *Amalgamated Televisions Services Pty Ltd v Marsden* (2001) 122 A Crim R 166. As to the availability of inferring notice of an order on the basis that "informed instructions" must have been given to legal representatives, see *Young v Smith* [2016] NSWSC 1051.

A court may generally accept an undertaking from a party in substitution for making an order, subject to the same jurisdictional limitations: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 165. For the purposes of the law of contempt, an undertaking given to the court is treated as if it was an order. Aliter if undertaking given inter partes: *Srotyr v Clissold* [2015] NSWSC 1770.

While the Commonwealth and the State are expected to comply with court orders, enforcement by contempt proceedings is not available: *Hoxton Park Resident's Action Group Inc v Liverpool City Council* [2014] NSWSC 704.

Breach of suppression orders

There are several distinct categories of contempt of court under the common law; breach of suppression orders is one: *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 46; *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [78]. To establish guilt, the applicant must prove beyond reasonable doubt that the respondent published the article (or caused it to be published); the publication of the article frustrated the effect of the suppression order because it contained material that was contrary to or that infringed the terms of the order; and when the article was published, the relevant respondent's knowledge of the terms and effect of the order was such that a reasonable person with that knowledge would have understood that the continued publication of the article would have the tendency to frustrate the efficacy of the order: *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [81]. Where the breach of an order relied upon is deliberate breach of a suppression order, proceedings could be brought under s 16 of the *Court Suppression and Non-publication Orders Act* 2010 (NSW) which provides for a penalty of 1,000 penalty units or imprisonment for 12 months for breaching an order for an individual, or 5,000 penalty units for a body corporation.

[10-0490] Implied undertakings in relation to use of documents provided in proceedings

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence … : *Hearne v Street* (2008) 235 CLR 125 at [96].

The types of material disclosed to which this principle applies include documents inspected after discovery (as to which see also UCPR r 21.7), documents produced on subpoena, witness statements served pursuant to a judicial direction and affidavits: *Hearne v Street* (2008) 235 CLR 125 at [96]. While previously categorised as an "implied undertaking" to the court, this is an obligation of substantive law, and binds third parties who receive the documents knowing of their origin.

As to considerations relevant to granting leave, see *Prime Finance Pty Ltd v Randall* [2009] NSWSC 361 (application for leave to provide copies of affidavits to police on the basis that they disclosed criminal offences). As to the scope of the obligation in relation to affidavits, see *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 533 cf *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [188].

[10-0500] Deliberate frustration of order by third party

Deliberate frustration of court orders will amount to contempt, provided that the purpose of the orders is clear: *CCOM Pty Ltd v Jiejing Pty Ltd* (1992) 36 FCR 524 at 531; *Attorney General v Mayas Pty Ltd*, above, at 355; *Baker v Paul* [2013] NSWCA 426.

For a consideration of the liability of a director for orders directed to a company, see *Mahaffy v Mahaffy* (2018) 97 NSWLR 119.

Refusal to attend on subpoena/give evidence

[10-0510] Liability for refusal to attend on subpoena or to give evidence

Refusal to attend in response to a subpoena is a contempt of court, though it is not a contempt "in the face of the court": *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459; see also UCPR r 33.12.

Refusal to be sworn, or refusal to answer material questions, will constitute contempt, in the absence of any relevant privilege: *Smith v The Queen* (1991) 25 NSWLR 1; *Registrar of the Court of Appeal v Craven (No 2)* (1995) 80 A Crim R 272.

See also procedure, including for the issue of warrant, under s 194 of the *Evidence Act* 1995.

As to proofs required for contempt by failure to comply with a subpoena to produce documents, see *Markisic v Commonwealth* (2007) 69 NSWLR 737; [2007] NSWCA 92 at 748; *Mahaffy v Mahaffy*, above, at [152].

[10-0520] Duress

Duress may be raised as a defence to contempt: *Registrar of the Court of Appeal v Gilby* (unrep, 20/8/91, NSWCA). The principles to be applied are those set out in *R v Abusafiah* (1991) 24 NSWLR 531 at 545. It is not sufficient that there be a generalised fear or apprehension of retaliation, although this may be a matter relevant to penalty: *Gilby*, above; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *R v Razzak* (2006) 166 A Crim R 132 at [24].

[10-0530] Prevarication

While the giving of false answers in the courts of evidence is likely to interfere with the administration of justice, such conduct will not usually constitute contempt. It may amount to contempt if it consists in giving palpably false answers so as to indicate that the witness is merely fobbing inquiry: *Coward v Stapleton* (1953) 90 CLR 573 at 578–579; see also *Keeley v Brooking* (1979) 143 CLR 162 at 169, 172, 174, 178; *Commissioner for the Police Integrity Commission v Walker (No 2)* [2006] NSWSC 696.

Jurisdiction and procedure

[10-0540] Supreme Court and Dust Diseases Tribunal

Contempt of court in the face, or in the hearing of, the Supreme Court may be dealt with under the summary procedure in SCR Pt 55 Div 2 (see [10-0060]) or by directing the registrar to commence proceedings under SCR Pt 55 Div 3. Contempt not in the face or hearing of the court must proceed under Div 3: see [10-0120].

Proceedings for contempt in the face or hearing of the Supreme Court, or for breach of orders or undertakings, are assigned to the division of the court (or the Court of Appeal, as the case may be) in

which the contempt occurred: SCA ss 48(2), 53(3). Contempt proceedings in respect of contempts of the Supreme Court, or of any other court, are otherwise assigned to the Common Law Division: SCA s 53(4).

The Dust Diseases Tribunal has the same powers for punishing contempt of the tribunal as are conferred on a judge of the Supreme Court for punishing contempt of a division of the Supreme Court: *Dust Diseases Tribunal Act* 1989 s 26.

[10-0550] District Court and Local Courts

The District Court has power to punish contempt of court committed in the face of the court or in the hearing of the court: DCA s 199.

The Local Court has the same powers as the District Court in respect of contempt of court committed in the face or hearing of the court: LCA s 24(1).

The District Court may refer an apparent or alleged contempt to the Supreme Court under DCA s 203 and the Local Court may refer an apparent or alleged contempt to the Supreme Court under LCA s 24(4) (see [10-0130]).

A possible contempt may alternatively be referred to the Attorney General for consideration of appropriate action.

Legislation

- *Civil Procedure Act* 2005 (NSW), 3(1), 4(1), Sch 1
- *Crimes Act* 1900, Pt 7 Div 3
- DCA ss 199, 203
- *Dust Diseases Tribunal Act* 1989, s 26
- *Evidence Act* 1995, s 194
- LCA s 24(1), (4)
- *Mental Health (Forensic Provisions) Act* 1990 (rep)
- *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020
- SCA ss 48(2), 53(3), 101(5), 101(6)

Rules

- SCR Pt 55 Div 2
- UCPR rr 1.5(1), 21.7, 33.12
- Supreme Court (General Civil Procedure) Rules 2005 (Vic)

Further reading

- 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

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