Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 49

September 2022

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 49

Update 49, September 2022

[1-0000] Disqualification for bias

Polsen v Harrison [2021] NSWCA 23 has been added at **[1-0020] Apprehended bias** for a useful summary of the principles that are to be applied in an application for recusal for apprehended bias.

[2-0000] Case management

Worthington bht Worthington v Hallissy [2022] NSWSC 753 has been added at **[2-0010] Overview.** This case reiterated that the intent of the UCPR and the court's practices is to ensure parties are given a fair opportunity to advance their cases, while ensuring litigation is not conducted by ambush or surprise.

Aon Risk Services Australia v Australian National University (2009) 239 CLR 175 is discussed at **[2-0020] General principles.** All Practice Notes have been reviewed and updated.

[2-2600] Stay of pending proceedings

The decision of *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 has been added at **[2-2690] Other grounds on which proceedings may be stayed**.

[2-3900] Limitations

The *Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* has also been added at **[2-3965] Cross references to related topics**. In this case, the court noted that the inclusion of s 6A(6) of the *Limitations Act* 1969 recognises that the significant public interest to which the removal of the limitation period for actions of this kind gives effect remains subject to the court's power to stay proceedings in the exceptional cases that call for its exercise.

[2-6300] Judgments and orders

Irlam v Byrnes [2022] NSWCA 81 regarding r 36.2 UCPR and the time period between the delivery of judgment and the delivery of reasons has also been added at **[2-6410] Written reasons.** *Cavanagh v Manning Valley Race Club* [2022] NSWCA 36, a recent decision regarding inadequacy of reasons for judgment has been added at **[2-6440] Reasons for judgment**.

[5-4000] Proceedings for defamation in NSW

This chapter has been extensively updated by her Honour Judge Judith Gibson, DCJ and reviewed by Professor David Rolph, FAAL from the University of Sydney Law School.

[5-7000] Intentional torts

Miles v Doyle (No 2) [2021] NSWSC 1312 and *Irlam v Byrnes* [2022] NSWCA 81 have been added at **[5-7190] Damages including legal costs.**

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

It is noted at **[6-1045] Claims subject to the Motor Accident Injuries Act 2017** that from 29 March 2022, statutory benefits for reasonable funeral expenses following the loss of a foetus of a pregnant woman that results from a motor accident are payable.

[7-1000] Interest

State of NSW v Skinner [2022] NSWCA 9 regarding prejudgment interest under s 151M of the *Workers Compensation Act* 1987 has been added at **[7-1050] Workers Compensation Act 1987**.

[8-0000] Costs

Osei v PK Simpson (2022) 106 NSWLR 458 has been added at **[8-0170] Regulated costs** under the subheading *Claims for personal injury damages.* In that case an injured plaintiff later sued his legal representatives and it was held that as the claim was for professional negligence and not damages for personal injury, the cap under Sch 1, cl 2 of the *Legal Profession Uniform Law Application Act* 2014 does not apply.

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FILING INSTRUCTIONS

Update 49

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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 [emphasis added]": *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 resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place: *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 at [41]–[43] (citing *Ebner* at [7]–[9], [33]).

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 and *Polsen v Harrison* [2021] NSWCA 23 at [46] for a useful summary of the principles that are to be applied in an application for recusal for apprehended bias.

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 an example of where a fair-minded observer would likely be concerned about a current close personal relationship between judge and a prosecutor connected with the proceedings, see *Gleeson v DPP (NSW)* [2021] NSWCA 63 at [29]. 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. See *McIver v R* [2020] NSWCCA 343 at [74] where the NSWCCA stated that "it was particularly important that there be no circumstance which might give rise to the possibility of pre-judgment, conscious or unconscious, as a result of a prior association. The position would be the same if the case was a civil case…".

(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

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.

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.

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.

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

- B Cairns, "Bias and procedural fairness at trial" (2021) 9 *Journal of Civil Litigation and Practice* 182
- 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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Case management

[2-0000] Court's power and duty of case management

The court has an inherent or incidental power to act effectively to regulate its own proceedings: *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476 per McHugh J. It also has a statutory power and duty of case management. This section deals generally with that power and duty. Particular applications are to be found in the sections on "Adjournment" at [2-0200], "Amendment" at [2-0700], "Dismissal for lack of progress" at [2-2400], and "Stay of pending proceedings" at [2-2600].

[2-0010] Overview

Section 56 of the CPA requires that the court manage disputes and proceedings in conformity with the overriding purpose set out in that section and in accordance with the objects enumerated in s 57 (the objects).

The overriding purpose of the CPA and the UCPR in their application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

The objects include efficient disposal of the business of the court, the efficient use of available judicial and administrative resources, and the timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties.

The court must seek to give effect to the overriding purpose in exercising its powers under the Act or rules: s 56(2). Construction of the Act and rules must seek to give effect to the overriding purpose (s 56(2)) and they must be construed and applied as best to ensure the attainment of the objects: s 57(2).

The formulation of techniques and procedures that will enhance speed, or efficiency, or fairness in the resolution of civil disputes is within the power of the court. Novelty is no bar to such power or duty, however, the trammelling of fundamental common law or statutory rights is such a bar: *State of NSW v Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394.

In deciding whether to make an order or direction for the management of proceedings, the court must seek to act in accordance with the dictates of justice. In so deciding, the court must have regard to the provisions of ss 56 and 57, and may have regard to a number of other factors set out in s 58(2) including "such other matters as the court considers relevant in the circumstances of the case" (s 58(2)(b)(vii)); see *Hans Pet Construction v Cassar* [2009] NSWCA 230.

The intent of the UCPR and the court's practices is to ensure that parties are given a fair opportunity to advance their cases, while ensuring that litigation is not conducted by ambush or surprise: *Worthington bht Worthington v Hallissy* [2022] NSWSC 753 at [16].

Emphasis is laid on the elimination of delay (s 59) and the proportionality of costs to the importance and complexity of the subject matter in dispute: s 60.

The court may give directions as to practice and procedure generally and may make a range of orders including dismissing proceedings where there has been a failure to comply with a direction: s 61.

The court may give directions as to the conduct of the hearing including as to limitations of time (s 62), however, the directions must not detract from the principle that each party is entitled to a fair hearing: s 62.

The court may give directions with respect to procedural irregularities: s 63. That section provides that a failure to comply with any requirement of the Act or of the rules, whether in respect of time,

place, manner, form or content or in any other respect shall be treated as an irregularity. There is thus no longer any valid distinction to be made between mere irregularities on the one hand and, on the other, matters which would have been regarded as nullities under the old authorities (see *Ritchie's* [s 63.5]). Non-compliance with the requirements as to service in r 2.7 of the Supreme Court (Corporations) Rules 1999 was held to be an irregularity within the meaning of s 63 of the *Civil Procedure Act* entitling the recipient to apply under s 63(3) for orders setting aside service, but did not of itself invalidate the proceedings or the service. Non-compliance with the rules of court may in certain situations serve the overriding purpose in s 56 of the *Civil Procedure Act* and need not be accompanied by any impropriety as "the rules are to be the servant of justice, not its master". There was no error in the primary judge's finding that it was appropriate to delay service for the applicant to secure a litigation funding agreement: *Choy v Tiaro Coal Ltd* (2018) 98 NSWLR 493 at [36]–[37].

The court may dispense with any requirement of the rules if satisfied that it is appropriate to do so: s 14. It may give directions in respect of any aspect of practice or procedure for which rules or practice notes do not provide: s 16. Section 15 provides for the issue of practice notes.

Section 86 permits the court to impose such terms as it may think fit on the making of any order or direction.

Part 2 of the UCPR supplements the provisions as to case management in the CPA discussed above. Rule 2.1 gives a wide general power to give such directions and orders "as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of proceedings". For an example of the use of r 2.1 to limit medical examinations, see *Tvedsborg v Vega* [2009] NSWCA 57 at [39]–[43]. For an example of the use of r 2.1 (and other provisions of the CPA and UCPR) to preserve pre-trial confidentiality in respect of investigations and discussion of relevant principles, see *Halpin v Lumley General Insurance Ltd* (2009) 78 NSWLR 265.

Rule 2.3, without limiting the generality of r 2.1, enumerates a number of specific matters to which directions and orders may relate.

Rule 2.3(h) and (l) provides that the court may give directions relating to the use of technology, see *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 49 NSWLR 51.

The courts have issued practice notes as listed below in respect of case management including those in respect of specialist lists.

[2-0020] General principles

As to the overriding purpose see the discussion by Einstein J in *Idoport*, above, at [17]–[18]; *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175 at [90]. For a discussion on the requirement that all relevant statutory provisions be taken into account, see *Hans Pet Construction v Cassar*, above.

Procedural directions must be directed towards the attainment of the overriding purpose. It follows that rigid compliance with orders and directions should not be insisted upon if the effect is to compromise attainment of the overriding purpose.

The court must take into account the efficient disposal of the business of the court and the efficient use of judicial resources: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 421 per Kirby P and 430 per Samuels JA.

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 *Aon Risk Services Australia v Australian National University*, the court held that "to the extent that statements about the exercise of the discretion to amend pleadings in that case suggest that case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative": French CJ at [6]; Gummow, Hayne, Crennan, Kiefel and Bell JJ at [111]; Heydon J at [133].

In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 the High Court, in a single judgment, made a very strong statement as to the breadth of powers of case management conferred on the courts by the CPA, the requirement that the courts exercise such powers and the duty of parties and their representatives to positively assist the courts in doing so and to avoid technical disputes about non-essential issues. Paragraphs [51]–[57] deal specifically with "the approach required by the CPA".

See also *Richards v Cornford (No 3)* [2010] NSWCA 134; *Wilkinson v Perisher Blue Pty Ltd* [2012] NSWCA 250 at [52]–[76] and *Kelly v Westpac Banking Corporation* [2014] NSWCA 348.

[2-0030] Dismissal of proceedings or striking out of defence

The emphasis upon the avoidance of delay is complemented by the provisions of r 12.7 of the UCPR which provide for the dismissal of proceedings or striking out of a defence for lack of progress. See "Dismissal for lack of progress" at [2-2400] below.

Legislation

- CPA ss 14, 16, 56–63, 64, 86

Rules

- UCPR rr 2.1, 2.3, 12.7

Practice Notes

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Local Court

Case Management of Civil Proceedings in the Local Court Practice Note Civ 1 of 2022

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Stay of pending proceedings

[2-2600] The power

There is a statutory power for all courts to stay, by order, any proceedings before the court, either permanently or until a specified day: CPA s 67.

The Supreme Court has inherent power to stay proceedings which are an abuse of process: *Jago v District Court of NSW* (1989) 168 CLR 23.

Certain stay proceedings may be affected by the *Trans-Tasman Proceedings Act* 2010 (Cth), as to which see "Trans-Tasman proceedings" at [5-3520]–[5-3540].

[2-2610] Forum non conveniens

An application for a stay of proceedings on the ground of forum non conveniens is ordinarily made by a defendant, with a view to requiring that the claim made by the plaintiff in the proceedings be litigated in some other jurisdiction.

[2-2620] The test for forum non conveniens

The test is whether the court is a "clearly inappropriate forum": *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Garsec v His Majesty The Sultan of Brunei* (2008) 250 ALR 682.

English authorities, such as *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, lay down a different test, namely, in which jurisdiction the case would most suitably be tried. Those cases should be disregarded.

[2-2630] Applicable principles of forum non conveniens

The following statement of principle appears in *Voth*, above, at 554 (HCA [30]):

> First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised "with great care" or "extreme caution".

"Oppressive" in this context means seriously and unfairly burdensome, prejudicial or damaging; and "vexatious" means productive of serious or unjustified trouble and harassment: *Oceanic*, above, per Deane J at 247, approved in *Voth* at 556.

The test focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on a judgment concerning the comparative merits of the two legal systems: *Voth* at 558–559.

For a further statement of principle to the same effect as in *Voth*, see *Henry v Henry* (1996) 185 CLR 571 at 587 (a passage adopted and applied in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 504):

> In *Voth*, this Court adopted for Australia the test propounded by Deane J in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case

> if continuation of the proceedings in that court would be oppressive, in the sense of "seriously and unfairly burdensome, prejudicial or damaging", or, vexatious, in the sense of "productive of serious and unjustified trouble and harassment" [*Oceanic Sun*, above at 247].

See also *Murakami v Wiryadi* (2010) 268 ALR 377.

[2-2640] Relevant considerations for forum non conveniens

Connecting factors

"Connecting factors" are relevant: *Spiliada*, above, per Lord Goff (dissenting) at 477–478, approved in *Voth* at 564–565. According to that passage in *Spiliada*:

- Connecting factors include factors "indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'" (such as the availability of witnesses).
- They also include factors which may make the other forum "the 'natural forum', as being that with which the action (has) the most real and substantial connection", such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

Legitimate personal or juridical advantage

A "legitimate personal or juridical advantage" to the plaintiff in having the proceedings heard in the domestic forum is a relevant consideration: *Spiliada* per Lord Goff at 482–484, a further passage approved in *Voth* at 564–565. According to that passage:

- Such advantages may include damages awarded on a higher scale than in the other forum, a more complete procedure of discovery, a power to award interest, or a more generous limitation period. But the mere fact that the plaintiff has such an advantage is not decisive.
- A stay order might be made notwithstanding that the plaintiff would be defeated by a time bar in the other jurisdiction; but, where a plaintiff has acted reasonably in commencing the proceedings in the domestic court and has not acted unreasonably in failing to commence proceedings within time in the other jurisdiction (for example, by issuing a protective writ), the plaintiff should not be deprived of the advantage of having the proceedings heard in the domestic court.
- Where a stay would otherwise be appropriate and the time limitation in the foreign jurisdiction is dependent on the defendant invoking the limitation, it can be made a condition of the stay that the defendant waive the time bar in the foreign jurisdiction.

Parallel proceedings in different jurisdictions

Parallel proceedings in different jurisdictions should be avoided if possible; it is prima facie vexatious and oppressive to commence a second action locally if an action is pending elsewhere with respect to the matter in issue; but this consideration is not necessarily determinative: *Henry v Henry*, above, at 590–591 (HCA [34]–[35]):

> Parallel proceedings in another country with respect to the same issue may be compared with multiple proceedings with respect to the same subject matter in different courts in Australia. In *Union Steamship Co of New Zealand Ltd v The Caradale* [(1937) 56 CLR 277 at 281], Dixon J observed of that latter situation that "[t]he inconvenience and embarrassment of allowing two independent actions involving the same question of liability to proceed contemporaneously in different courts needs no elaboration." From the parties' point of view, there is no less — perhaps, considerably more — inconvenience and embarrassment if the same issue is to be fought in the courts of different countries according to different regimes, very likely permitting of entirely different outcomes.
>
> It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue. And although there are cases in which it has been held that it is not prima facie vexatious, in

> the strict sense of that word, to bring proceedings in different countries, the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such, in our view, that, prima facie, the continuation of one or the other should be seen as vexatious or oppressive within the *Voth* sense of those words. [references deleted]

Waste of costs

A waste of costs if the proceedings were stayed is a legitimate consideration: *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 at [89].

Local professional standards

Where professional standards in a particular locality are in question, that is a relevant consideration: *Voth* at 570.

Law of the local forum

If the law of the local forum is applicable in determining the rights and liabilities of the parties, that is a very significant consideration against granting a stay of the local proceedings, but not a decisive factor: *Voth* at 566.

Foreign lex causae

Where the applicant for a stay seeks to rely on a foreign lex causae as providing an advantage, it is for the applicant to give proof of the foreign law and, in particular, the features of it which are said to provide the advantage: *Regie Nationale des Usines Renault SA v Zhang*, above, at [72]. Further, the applicant must establish that the lex causae is the foreign law relied upon: *Puttick v Tenon Ltd* (2008) 238 CLR 265.

The local court is not a clearly inappropriate forum merely because foreign law is to be applied as the lex causae: *Regie Nationale des Usines Renault SA v Zhang* at [81].

Agreement to refer disputes to a foreign court

An agreement to refer disputes to a foreign court exclusively does not mandate a determination that the domestic court is a clearly inappropriate forum, but substantial grounds are required for refusing a stay in such a case: *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association Ltd* (1997) 41 NSWLR 559 at 569, per Giles CJ Com Div and the authorities cited therein. Also see *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 at [83]–[92].

Further relevant considerations

The following matters were stated in *Henry v Henry*, above, at 592–593, to be relevant considerations:

- No question arises unless the courts of the respective localities have jurisdiction
- If the orders of the foreign court will not be recognised locally, the application for a stay will ordinarily fail
- If the orders of the foreign court will be recognised locally, it is relevant whether any orders made locally may need to be enforced elsewhere and, if so, the relative ease with which that can be done
- Which forum can provide more effectively for the complete resolution of the matters in issue
- The order in which the proceedings were instituted, the stage the respective proceedings have reached, and the costs that have been incurred, or
- Whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing.

[2-2650] Conditional order

In an appropriate case, proceedings may be stayed conditionally (see above). In *Voth*, the defendant had undertaken not to invoke the time bar available in the foreign court (at 571). A stay was ordered on the condition that the respondent did not plead the bar, provided that the plaintiff commenced proceedings in the foreign court within a time specified in the order.

[2-2660] Conduct of hearing and reasons for decision

Argument should be brief and reasons for decision may ordinarily be brief. The following passage appears in *Voth* at 565 (HCA [53]):

> The qualification is that we think that, in the ordinary case, counsel should be able to furnish the primary judge with any necessary assistance by a short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours. There may well be circumstances in which the primary judge may conclude that it is desirable to give detailed reasons balancing the particular weight to be given to the presence or absence of particular connecting factors and explaining why the local forum is or is not a clearly inappropriate one. Ordinarily, however, it will be unnecessary for the primary judge to do more than briefly indicate that, having examined the material in evidence and having taken account of the competing written and oral submissions, he or she is of the view that the proceedings should or should not be stayed on forum non conveniens (ie "clearly inappropriate forum") grounds.

Suggested formula for ultimate finding

I am satisfied / not satisfied that this court is a clearly inappropriate forum for the determination of these proceedings.

Suggested forms of order

I order that these proceedings be stayed permanently [*adding, if appropriate*] on the condition that …

The application that these proceedings be stayed is dismissed. (Costs as appropriate.)

[2-2670] Related topic: anti-suit injunction

For injunction to restrain the prosecution of proceedings in a foreign court, see *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[2-2680] Abuse of process

Proceedings may be stayed permanently, as an abuse of process, where there cannot be a fair trial due to delay in commencing the proceedings: *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

The varied circumstances in which the use of the court's processes will amount to an abuse, notwithstanding that the use is consistent with the literal application of its rules, do not lend themselves to exhaustive statement. Either of two conditions enlivens the power to permanently stay proceedings as an abuse of process: where the use of the court's procedures occasions unjustifiable

oppression to a party, or where the use serves to bring the administration of justice into disrepute: *UBS AG v Scott Francis Tyne as trustee of the Argot Trust* (2018) 92 ALJR at [1]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [33].

The inherent jurisdiction of the Supreme Court to stay proceedings on this ground extends to proceedings in courts and tribunals over which the Supreme Court exercises a supervisory jurisdiction: *Walton v Gardiner* (1993) 177 CLR 378; *Jago v District Court of NSW*, above.

The power to order a stay provided by s 67 of the CPA is available as a tool to resolve the problem presented by multiple proceedings, and overlaps with the inherent power to stay a proceeding to prevent abuse of its processes, which extends to staying proceedings that are frivolous, vexatious or oppressive: *Wigmans v AMP Ltd* [2021] HCA 7 at [14], [72], [112].

Proceedings may be stayed, as an abuse of process, where the predominant purpose in bringing the action is not the vindication of reputation but to provide a forum for the advancement of the plaintiff's beliefs: *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639, or where there is an attempt to litigate that which should have been litigated in earlier proceedings or to re-litigate a previously determined claim: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [33] citing *Reichel v Magrath* (1889) 14 App Cas 665.

[2-2690] Other grounds on which proceedings may be stayed

- Pending the determination of proceedings in another forum: see *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 and *L & W Developments Pty Ltd v Della* [2003] NSWCA 140; including partial stay of proceedings where not all parties to litigation are parties to the relevant exclusive jurisdiction clause: see *Australian Health and Nutrition Assoc Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419.
- Concurrent criminal proceedings: see [2-0280] in "Adjournment".
- Consolidation of arbitral proceedings: *Commercial Arbitration Act* 2010, ss 27C(3)(c), 33D(3).
- Agreement to mediate and/or arbitrate before action: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13.
- Failure to pay the costs of discontinued proceedings involving substantially the same claim: r 12.4.
- Failure to pay the costs of dismissed proceedings involving substantially the same claim: r 12.10.
- Failure to answer interrogatories: r 22.5.
- Failure to comply with directions. Section 61 of the CPA provides that, in the event of non-compliance with a direction, the court may (amongst other things) dismiss or strike out the proceedings, or may make such other order as it considers appropriate, which would appear to include an order for a stay pending compliance with the direction.
- Failure to conform to timetable for medical examination: *Rowlands v State of NSW* (2009) 74 NSWLR 715.
- Significant delay between the events giving rise to the cause of action and the commencement of proceedings, which delay has resulted in relevant evidence becoming unavailable or impoverished: *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [77], [87]; [182]; [207]; *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292 at [303]; [428].
- Where it is demonstrated on the balance of probabilities that a fair trial would not be possible in the circumstances. Such circumstances may include where the defendant's oral evidence goes to a critical aspect of liability but the defendant is unable to give evidence for example due to incapacity: *Moubarak by his tutor Coorey v Holt* at [88], [92]–[96]; [182]; [207]; or where the

lack of account from, and death of, a major witness would result in an unfair trial: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [3]; [120]–[123].

- For a discussion of lack of proportionality as a ground for a permanent stay, see *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639; [2016] NSWCA 296 at [130]–[143].

This list is not necessarily comprehensive.

Legislation

- CPA ss 61, 67
- *Commercial Arbitration Act* 2010, s 27C(3)(c)
- *Trans-Tasman Proceedings Act* 2010 (Cth)

Rules

- UCPR rr 12.4, 12.10, 22.5

[The next page is 1255]

Limitations

[2-3900] Introduction

The substantive law in relation to limitation of actions is not dealt with in this section except to the extent that the topic is the subject of the CPA and the UCPR.

For a table providing the limitation period for various causes of action under the legislation of the various States and Territories, see *Thomson Reuters*, "Table of Limitation of Actions", at https://support.thomsonreuters.com.au and at [5.10.10] in *The Laws of Australia*.

For the law relating to limitations, as at the years of publication, see P Handford, *Limitation of Actions: The Laws of Australia*, 2017, 4th edn, Thomson Reuters, Australia.

As to the application of limitation provisions to equitable claims, see *In the Matter of Auzhair Supplies Pty Ltd (in Liq)* (2013) 272 FLR 304; [2013] NSWSC 1.

Certain limitation provisions may be affected by the *Trans-Tasman Proceedings Act* 2010 (Cth), as to which see "Trans-Tasman proceedings" at [5-3540].

[2-3910] Provisions relating to personal injury and death in the Limitation Act 1969

In relation to causes of action for personal injury or death, the *Limitation Act* 1969 provides for three categories of case:

> Category 1: where the cause of action accrued before 1 September 1990
>
> Category 2: where the cause of action accrued on or after 1 September 1990, but not including Category 3 cases
>
> Category 3: where the injury or death occurred on or after 6 December 2002, but not including cases covered by the *Motor Accidents Compensation Act* 1999.

[2-3920] Provisions applicable to all three categories

For ultimate bar of 30 years, see Pt 3, Div 1, s 51.

For suspension of limitation periods while a person is under a disability, see Pt 3, Div 2, s 52.

Category 1: Where the cause of action accrued before 1 September 1990

Part 2, Div 2, ss 14 and 19(1)(a) of the Act apply. The limitation period is six years from accrual of the cause of action.

For extension of this limitation period, see Pt 3, Div 3, Subdiv 1, ss 57–60.

Category 2: Where the cause of action accrued on or after 1 September 1990, but not including Category 3 cases

Part 2, Div 2, ss 18A and 19(1)(b) apply. The limitation period is three years from accrual of the cause of action.

For extension of this limitation period, see Pt 3, Div 3, Subdiv 2 (Secondary limitation period), ss 60A–60D. The subdivision provides for a maximum five years extension if it is just and reasonable to so order. Matters to be considered are listed in s 60E. Also see *Certain Lloyds Underwriters v Giannopoulos* [2009] NSWCA 56.

An extension cannot be granted if proceedings had not commencing within the five year secondary limitation period: *Turagadamudamu v PMP Ltd* (2009) 75 NSWLR 397.

Further as to Categories 1 and 2: Discretionary extension for latent injury etc

For a further provision for extension in relation to Category 1 and Category 2 cases, see Pt 3, Div 3, Subdiv 3, ss 60F–60H. The extension is available where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time. Matters to be considered are listed in s 60I.

As to the limits of permissible cross-examination at the hearing of such an application, see *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389. In that case, Handley and Beazley JJA at 394–395, Santow AJA agreeing, approved the review of the authorities relating to ss 60G and 60I provided in the judgment under appeal, *McLean v Commonwealth of Australia* (unrep, 28/6/96, NSWSC), which included the following passage:

1. The matter or matters in s 60I(1)(a), as to which the applicant says he was unaware at the relevant time, need not be proved as the fact.
2. Such matters need only have been claimed in the cause, subject to the following qualification.
3. The claimed matter must not be fanciful, in the sense that there must be a serious issue to be tried.
4. The last-mentioned requirement will ordinarily be satisfied by establishing that the plaintiff is likely to be able to adduce credible evidence at the trial which, if accepted, would establish the matter in question, or that there is a reasonable prospect that he would be able to do so.
5. Cross-examination of witnesses on the motion concerning such matters and/or concerning the merits of the cause of action as a whole will ordinarily be inapposite, subject to the following qualification.
6. Cross-examination of witnesses will be permitted if cross-examination might show that the plaintiff's prospects of proving the matter or matters, as to which ignorance is alleged, and/or the cause of action as a whole are hopeless or, at least, extremely low.
7. Proof of the applicant's unawareness, at the relevant time or times, of one or more of the matters specified in s 60I(1)(a) (as distinct from the matters themselves) must be proved as a fact.
8. Ordinarily, liberal, if potentially productive, cross-examination of the applicant and any other witnesses on the issue of ignorance will be allowed.

As to the cross-examination of expert witnesses on an application of this kind, Handley and Beazley JJA said in their judgment at 395, Santow AJA agreeing:

> We also endorse the judge's interlocutory ruling disallowing cross-examination of the applicant's experts. An application for extension is not a trial, or a dress rehearsal for the trial. The court is concerned with whether there are serious questions to be tried, and once this threshold is established on the relevant issues, cross-examination or further cross-examination on those issues can serve no useful purpose. We respectfully adopt the judge's reasons on these matters. These grounds of appeal have not been established.

Category 3: Where the injury or death occurred on or after 6 December 2002, but not including cases covered by the Motor Accidents Compensation Act 1999

Part 2, Div 6, ss 50A–50F apply. The limitation period is the first to expire of "the 3 year post discoverability limitation period" and "the 12 year long-stop limitation period": s 50C. For the meaning of these terms and for provisions relating to the date on which a cause of action is discoverable, see ss 50C and 50D.

There is no provision for extension of the limitation period in Category 3 cases.

For special provisions relating to minors injured by close relatives and relating to the effect of disability on the limitation period, see ss 50E and 50F. For a detailed analysis of the provisions relating to this category, see *Baker-Morrison v State of NSW* (2009) 74 NSWLR 454 and *State of NSW v Gillett* [2012] NSWCA 83.

[2-3930] Motor Accidents Compensation Act 1999

The time limit is three years except with leave of the court: s 109(1). As to the circumstances under which time does not run, see s 109(2) and *Paice v Hill* (2009) 75 NSWLR 468.

Leave must not be granted unless the claimant provides a full and satisfactory explanation for the delay and the total damages likely to be awarded if the claim is successful are not less than the formula in the section: s 109(3).

The requirement as to damages does not apply to a claimant who is legally incapacitated because of age or mental capacity: s 109(4).

For the meaning of a full and satisfactory explanation, see *Russo v Aiello* (2003) 215 CLR 643.

The *Limitation Act* 1969 does not apply: s 109(5).

The discretionary principles concerning applications for extension of time generally (see below) would apply.

[2-3935] Motor Accident Injuries Act 2017

The time limit is three years except with leave of the court: s 6.32(1). As to the circumstances under which time does not run, see s 6.32(2) and *Paice v Hill* (2009) 75 NSWLR 468.

Leave must not be granted unless the claimant provides a full and satisfactory explanation for the delay and the total damages likely to be awarded if the claim is successful are not less than the formula in the section: s 6.32(3).

The requirement as to damages does not apply to a claimant who is legally incapacitated because of age or mental capacity: s 6.32(4).

For the meaning of a full and satisfactory explanation, see *Russo v Aiello* (2003) 215 CLR 643.

The *Limitation Act* 1969 does not apply: s 6.32(5).

The discretionary principles concerning applications for extension of time generally (see below) would apply.

[2-3940] Workers Compensation Act 1987

The limitation period for an action for damages against an employer who has paid compensation is three years from the date of injury except by leave of the court: s 151D(2).

Again, the *Limitation Act* 1969 does not apply (s 151D(3)), and the discretionary principles concerning applications for extension of time generally would apply: see [2-3950].

In certain cases time may cease to run: s 151DA, *Paper Coaters Pty Ltd v Jessop* [2009] NSWCA 1.

[2-3950] Discretionary considerations concerning applications for extension of time generally

The following general principles were laid down in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Holt v Wynter* (2000) 49 NSWLR 128; and *Itek Graphix Pty Ltd v Elliott* (2002) 54 NSWLR 207.

1. The onus is on the applicant to satisfy the court that the limitation period should be extended.
2. The test is whether the justice of the case requires that the application be granted.
3. A material consideration is whether a fair trial is possible by reason of the time that has elapsed since the events giving rise to the cause of action. That is to be judged at the time of the application. It is not a question of comparing the situation at the time of the application with the situation when the limitation period expired and confining attention to any additional prejudice.
4. The length of delay and any explanation for it are relevant considerations.
5. A respondent is prima facie prejudiced by being deprived of the protection of the limitation period.

6. It is open to the respondent to adduce evidence of any further particular prejudice claimed.
7. The application should be refused if the effect of granting an extension would result in significant prejudice to the respondent.
8. The application should not be granted if the applicant, having made a deliberate decision not to commence proceedings within the limitation period, fails to give a satisfactory explanation for that conduct, notwithstanding that the respondent would suffer no prejudice from the delay.

As to what is meant by a fair trial, Priestley J said in *Holt v Wynter* (2000) 49 NSWLR 128 at [79]:

> … One thing seems to be clear; that is that the term is a relative one and must, in any particular case, mean a fair trial between the parties in the case in the circumstances of that particular case. Further, for a trial to be fair it need not be perfect or ideal. That degree of fairness is unattainable. Trials are constantly held in which for a variety of reasons not all relevant evidence is before the court. Time and chance will have their effect on evidence in any case, but it is not usually suggested that that effect *necessarily* prevents a fair trial. [Emphasis in original.]

Circumstances relevant to the grant of leave are not limited to those concerning the fairness of any trial between the applicant and the prospective defendant: *Windsurf Holdings Pty Ltd v Leonard* [2009] NSWCA 6 at [80]–[83]. Such circumstances may include the expiry of insurance cover: *Windsurf Holdings Pty Ltd v Leonard*, above, at [90].

A court exercising a discretion under a limitation law of another state or territory must exercise the discretion as far as practicable in the manner in which it is exercised in comparable cases by the courts of that state or territory: *Choice of Law (Limitation Periods) Act* 1993 s 6; *Windsurf Holdings Pty Ltd v Leonard* at [14].

[2-3960] Pleading the defence

A defence that the proceedings are statute barred must be specifically pleaded. This is so notwithstanding that the statute extinguishes the cause of action: *Limitation Act* 1969, s 68A; UCPR r 14.14(2) and (3).

Section 63 provides that, on the expiration of the limitation period fixed by the Act, the cause of action is extinguished. However, the effect of s 68A is that the benefit of the extinction of the cause of action is waived by the defendant if the bar is not pleaded: *Commonwealth of Australia v Mewett* (1995) 59 FCR 391, per Lindgren J at 421.

As to the position where the court has no jurisdiction, see *Turagadamudamu v PMP Ltd* (2009) 75 NSWLR 397.

Whether to decide a limitation defence separately

If a limitation defence is raised or anticipated, there is usually no doubt that the limitation period has run out and the only question, in personal injury cases, is whether the plaintiff should be granted an extension of the limitation period. However, where there are serious issues for determination under the limitation defence (such as when the plaintiff first suffered damage), a question arises as to whether to determine any such issue separately in advance of the hearing of the cause.

A separate determination of the defence, or of some issue arising under the defence, is rarely entertained but may be appropriate in the circumstances of the case. For relevant considerations, see "Separate determination of questions" at [2-6100].

Whether to decide an application to extend the limitation period separately

An application for extension of the limitation period may be made in one of the following ways:

- by summons before filing a statement of claim
- by notice of motion filed with the statement of claim, or
- by notice of motion after filing the statement of claim.

Irrespective of how the application is made, a question arises as to whether to determine the application separately or to stand the application over to be heard concurrently with the cause.

On the other hand, there may be cases where it is preferable to stand the application over to be heard in conjunction with the cause, for example:

- where there is little by way of other evidence to be adduced at the hearing of the cause
- where a question of credibility arises in relation to the same witness or witnesses with the potentiality of inconsistent findings of fact, or
- where it would be unduly burdensome or unfairly prejudicial for the plaintiff and/or other witnesses to be examined more than once concerning facts in common between the application and the cause.

Whether to decide the issue of liability when an extension of time has been denied

In *Prince Alfred College Inc v ADC* (2016) 90 ALJR 1085; [2016] HCA 37 the High Court observed at [9]:

> The Court generally encourages primary judges to deal with all issues, even if one is dispositive, so that any appeal may be final.

However, in that case, for reasons set out at [111]–[119], which included prejudice to the defendant caused by the significant passage of time and destruction of evidence, the court held that the decision having been made to deny an extension of time, the issue of liability should not have been determined.

[2-3965] Cross references to related topics

- Amendment, see "Limitation periods" at [2-0780] for amendment raising a cause of action which is statute barred; and "Grounds for refusal of amendment" at [2-0720] for a late application to add a limitation defence.
- Cross-vesting legislation, see "Cross-vesting" at [2-1400] for cases where different limitation periods are applicable.
- Consolidation of proceedings, see [2-1800] regarding the court's power to order consolidation to preserve a party's rights under the *Limitation Act* 1969.
- Stay of pending proceedings, see "Legitimate personal or juridical advantage" at [2-2610] where a more generous limitation period in the domestic forum may be a relevant consideration in deciding to order a stay.
- Summary disposal and strike out applications, see "Limitation defence" at [2-6920]: limitation questions should be decided in interlocutory proceedings only in the clearest of cases.
- As to limitation issues in defamation proceedings, see [5-4050].
- No limitation period in child abuse actions, s 6A *Limitation Act*: Legislative amendments which inserted s 6A into the *Limitation Act* 1969 so as to disapply the statute of limitations in respect of such claims manifest an intention that the passage of time is not of itself to be treated as unacceptably prejudicing a fair trial. However, the same amendments, by s 6A(6), also evince the intention that they not detract from the court's duty to control its process by staying proceedings which are an abuse of process where a fair trial can no longer be had: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [3] per Brereton JA. See also [2-2690] Other grounds on which proceedings may be stayed.

[2-3970] Table of limitation provisions in NSW

Adapted with permission from P Handford, *Limitation of Actions: The Laws of Australia*, 2012, 3rd edn, Thomson Reuters, Australia.

This table deals only with the limitation periods of general application set out in the *Limitation Act* 1969 and related legislation of New South Wales or the Commonwealth. There are other limitation rules which are set out in other statutes, with which the service does not deal. Unless otherwise stated, references to sections are references to the *Limitation Act* 1969.

References in square brackets are references to the paragraphs from *Limitation of Actions: The Laws of Australia* in which the limitation provisions in question are discussed.

Limitation periods run from the time when the cause of action accrues, unless some other rule is stated. The rules dealing with when a cause of action accrues are discussed in the paragraphs referred to. "P" refers to the plaintiff and "D" refers to the defendant.

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
CONTRACT AND QUASI-CONTRACT		
Contract (except actions founded on a deed)	6 years: s 14(1)(a) See [5.10.620]	
Actions for seamen's wages	6 years: s 22(1) See [5.10.700]	
Actions on a deed	12 years: s 16 See [5.10.710]	
Quasi-contract	6 years: s 14(1)(a) See [5.10.720]	
Action arising by virtue of frustration of contract	6 years from date of frustration: s 14A See [5.10.720]	
Actions for an account	6 years: s 15 See [5.10.1870]	
TORT		
Tort (other than specific cases set out below)	6 years: s 14(1)(b) See [5.10.740]	
Trespass	6 years: s 14(1)(b) (General tort limitation period) See [5.10.740], [5.10.760]	
Second or subsequent conversion	6 years from accrual of original cause of action: s 21 See [5.10.770]	
Actions for breach of statutory duty	6 years: s 14(1)(b) See [5.10.740]	
Defamation: Causes of action accruing before 1 January 2006	1 year from publication: s 14B(3) (now repealed) See [5.10.870]	3 years from publication, if unreasonable for P to have commenced action within 1 year from publication: s 56A (as in force prior to amendment). See [5.10.870]
Defamation: Causes of action accruing on or after 1 January 2006	1 year from publication: s 14B (subject to transitional provisions in Sch 5 Pt 2 cl 7(2). See [5.10.880]	3 years from publication, if unreasonable for P to have commenced action within limitation period: s 56A(2) See [5.10.880]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Contribution and indemnity between joint tortfeasors	2 years from date action accrues to tortfeasor, or 4 years from expiry of limitation period for principal cause of action, whichever period expires first: s 26(1) See [5.10.1920]	
PERSONAL INJURY		
Personal injury: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1050]	1 year after material facts of decisive character within P's means of knowledge: s 58(2) See [5.10.1050] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4 See [5.10.1080]
Personal injury: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A See [5.10.1060]	An additional 5 years, if just and reasonable: s 60C See [5.10.1070] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, See [5.10.1080]
Personal injury: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.1090]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A See [5.10.1100] There is a special provision for minors: s 62D See [5.10.2230]
Dust-related conditions	No limitation period: *Dust Diseases Tribunal Act* 1989 s 12A See [5.10.990]	
Child abuse	No limitation period where death or personal injury results from child abuse: s 6A (has retrospective effect).	
Road accidents	See [5.10.990]	
Work accidents	See [5.10.990]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Wrongful death actions: Causes of action accruing before 1 September 1990	6 years from death: s 19(1) See [5.10.1340]	1 year after material facts of decisive character within deceased's means of knowledge: s 60(2) See [5.10.1340] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4
Wrongful death actions: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years from death: s 19(1)(b) See [5.10.1340]	5 years, if just and reasonable: s 60D(2) See [5.10.1340] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60H(2) See [5.10.1340]
Wrongful death actions: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from death, whichever expires first: s 50C(1) See [5.10.1340]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A(2) See [5.10.1340]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1760] and [5.10.2010]	1 year after material facts of decisive character within P's means of knowledge: s 59(2) See [5.10.2020]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A(2) See [5.10.1760] and [5.10.2010]	Up to 5 years if just and reasonable: s 60C(2) See [5.10.2020]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from death, whichever expires first: s 50C See [5.10.1760] and [5.10.2010]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A(2) See [5.10.1340]
Cause of action in tort surviving against estate of deceased person	Period same as if deceased had survived See [5.10.1760] and [5.10.2010]	
PROPERTY DAMAGE AND ECONOMIC LOSS		
Action for negligence for property damage or economic loss	6 years: s 14(1)(b) (general tort limitation period) See [5.10.830] See also [5.10.1470]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Action in respect of defective building work	10 years from completion: *Environmental Planning and Assessment Act* 1979 s 6.20 See [5.10.840]	
RELATED ACTIONS		
Actions on a judgment	12 years from date judgment became enforceable: s 17(1) See [5.10.1970]	
Actions to enforce an arbitral award (where agreement to arbitrate not under seal)	6 years: s 20(2)(b) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.1980] and [5.10.1910]	
Actions to enforce an arbitral award (where agreement to arbitrate made under seal)	12 years: s 20(2)(a) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.1980] and [5.10.1910]	
Actions to enforce a recognizance	6 years: s 14(1)(c) See [5.10.1990]	
Actions to recover a penalty or forfeiture or other sum recoverable by virtue of an enactment	2 years: s 18(1) See [5.10.2000]	
Actions to recover sum recoverable by virtue of an enactment (other than penalty or forfeiture or sum by way of penalty or forfeiture)	6 years: s 14(1)(d) See [5.10.2000]	
Actions to recover arrears of income	6 years: s 24(1) See [5.10.2040]	
LAND		
Action to recover land	12 years: s 27(2) See [5.10.1470]	
Action to recover land by holder of future interest to recover land	12 years: s 27(2) Action accrues when P becomes entitled to immediate possession, if no person in possession under interest claimed: s 31 See [5.10.1580]	
Action by tenant entail	Entailed interests abolished See [5.10.1630]	
Actions by the Crown to recover land	30 years: s 27(1) See [5.10.1620]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Action to recover land brought by person other than Crown where right first accrued to Crown	At any time before expiration of Crown limitation period, or 12 years from date when right of action accrued to person other than Crown, whichever period first expires: s 27(4) See [5.10.1620]	
Action to recover arrears of rent, or damages in respect of arrears	6 years: s 24(1) See [5.10.1660]	
MORTGAGES		
Action by mortgagor to redeem (land and personalty)	12 years from date mortgagee last went into possession, or last received payment of principal or interest: s 41 See [5.10.1680]	
Action by mortgagee to recover possession (land and personalty)	12 years: s 42(1)(b) See [5.10.1690]	
Action by mortgagee to foreclose (land and personalty)	12 years: s 42(1)(c) See [5.10.1700]	
Action by mortgagee to recover principal money (land and personalty)	12 years: s 42(1)(a) See [5.10.1710]	
Action by mortgagee to recover interest	6 years from accrual (or date prior mortgagee discontinues possession) or when limitation period for action to recover principal expires, whichever period first expires: s 43(1) See [5.10.1720]	
TRUSTS		
Actions by a beneficiary against a trustee to recover trust property, or for breach of trust	6 years: s 48(a) See [5.10.1730]	
Actions in respect of fraud or fraudulent breach of trust, and actions to recover trust property converted by a trustee	12 years from date of discoverability, or expiration of any other applicable limitation period under *Limitation Act*, whichever is later: s 47(1) See [5.10.1740]	
DECEASED ESTATES		
Actions claiming the personal estate of the deceased, under will or on intestacy	6 years: s 48 (breach of trust limitation period) See [5.10.1760]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions to recover arrears of interest in respect of legacy, or damages in respect of arrears	6 years: s 24(1) See [5.10.1760]	
ADMIRALTY ACTIONS		
Maritime claims generally	Limitation period that would have been applicable if proceeding brought otherwise than under *Admiralty Act* 1988 (Cth), or 3 years from when cause of action arose: *Admiralty Act* 1988 (Cth) s 37(1) See [5.10.1880]	May be extended where court otherwise has no power to extend limitation period in respect of maritime claim, but has power to extend limitation period in respect of claim of same kind: *Admiralty Act* 1988 (Cth) s 37(3) See [5.10.1890]
Actions to enforce claim or lien against ship or shipowner in respect of damage to another ship, its cargo or freight, any property on board, or loss of life or personal injury suffered by anyone on board	2 years from date of damage: s 22(2), (3) See [5.10.1880]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.1890]
Actions to enforce claim or lien in respect of salvage services	2 years from date services rendered: s 22(3), (4) See [5.10.1890]	Can be extended to such extent as court thinks fit: s 22(3), (4) See [5.10.1890]
MISCELLANEOUS		
Arbitrations	After expiration of limitation period fixed by *Limitation Act* for cause of action in respect of same matter: s 70(2) See [5.10.1910]	In stated circumstances, court can order that time between commencement of arbitration and making of order should not count in reckoning of limitation period: s 73 [5.10.1910]
Actions to recover tax	12 months after tax paid: *Recovery of Imposts Act* 1963 s 2(1)(b) See [5.10.2040]	
ULTIMATE BAR		
Ultimate bar	30 years from date limitation period runs (in all cases except wrongful death or personal injury where the court has extended the limitation period): s 51(1) See [5.10.2150]	

Legislation

- *Admiralty Act* 1988 (Cth) s 37
- *Choice of Law (Limitation Periods) Act* 1993 s 6
- *Dust Diseases Tribunal Act* 1989 s 12A

- *Environmental Planning and Assessment Act* 1979 s 6.20
- *Limitation Act* 1969 (NSW) ss 14, 14A, 14B, 15, 16, 17, 18, 18A, 19, 20, 21, 22, 24, 26, 27, 41, 42, 43, 47, 48, 50A–50F, 51, 52, 57–60, 60A–60D, 60E, 60F–60H, 60G, 60I, 63, 68A, 70, 73
- *Motor Accidents Compensation Act* 1999 s 109(1), (3), (5)
- *Motor Accident Injuries Act* 2017 s 6.32(1)–(5)
- *Recovery of Imposts Act* 1963 s 2(1)(b)
- *Trans-Tasman Proceedings Act* 2010 (Cth)
- *Workers Compensation Act* 1987 s 151D(2), (3)

Rules

- UCPR r 14.14(2), (3)

Further References

- P Handford, *Limitation of Actions: The Laws of Australia*, 2017, 4th edn, Thomson Reuters, Australia

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Judgments and orders

[2-6300] Introduction

Judgments and orders are dealt with in Pt 7 of the CPA and Pt 36 of the UCPR. Section 63 of the *Supreme Court Act* 1970 is also relevant. As to the meaning of judgments and orders, see *Thomson Reuters* at [r 36.0.40]; *Salter v DPP* (2009) 75 NSWLR 392.

[2-6310] Duty of the court

The court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires: CPA s 90(1).

In doing so the court must seek to facilitate the just, quick and cheap resolution of the real issues in the proceedings: CPA s 56.

The court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters of controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided: SCA s 63.

At any stage of proceedings, the court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process or notice of motion: r 36.1.

The rule calls for the resolution of all matters in dispute between the parties and allows a determination in favour of a defendant's claim even though a cross-claim has not been filed.

The position remains that, at least generally, the proceedings should be put in proper form before the matter is completed: *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446.

It may also be the case that particular relief should not be granted having regard to the way in which the case has been conducted.

[2-6320] Consent orders

A consent order, once authenticated or signed by a judge, formalises the terms of agreement between two parties and makes it binding. Generally a court will make consent orders, however, see *Ritchie's* at [36.1A.2] for examples of situations in which such orders will be refused. Following *Damm v Coastwide Site Services Pty Ltd* [2017] NSWSC 1361, r 36.1A was amended to clarify that the court must be satisfied that all relevant parties to the proceedings have been notified before giving a consent judgment or ordering that such a judgment be entered. The court should be independently satisfied it has jurisdiction to make the consent order, because jurisdiction cannot be conferred by consent.

[2-6330] All issues

It is desirable for a judge to determine all issues in question and, in particular, to make findings as to damages even when a claim fails on the issue of liability, at least where an appeal is reasonably possible: *Nevin v B & R Enclosures* [2004] NSWCA 339 at [74]–[75]. However, a further hearing as to damages should not be held where liability has been determined adversely to the plaintiff on the hearing of a separate issue: *Di Pietro v Hamilton* (unrep, 6/9/90, NSWCA).

It may, however, be advisable in certain circumstances to "grant liberty to apply" or "reserve the case for further consideration". The reason for and affect of these orders is discussed in considerable detail in *Australian Hardboards Ltd v Hudson Investment Group Ltd* (2007) 70 NSWLR 201 Campbell JA at [50]–[75].

[2-6340] Cross-claims

Where there is a claim by a plaintiff and a cross-claim by a defendant the court may give judgment for a balance or in respect of each claim: CPA s 90(2). The same can be done in respect of several claims between plaintiffs, defendants and other parties: CPA s 90(2).

[2-6350] Effect of dismissal

The dismissal of any proceedings, either generally or in relation to any cause of action, or of the whole or any part of a claim for relief in any proceedings does not, subject to the terms of any order for dismissal, prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings: CPA s 91(1).

However if, following a determination on the merits in any proceedings, the court dismisses the proceedings, or any claim for relief of the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in any court: CPA s 91(2).

[2-6360] Possession of land

A judgment for possession of land takes the place of and has, subject to the UCPR, the same effect as a judgment for ejectment given under the procedure of the Supreme Court before 1 July 1972: see CPA s 92. See s 20 of the CPA as to the substitution of a claim for judgment for possession of land for an action in ejectment and the discussion in *Ritchie's* [s 20.5]–[s 20.25] and *Thomson Reuters* [s 20.20]–[s 20.40].

[2-6370] Detention of goods

As to judgments for the detention of goods, including the alternatives open to the court, see CPA s 93. As to the exercise of the discretion to order a specific restitution of goods, see *Ritchie's* [s 93.5]–[s 93.15] and *Thomson Reuters* [s 93.40].

[2-6380] Set off of judgments

As to set off of judgments see "Set off and cross-claims" at [2-2000].

[2-6390] Joint liability

Section 95 of the CPA deals with the consequences of a judgment against one or more, but not all, persons having a joint liability. See *Ritchie's* [s 95.5]–[s 95.25] and *Thomson Reuters* [s 95.20].

[2-6400] Delivery of judgment

Traditionally judgments were delivered orally in open court: *Palmer v Clarke* (1989) 19 NSWLR 158 at 164. Rules 36.2 and 36.3 facilitate the delivery of judgments, particularly in the District Court and the Local Court, where the decision has not been an extempore one delivered orally at or following the hearing.

[2-6410] Written reasons

Where a court gives a judgment or makes any order or decision and its reasons for the judgment, order or decision are reduced to writing, it is sufficient for the court to state its judgment, order or decision orally, without stating the reasons: r 36.2(1). Usually after the statement of the judgment, order or decision is made the judicial officer says: "I publish my reasons".

After the oral statement a written copy of the judgment, order or decision including the written reasons for it must then be delivered to an associate, registrar or some other officer of the court for delivery to the parties or may be delivered directly to the parties: r 36.2(2).

Reasons may be delivered at some time after delivery of judgment rather than, as Samuels JA said in *Palmer v Clarke* (1989) 19 NSWLR 158, at that time. While the words in r 36.2 "After a judgment" combined with … "must then be delivered" suggests that it is necessary for the reasons to be delivered with a degree of contemporality, the rule does not specify the limit of any timeframe that might be permissible. If a delay is de minimis and of no consequence, it would not be in breach of r 36.2. Each case depends on its particular circumstances: *Irlam v Byrnes* [2022] NSWCA 81 at [119]–[122].

[2-6420] Deferred reasons

Whilst the Supreme Court has an inherent power to make orders and give reasons later, whether oral or written (*King Investment Solutions Pty Ltd v Hussain* (2005) 64 NSWLR 441), the District Court and Local Court do not have that power and must comply with the relevant legislation: *Palmer v Clarke* at 165; *Cumming v Tradebanc International Ltd* [2002] NSWSC 70 at [38]–[58].

[2-6430] Reserved judgment

If a judicial officer reserves judgment or decision on any question, that judgment or decision may be given either in open court or in the absence of the public, or reduced to writing, signed and forwarded to the registrar at the venue for the proceedings: r 36.3(1). If the judgment or decision is given by the judicial officer, it may be at the venue of the proceedings or at any other place at which the judicial officer is authorised to hear or dispose of the proceedings. If a registrar receives a judgment so forwarded, the registrar must appoint a time for the decision or judgment to be read. The registrar must give at least 24 hours notice to the parties, in writing or otherwise, of the appointed time. At that time the judgment or decision must be read by another judicial officer or the registrar, whether or not the court is sitting at that time: r 36.3(2).

A judgment or decision so given or read takes effect at that time and is as valid as if given by the judicial officer at the hearing: r 36.3(3).

The procedure authorised by r 36.2 applies to a reserved judgment or decision: r 36.3(4).

[2-6440] Reasons for judgment

As to the content of reasons for judgment, see Judicial Commission of NSW, *Handbook for Judicial Officers*, 2021, "Judicial method" — ; *Ritchie's* [36.2.10]–[36.2.35]; *Thomson Reuters* [r 36.2.60].

See also *The Nominal Defendant v Kostic* [2007] NSWCA 14 (failure to provide adequate reasons regarding medical evidence); *Whalan v Kogarah Municipal Council* [2007] NSWCA 5 (judge's reasons did not engage with the case presented by plaintiff). As to reasons for demeanour findings, see *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186. As to amendments or additions to ex tempore reasons, see *Spencer v Bamber* [2012] NSWCA 274. Concision in judgments is desirable, but not if it comes at the expense of failing to give adequate reasons: *Cavanagh v Manning Valley Race Club* [2022] NSWCA 36 at [24].

Reasons, which may be short, are required for orders under s 10A of the *Criminal Assets Recovery Act* 1990: *International Finance Trust Company v NSW Crime Commission* [2008] NSWCA 291; *Elfar v NSW Crime Commission* [2009] NSWCA 348.

[2-6450] Setting aside and variation of judgments and orders

See commentary at [2-6600].

[2-6460] Date of effect of judgments and orders

A judgment or order generally takes effect as of the date on which it is given or made, or, if the court orders that it not take effect until it is entered, as of the date on which it is entered: r 36.4(1).

However, if the court directs the payment of costs and the costs are to be assessed, the order takes effect as of the date when the relevant cost assessor's certificate is filed: r 36.4(2).

Further, despite the above rules, the court may order that a judgment or order is to take effect as of a date earlier or later than the date fixed by these subrules: r 36.4(3).

Although it is not entirely clear that r 36.4 applies in circumstances where the court has not expressly ordered that costs be assessed, the court in *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 211 ordered that the costs judgment take effect earlier than the date when the costs assessor's certificate is filed: at [27].

As to the discretion conferred by r 36.4(3), see *Ritchie's* [36.4.7] and *Thomson Reuters* [r 36.4.60].

[2-6470] Time for compliance with judgments and orders

If a judgment or order requires a person to do an act within a specified time the court may, by order, require the person to do the act within another specified time: r 36.5(1). If a person is required to do the act forthwith, or forthwith on a specified event or the time in which it is to be done is not specified, the court may require the person to do the act within a specified time: r 36.5(2).

If no time is specified in a judgment or order for doing an act, it is not enforceable until that time is specified: *Wyszynski v Bill* [2005] NSWSC 110 at [45].

[2-6480] Arrest warrants

An arrest warrant issued by order of the court must be signed by the judicial officer or by a registrar: r 36.9.

[2-6490] Entry of judgments and orders

Any judgment or order of the court is to be entered: r 36.11(1).

A judgment or order is taken to be entered, unless the court orders otherwise, when it is recorded in the court's computerised court record system: r 36.11(2). To be effective, the record must set out the judgment or orders made: *Mills v Futhem Pty Ltd* (2011) 81 NSWLR 538 at [27].

If the court directs that a judgment or order be entered forthwith, the judgment or order is taken to be entered when a document embodying the judgment or order is signed and sealed by a judicial officer or a registrar or when the judgment or order is recorded in the court's computerised court record system, whichever first occurs: r 36.11(2A).

As to the extended meaning of judgment or order for the purpose of this rule, see r 36.11(3).

As to the practice and procedure of the various courts, see *Thomson Reuters* [r 36.11.61]–[r 36.11.80].

For a detailed discussion of r 36.11 and related issues see: *Mills v Futhem Pty Ltd* (2011) 81 NSWLR 538. As to the effect of a judgment being entered, see *Katter v Melhem* (2015) 90 NSWLR 164; [2015] NSWCA 213 at [69]–[81].

[2-6500] Service of judgment or order not required

A sealed copy of a judgment or order need not be served unless the UCPR expressly so requires or the court so directs: r 36.14.

A judgment is not enforceable by committal or sequestration unless a sealed copy is served personally on the person bound by the judgment (r 40.7(1)(a)) and, if relevant, within the appropriate time: r 40.7(1)(b). This rule does not apply to a committal or sequestration arising from a failure to comply with the requirements of a subpoena.

For circumstances in which it would be appropriate for the court to order such service, see *Thomson Reuters* [r 36.14.40]. Examples are where substituted service is ordered or a non-party is affected by an order.

Legislation

- CPA ss 20, 56, 90, 91, 92, 93, 95, Pt 7
- *Criminal Assets Recovery Act* 1990 s 10A
- SCA s 63

Rules

- UCPR rr 36, 40.7

Further references

- *Ritchie's* [s 20.5]–[s 20.25], [36.1.10], [36.4.7], [s 93.5]–[s 93.15], [s 95.5]–[s 95.25]
- *Thomson Reuters* [s 20.20]–[s 20.40], [r 36.4.60], [r 36.11.61]–[r 36.11.80], [r 36.14.40], [s 93.40], [s 95.20]

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Proceedings for defamation in NSW

Acknowledgement: the following material has been prepared by her Honour Judge Judith Gibson, District Court of NSW and was reviewed in 2022 by Prof David Rolph, FAAL, Professor of Law, University of Sydney Law School.

[5-4000] Introduction

The topics covered by this section are:

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

Defamation actions are perceived as "controversial" (P George, *Defamation Law in Australia*, 3rd edn, LexisNexis, Sydney, 2017 ("George") at [3.13]) because freedom of speech and protection of reputation are difficult to balance. Many of the complexities derive from the maintaining of this balance.

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

[5-4005] The legislative framework

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

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

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

Another relevant statute is the *Limitation Act* 1969. Restrictive limitation provisions apply to defamation actions.

The *Limitation Act* 1969, s 14B provides that an action for defamation is not maintainable if brought after the end of a limitation period of one year running from "the date of the publication of the matter complained of". "Publication" occurs each time the matter is read, heard or seen. The limitation period can be extended in limited circumstances: *Limitation Act* 1969, s 56A. Because every communication of defamatory matter gives rise to a separate cause of action (known as the "multiple publication rule"), problems may arise applying the limitation period in defamation, particularly where the material is published online. The *Defamation Amendment Act* 2020 (discussed further below) introduced a "single publication rule" under the *Limitation Act* 1969, s 14C for publications after the date of the amendments. This provides that, where a publisher publishes defamatory matter and subsequently the publisher or an associate publishes substantially the same defamatory matter, the cause of action in defamation is taken to accrue at the date of first publication.

[5-4006] Defamation Amendment Act 2020

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

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

A memorandum as to the principal changes made by the Act appears at Appendix 1. A list of links to the amending legislation in each of the States and Territories (except Western Australia and the Northern Territory, which have yet to consider the legislation) appears as Appendix 2.

The Draft Part A Model Defamation Amendment Provisions and an accompanying Background Paper were released for public consultation in August 2022.

[5-4007] Publications made on the internet

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

There are defences falling outside the uniform legislation for internet service providers ("ISPs") as well as the defence of innocent dissemination (outlined in more detail below).

Schedule 5, cl 91 of the *Broadcasting Services Act* 1992 (Cth), which provided immunity from State and Territory laws and common law and equitable principles to ISPs and internet content hosts in circumstances where they were not aware of the nature of the content in question, was replaced (as of 23 January 2022) by s 235 of the *Online Safety Act* 2021 (Cth), which is in the same form. Clause 91 was never the subject of consideration by the courts, so the extent of the protection that it gave, and which s 235 continues to give, to these entities has yet to be tested.

The *Online Safety Act* may also need to be consulted where an online publication is offensive, as opposed to (or in addition to) any claim for defamation. The *Online Safety Act* provides for the

appointment of an eSafety Commissioner as well as a complaints process for the removal of online cyberabuse. The definition of "serious harm" in s 5 ("serious physical harm or serious harm to a person's mental health, whether temporary or permanent") may be a useful analogy in rulings on serious harm under s 10A of the amended legislation (for publications made after 1 July 2021 in those States and Territories where the uniform legislation has been amended).

The law relating to internet publication is changing rapidly; in *Tamiz v Google Inc* [2012] EWHC 449 (QB), Eady J considered an ISP was not liable even after notification that its service was being used for the communication of defamatory matter, principally because of the sheer volume of internet publication. See also *Bunt v Tilley* [2006] 3 All ER 336; *Metropolitan International Schools Ltd t/as Skills Train and/or Train2Game v Designtechnica Corp t/as Digital Trends* [2011] 1 WLR 1743; *Karam v Fairfax New Zealand Limited* [2012] NZHC 887.

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

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

While the leading Australian case remains *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, and liability for third party commentary has been considered at length in *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27, the High Court has now, by majority, held that when it is functioning purely as a search engine, Google is a search engine and not a publisher: *Google LLC v Defteros* [2022] HCA 27. The differing approaches taken by the High Court in both these decisions confirm that this is an area of the law where there is likely to be significant change and development. There is no clear ratio in the majority judgments. Many questions are raised and not all have been answered. In particular, in *Google LLC v Defteros*, there is an issue as to how broad the application of this judgment is, as the Canadian decision on which much of the reasoning was based *(Crookes v Newton* [2011] 3 SCR 269) was not a case involving a Google search result, but a hyperlink on a website.

In *Voller,* the question was whether media companies whose Facebook pages hosted comments by third parties were in fact publishers of the defamatory material. At first instance and on appeal, it was held that the media companies were publishers of the third-party comments notwithstanding the technological limitations on their control of the pages. Before the High Court, the appellants changed their position on the issue of intention and knowledge, to contend that the common law required that the publication of defamatory material be intentional, which meant that, in circumstances of no prior notification (as was the case in *Voller*, as no concerns notice was sent before suit), there was no publication: at [20].

All the members of the court rejected the submissions about the need for publication to be intentional, and effectively held that publication did not require knowledge. However, their Honours differed in their method of assessment of whether the media companies had participated in the act of publication and (in the case of Edelman and Steward JJ, both of whom would have allowed the appeal in part) as to the consequences of these findings.

Kiefel CJ, Keane and Gleeson JJ considered that the media companies had facilitated, encouraged and thereby assisted the posting of comments by the third-party Facebook users, which rendered them the publishers of those comments. Gageler and Gordon JJ, similarly emphasized that the media

companies had chosen to operate public Facebook pages in order to engage commercially with the over 15 million Australians who were Facebook users, concluded that these arrangements gave their claim of being passive and unwitting victims of Facebook's method of functioning an air of unreality.

Edelman J dissented in part. While the appellants had assisted in the publication of third-party comments, by merely creating a page in posting a story with an invitation to comment, they had not manifested an intention or common purpose with the author of the comment and their unrelated words would not be in pursuance of, or in response to, the invitation. A random remark by a third party, unconnected to the story, would not fall within any manifest common intention.

Steward J would also have allowed the appeal in part. Merely allowing third-party access to a Facebook page is, of itself, insufficient to justify a factual conclusion that the Facebook page participated in the publication of all the third-party comments posted thereafter. It followed that there must be some feature of the content, nature or circumstances of a Facebook post that justified a conclusion that it had procured, provoked or conduced third-party defamatory comment or comments, such as to make the Facebook page owner the publisher of such comments: at [180].

It is important to note that this decision relates to liability for publication only, and not to the defence of innocent dissemination, although Rothman J (at first instance) had, after finding the appellants were publishers, gone on to consider aspects of the defence of innocent dissemination under s 32 of the *Defamation Act* 2005. The issue of the defence of innocent dissemination was specifically excluded from consideration in the Court of Appeal (at [37] per Basten JA), which was in turn the position that the High Court took: at [17]–[19]. The issue of the defences to be relied upon will now be an issue for the trial.

[5-4010] The pleadings

Defamation cases are conducted in the Supreme Court in accordance with Practice Note No SC CL 4 — Defamation List (commenced 5 September 2014), a similar form of which is in use in the District Court (DC Practice Note No 6 — Defamation List (commenced 9 February 2015)). The practice note regulates the speedy and efficient disposal of interlocutory applications and emphasises the importance of proportionality. As a consequence of the cross-vesting legislation, defamation proceedings may also be commenced in the Federal Court of Australia where there is a cause of action in the ACT or the NT: *Crosby v Kelly* (2012) 203 FCR 451. The presumptive mode of trial in the Federal Court is trial by judge alone. Although the Federal Court has a discretion to order trial by jury, the provisions of the *Federal Court of Australia Act* 1976 (Cth) on the mode of trial in that forum override the right of any party to elect to have a defamation case tried by a jury under State defamation legislation. The Full Federal Court has stated that trial by jury in a defamation case in the Federal Court will be exceedingly rare: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61.

In addition, as hearings in the Federal Court are conducted under the docket system, interlocutory issues will generally be left to the trial, including imputation arguments, as occurred in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33; see *Goodfellow v Fairfax Media Publications Pty Limited* [2017] FCA 1152 at [25]–[28]. This can have significant costs consequences for a party who fails on a threshold issue such as the capacity of the imputations: *Hockey v Fairfax Media Publications Pty Limited (No 2)* [2015] FCA 750 at [103]–[124]; *Taylor v Nationwide News Pty Ltd (No 2)* [2022] FCA 149.

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

The statement of claim

This pleading must contain full particulars of the matter complained of and its context, the imputations pleaded to arise (whether in their natural and ordinary meaning or by true innuendo),

details of publication (including particulars of identification if the plaintiff is not named) and republication, as well as any claim for special damages and aggravated compensatory damages: Tobin & Sexton at [25,015]–[25,115]. Exemplary damages are not available: *Defamation Act* 2005, s 37. A claim for interest should be pleaded (Tobin & Sexton at [25,120]) but, if omitted, may still be claimed.

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

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

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

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

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

The statement of claim must also include particulars of serious harm to reputation for publications made after the date s 10A comes into force. This is a new statutory element of the cause of action in defamation, in addition to the existing common law elements of defamatory matter, identification and publication. The element of serious harm to reputation was introduced by the *Defamation Amendment Act* 2020, which commenced on 1 July 2021. It is modelled on the *Defamation Act* 2013 s 1, which applies in England and Wales. As at September 2022, it is unclear what will be required by courts for a plaintiff to establish serious harm to reputation under the *Defamation Act* 2005 (NSW) s 10A. The English case law is likely to provide some guidance to Australian courts. See generally D Rolph, "A serious harm threshold for Australian defamation law" (2022) 51 *Australian Bar Review* 185.

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

Damage to reputation in defamation actions is presumed. It is not necessary to allege or prove injury to reputation: *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 150 per Windeyer J;

Bristow v Adams [2012] NSWCA 166. The plaintiff nevertheless should include a claim for compensatory damages in the relief sought. This should include any claim for special damages and/or aggravated compensatory damages, together with particulars of the facts and matters relied upon: UCPR r 15.31.

Damages for non-economic loss under the UDA are capped: s 35. For publications made after 1 July 2021, that cap is a "hard" cap. A plaintiff has also always been entitled to claim general damages for loss of business (as opposed to special damages): *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225; Tobin & Sexton at [25,110]. The relationship between an *Andrews* claim and the cap on damages has not yet been authoritatively determined. Any claim for special damage should be particularised: Tobin & Sexton [25,105].

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

The defence

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

Where the matter complained of is restricted to publication in Australia, defences under the Act and the common law of Australia must be pleaded. Where the matter complained of is pleaded to have been published outside Australia (for example, publications in other jurisdictions, via the internet), defences in the jurisdiction where the publication is heard, read or downloaded will apply: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Rader v Haines* [2021] NSWDC 610 (publication made in the United Kingdom).

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

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

1. **Justification (s 25):** UCPR rr 14.32 and 15.22. The most common problems with this defence arise from last-minute particulars, or an application to plead it just before the trial: *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648; Tobin & Sexton at [25,175]. The particulars of this defence, other than in clear situations where it is fully set out in the publication, should be set out with precision, and may include material not referred to in the matter complained of, including events subsequent to the publication: Tobin & Sexton at [25,180]–[25,190].
2. **Contextual truth (s 26):** UCPR rr 14.33 and 15.23. Although the scope of this defence was reduced by *Besser v Kermode*, above, the reformulated defence, which came into effect on 1 July 2021, should revitalise this defence, in particular by permitting the defendant to "plead back" the plaintiff's imputations as contextual imputations. See Tobin & Sexton at [25,145]–[25,160]. The pleadings and particulars are described in Tobin & Sexton at [25,165]–[25,170].

3. **Absolute privilege (s 27):** UCPR rr 14.34 and 15.24. This defence is commonly dealt with as a summary judgment application.
4. **Publication of public and official documents (s 28):** UCPR rr 14.35 and 15.25.
5. **Fair report of proceedings of public concern (s 29):** UCPR rr 14.36 and 15.26.
6. **Qualified privilege (s 30):** UCPR rr 14.37 and 15.27. The requirements for particulars of this defence are set out in Tobin & Sexton at [25,215]–[25,220]. If this defence is pleaded, the plaintiff should usually file a reply, in order to put in issue whether the publication was "reasonable" in all the circumstances within the meaning of ss 30(1)(c) and 30(3). Note that this defence differs from the common law defence, which is described in further detail below.
7. **Publication of matter concerning issue of public interest (s 29A):** UCPR r 14.36A.
8. **Honest opinion (s 31):** UCPR rr 14.38 and 15.28. This statutory defence is, with some modifications, adapted from the common law defence of fair comment, but it is still possible to rely upon the common law defence. There are three forms of honest opinion defence: s 31(1)–(3). If this defence is pleaded, the plaintiff should usually file a Reply, in order to put in issue the matters in s 31(4). The defence has rarely been successful, but see *O'Brien v Australian Broadcasting Corp* [2016] NSWSC 1289.
9. **Scientific or academic peer review (s 30A):** UCPR r 14.37A.
10. **Innocent dissemination (s 32):** UCPR rr 14.39 and 15.29. This defence, once little used, is of significance for internet publications. In addition to s 32, an ISP may rely upon *Broadcasting Services Act* 1992 (Cth), Sch 5 cl 91: Tobin & Sexton [24,035]; Collins at [3.08], [16.133]–[16.144]. The common law defence of innocent dissemination also survives.

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

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

1. **Offer of amends:** *Defamation Act* Pt 3, Div 1. This provides for service of a "concerns notice" (s 14(2)) followed by a procedure for the making of an offer to make amends (s 15) which may be withdrawn (s 16) or accepted (s 17). A concerns notice is now mandatory; defamation proceedings cannot be commenced without a concerns notice having been served on the defendant: (s 12B). As to the formal requirements of a concerns notice, see s 12A. For the avoidance of doubt, a document filed or lodged in a proceeding to commence defamation proceedings does not constitute a Concerns notice: s 12A(2). Where there is a failure to accept a reasonable offer to make amends "a court" (s 18(2)) must determine whether the offer was made as soon as practicable and was reasonable, having regard to the circumstances set out in s 18(2). The provisions of the *Defamation Act* prior to the new amendments were unclear as to whether determination of these issues is a matter for the jury or for a judge sitting alone: *Hunt v Radio 2SM Pty Ltd (No 2)* (2010) 10 DCLR (NSW) 240. The defence is not limited to small publications, and substantial damages may be awarded. In *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 McCallum J held that an offer of amends of $50,000 and an apology were insufficient where the imputations were gravely serious claims that a teacher had sexual relations with underage students; at that time the award of $350,000 was the highest sum awarded under the uniform legislation.
2. **Statutory defences containing a good faith provision:** An example of a statutory provision offering a defence for a publication made in good faith is *Health Care Complaints Act* 1993 (NSW), s 96.
3. **Common law variant of justification (*David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667):** This defence has been held by the NSW Court of Appeal (see *Fairfax Media*

Publications Pty Ltd v Bateman (2015) 90 NSWLR 79) to be unavailable in this State, but it is available in most other States and Territories; see, for example, *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206; *Balzolal v Fairfax Digital Australia and New Zealand Pty Ltd* [2016] QSC 175; *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314.

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

5. **Qualified privilege at common law:** This is the most commonly pleaded defence, and the particulars necessary to establish it differ from the statutory defence. It is not possible, in this overview, to deal with the elements of the defence in detail. The general principles are set out in Tobin & Sexton at [14,010]–[14,065]. Attempts by the media to rely upon this defence have been unsuccessful: Tobin & Sexton at [14,070] and *Lloyd-Jones v Allen* [2012] NSWCA 230. Qualified privilege at common law was described as a limited defence in *Bennette v Cohen* [2009] NSWCA 60 at [139]–[143]. However, the High Court has since reviewed and clarified elements of reciprocity and interest in *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534, and rejected the asserted requirement, in cases such as *Bennette*, for "pressing need" (at [51]) for the publication to have been made. The High Court explained the operation of the defence where the publication was made in response to an attack (see also *Harbour Radio Pty Ltd v Trad* (2011) 245 CLR 257).

6. **The *Lange* defence:** The right of freedom of speech implied in the Constitution, and its impact upon defamation law, in relation to publications in the media concerning "government and political matters", is explained in *Lange v Australian Broadcasting Corp* (1997) 180 CLR 520. The decision has been criticised as limited (see R Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd edn, Thomson Reuters, at [27-58] n155), and its impact on defamation law since 1997 has been slight. It is not possible to deal with the complexities of this defence in this overview of defamation law. Briefly stated, the decision is a hybrid of common law and statutory qualified privilege, with a more stringent test of reasonableness than statutory qualified privilege. The defence has, for most practical purposes, been superseded by the s 30 defence, and probably now the s 29A defence as well. For a detailed analysis, see P Applegarth, "Distorting the Law of Defamation" (2011) 30(1) *University of Queensland Law Journal* 99-117.

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

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

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

- if the plaintiff is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act*, s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, or in relation to statements made concerning court proceedings (*Cumberland v Clark* (1996) 39 NSWLR 514 at 518–521) or in parliament (*Della Bosca v Arena* [1999] NSWSC 1057);

- where the proceedings may be struck out as an abuse of process; for example, where other proceedings have been brought for the same publication: *Bracks v Smyth-Kirk* (2009) 263 ALR 522. Leave to commence proceedings under s 23 may be granted retrospectively: *Carey v Australian Broadcasting Corp* (2012) 84 NSWLR 90;
- where issues of proportionality (*Bleyer v Google Inc* (2014) 88 NSWLR 670) or or a failure to meet the minimum threshold of seriousness (*Kostov v Nationwide News Pty Ltd* (2018) NSWLR 1073) arise. This is a controversial area of the law, as these doctrines have yet to receive appellate confirmation; or
- note also the entitlement for the early determination of "serious harm" set out in s 10A for publications to which the 2021 amendments apply.

Summary judgment applications brought on the basis that the claim is trivial, successful in the UK, have also been brought in NSW: *Barach v University of NSW* [2011] NSWSC 431; *Bristow v Adams* [2012] NSWCA 166 at [41] as well as in other jurisdictions: *Lazarus v Azize* [2015] ACTSC 344; *Asmar v Fontana* [2018] VSC 382. However, in *Bleyer v Google Inc* (2014) 88 NSWLR 670, McCallum J permanently stayed proceedings pursuant to UCPR r 12.7 and CPA s 67 where the publication was limited, the defences strong and enforcement in the United States unlikely. Additionally, pleadings which are clearly hopeless may be dismissed summarily: *McGrane v Channel Seven Brisbane Pty Ltd* [2012] QSC 133; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850 at [28]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [101]–[103]; *Trkilja v Dobrijevic (No 2)* [2014] VSC 594.

The Reply

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

Other pleadings

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

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

Applications to amend or strike out portions of the pleadings in defamation actions occur most commonly at two stages. The first is at the commencement of the litigation. Applications for rulings

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

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

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

[5-4030] Applications to amend or to strike out imputations

When a judge makes orders striking out imputations, pleadings, or a cause of action, reasons should be given. In *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWCA 6, the NSW Court of Appeal stated that interlocutory decisions affecting a party's case, such as the striking out of imputations, should be contained in a judgment, and that the practice of making rulings without giving reasons was "regrettable": at [102].

Imputations pleaded by parties fall into three categories: those pleaded by the plaintiff, those pleaded by the defendant pursuant to s 26 *Defamation Act*, and "*Hore-Lacy*" imputations: *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; *Besser v Kermode* (2011) 81 NSWLR 157 at [56].

There have been many judgments concerning form and capacity of imputations in New South Wales since the procedure first became widespread in the late 1970s. This is because, prior to the UDA, the imputations (and not the publications from which they were derived) were the cause of action: *Defamation Act* 1974 s 9. An amendment to the *Defamation Act* 1974, s 7A, in 1994, restricted the jury's role essentially to this issue only. This led to many "perverse" or unreasonable verdicts in the NSW Supreme Court. The UDA accordingly abandoned the concept of a cause of action based on the pleaded imputations; the cause of action is the publication. New South Wales decisions on these issues prior to the UDA need to be read with this history in mind.

The principles to follow on capacity issues are those set out by the High Court in *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716, where the court (in particular Kirby J at [20]–[22]) warned against "excessive refinement" in relation to pleading imputations. The High Court essentially restated these principles in *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

The relevant principles in relation to challenges to the plaintiff's imputations may be summarised as follows:

1. Imputations may be challenged on three bases: "capacity" (whether the imputation is conveyed); form; and defamatory meaning.

2. The correct approach to determining issues of capacity is set out in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164–167, *Griffith v John Fairfax Publications Pty Ltd* [2004] NSWCA 300 at [19]–[20] and *Favell v Queensland Newspapers Pty Ltd*, above. In *Hue v The Vietnamese Herald* [2009] NSWSC 1292 at [9], McCallum J summarised the principle very simply as being "whether the meaning contended for is

reasonably capable of being conveyed by the matter complained of", noting the statement in *Favell* at [17] that the question is ultimately what a jury could properly make of the imputation. The High Court stated:

> Such a step is not to be undertaken lightly but only, it has been said, with great caution. In the end, however, it depends on the degree of assurance with which the requisite conclusion is or can be arrived at. The fact that reasonable minds may possibly differ about whether or not the material is capable of defamatory meaning is a strong, perhaps an insuperable, reason for not exercising the discretion to strike out: *Favell v Queensland Newspapers Pty Ltd* [2004] QCA 135; *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at [6].

3. Issues of the proper form of imputations, like capacity, are questions of practical justice rather than philology: *Drummoyne Municipal Council v Australian Broadcasting Corp* (1991) 21 NSWLR 135 at 137 per Gleeson CJ; see also *Gant v The Age Co Ltd* [2011] VSC 169 at [40]. Objections commonly raised are that the words in the imputation offend some principle of grammar or meaning by being ambiguous or a "weasel word". If the word used is slang which is not widely known, the imputation may require an alternative true innuendo pleading: *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161 ("bent").

4. An imputation is defamatory, according to the most commonly applied test, if the words tend to lower the plaintiff in the estimation of right-thinking members of society generally: *Sim v Stretch* [1936] 2 All ER 1237; *Radio 2UE Sydney Pty Ltd v Chesterton*, above, at [3]–[7]. Courts should be slow to find that an imputation is not defamatory, or that the bane is outweighed by the antidote (*Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749), as these are quintessentially matters for the tribunal of fact.

5. Similar principles apply to challenges to the form and capacity of the defendant's imputations.

[5-4040] Other interlocutory applications

Other pre-trial applications range from urgent applications for an interlocutory injunction, to arguments unique to defamation law (such as so-called "strike in" applications) to arguments common to other causes of action, such as disputes about the adequacy of discovery or answers to interrogatories.

1. **Discovery before action:** Where a plaintiff seeks preliminary discovery to enable proceedings to be commenced, an application may be brought under UCPR r 5.2(2)(a). There is, however, a rule of practice that both during the process of discovery and in pre-discovery proceedings, a media defendant will not be required to disclose the sources for the matter complained of if those sources provided information to the media defendant on conditions of confidentiality ("the newspaper rule"): *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 (the *Newspaper Rule* case); *Guide Dog Owners' & Friends' Association v Herald & Weekly Times* [1990] VR 451.The principles are set out by McColl JA in *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506 at [46]–[52].

2. **Interlocutory injunction:** The circumstances in which an interlocutory injunction will be granted in defamation actions are rare as, in addition to the barriers faced by litigants in other causes of action (*American Cyanamid v Ethicon Ltd* [1975] AC 396), a plaintiff in defamation proceedings faces the additional hurdle of balancing the asserted damage to his reputation with the defendant's entitlement to freedom of speech: *Church of Scientology of California Inc v Readers Digest Services Pty Ltd* [1980] 1 NSWLR 344; see also *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57. Justice Heydon, in the latter case, in dissent, said that the effect of the majority's decision was that "as a practical matter no plaintiff is ever likely to succeed in an application against a mass media defendant for an interlocutory injunction to restrain publication of defamatory material on a matter of public interest, however strong the plaintiff's case, however feeble the defences and however damaging the defamation": at [170].

The relevant principles are discussed in Tobin & Sexton at [23,001]–[23,037] and in George at 39.2. Such applications are generally brought in the Supreme Court, although the District Court's jurisdiction would permit the making of ancillary interlocutory orders.

Interlocutory injunctions may become more common as defamation actions increasingly reflect privacy concerns: D Rolph, "Irreconcilable Differences? Interlocutory injunctions for defamation and privacy" (2012) 17 *Media and Arts Law Review* 170-200. Actions for breach of privacy in England (a cause of action not available in Australia) are a fertile source for such applications; actions for breach of privacy now outnumber defamation actions: see International Forum for Responsible Media, *Inforrm Blog*, Table of Media Law cases, accessed 20 November 2019.

3. **Discovery, interrogatories and challenges to pleadings:** While the same principles applicable to discovery in civil litigation generally apply to defamation, failure to provide full discovery may have serious consequences: *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264; *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523. A defendant may not, however, insist upon discovery prior to providing particulars of justification which make the documents sought relevant: see the cases discussed in Tobin & Sexton at [25,230].

   Topics upon which interrogatories may be administered by the plaintiff include specific admissions in relation to publication, identification (if the plaintiff is not named), intention to convey the imputations, the extent of publication and readership, inquiries prior to publication, belief in the truth of the imputations and failure to apologise: *Clarke v Ainsworth* (1996) 40 NSWLR 463. The topics about which a defendant may interrogate include "reaction" (*Kermode v Fairfax Media Publications (No 2)* [2011] NSWSC 646 at [27]–[29]), injury to reputation, in the form helpfully set out by Hunt J in *Assaf v Skalkos* (1995) A Def R 52-050, and the plaintiff's belief as to falsity: *Clout v Jones* [2011] NSWSC 1430. More than 30 interrogatories may be administered: *Lewis v Page* (unrep, 19/7/89, NSWSC).

   Applications to strike out defences, and in particular the defence of justification, have been granted in a number of actions in the Federal Court: see for example *ABC v Chau Chak Wing* (2019) 271 FCR 632.

4. **Jury-related applications:** Where one party has requisitioned a jury, the opposing party may challenge the requisition. The most common grounds are that the correct procedure for requisitioning a jury has not been followed (*Bristow v Adams* (2010) 10 DCLR (NSW) 261) or where it is asserted the grounds set out in *Defamation Ac*t, s 21 are relied upon: *Ange v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1200. The CPA does not confer power on the court to dispense with a jury by the court's own motion: *Channel Seven Pty Ltd v Fierravanti-Wells* (2011) 81 NSWLR 315 at [94]. Note that jury trials are not available for defamation proceedings heard in the Federal Court of Australia: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61.

5. **Non-publication orders:** Applications for injunctive relief may be accompanied by an application for a non-publication order, such as the anonymisation of the parties' names (*W v M* [2009] NSWSC 1084) and/or for the proceedings to be conducted in the absence of the public: *AMI Aus Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1290. See [1-0400]ff.

6. **Strike-in applications:** The plaintiff must plead the defamatory words and any other words capable of materially altering the meaning of the matter complained of. Determining the context of the publication may be difficult if it is, for example, one of a series of publications separated by time, or space, such as book instalments (*Burrows v Knightley* (1987) 10 NSWLR 651), or if the plaintiff has sued on part only of a broadcast: *Gordon v Amalgamated Television Services Pty Ltd* [1980] 2 NSWLR 410 at 413–5; *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605 at [26]. An application may be made to "strike out" portions of a matter complained of if the plaintiff has included material that is arguably a separate publication or (more commonly) to

"strike in" portions of a publication which have been excluded by the plaintiff. Applications of this kind are likely to become more frequent due to the fluid nature of electronic publications. Potential future problems include hyperlinks: *Crookes v Wikimedia Foundation Inc* (2011) SCC 47 (Supreme Court of Canada); Collins at [3.11]ff; [5.29]–[5.34].

7. **Summary judgment applications:** See [5-4010].

8. **Transfer of proceedings to another court:** Applications to transfer proceedings to another jurisdiction proceed on the same bases as applications in other actions. In *Crosby v Kelly* (2012) 203 FCR 451 the Full Court of the Federal Court held that *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) s 9(3) created a surrogate Commonwealth law by reference to the jurisdiction of the ACT Supreme Court, thereby conferring jurisdiction to hear defamation actions. Applications to cross-vest defamation proceedings may occur more commonly following this decision, particularly where a *Lange* defence is pleaded. Jury trials are not ordered in the Federal Court and in addition a more generous approach to pleading issues applies; see *Goodfellow v Fairfax Media Publications Pty Ltd* [2017] FCA 1152 at [52]–[74] (form of imputations) and [80] (inutility of capacity hearings in non-jury trials).

[5-4050] Limitation issues

When the UDA was enacted, all jurisdictions amended their limitation statutes to provide that a cause of action was not maintainable if brought after the end of the limitation period (one year) from the date of publication of the matter complained of: *Limitation Act* 1969 s 14B. An extension of up to three years may be granted, but the test (that the plaintiff must demonstrate that it was not reasonable to have commenced an action within the one year period from date of publication) has been called a "difficult hurdle": *Rayney v State of Western Australia (No 3)* [2010] WASC 83 at [41].

The test of unreasonableness was a difficult one to satisfy; in *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, the court (by majority) considered that negotiations for an offer of amends (where the plaintiff contended it was not reasonable to start proceedings which would imperil these negotiations) was an insufficient ground.

There have been changes to the limitation statutes as a result of the reforms to the Model Defamation Provisions, which came into effect in NSW on 1 July 2021, following the commencement of the *Defamation Amendment Act* 2020. The limitation period remains one year under the *Limitation Act* 1969, s 14B but the test for extending the limitation period for up to three years under the *Limitation Act* 1969 (NSW) s 56A has been altered to confer a discretion on the court to grant the extension where the court is satisfied that it is just and reasonable to do so. As to the relevant considerations for the exercise of this discretion, see *Limitation Act* 1969 s 56A(3).

Prior to 1 July 2021, there was no "single publication" rule in NSW. The effect of this was that every communication of defamatory matter created a separate cause of action, with the limitation period running for each cause of action. The *Limitation Act* 1969 s 14C now creates a "single publication" rule, providing that the limitation period for subsequent publication of similar matter by the same publisher or an associate will run from the time of first publication.

[5-4060] Conduct of the trial (judge sitting alone)

Where the parties have not requisitioned a jury, the trial judge will determine all issues of fact and law. In such cases, a separate hearing as to damages is not necessary.

The role of the judge during the trial Due to the complexity of defamation trials, judges used to play an active role in both jury and non-jury trials, by putting questions to witnesses, pointing out *Brown v Dunn* problems (*Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219) or limiting address time in accordance with the principles discussed in *GPI Leisure Corp Ltd*

v Herdsman Investments Pty Ltd (No 3) (1990) 20 NSWLR 15. While this is still the case in other common law jurisdictions (Brown, [17.2(3)(a)]), this may not be the case in New South Wales: *Lee v Cha* [2008] NSWCA 13.

Many of the applications that parties make during a trial occur whether a jury is empanelled or not; for convenience, applications which mainly relate to the jury's role are set out in a separate section below. The following are examples of rulings which may be sought in a judge-alone trial:

- **No case submission:** where the claim is clearly hopeless, an application may be made during the trial for the whole case to be struck out: *Wijayaweera v St Gobain Abrasives Ltd (No 2)* [2012] FCA 98 (note that this application proceeds on different principles to those applicable to an application to take a defence or the whole action from the jury; see [5-4070] below);
- **Reputation:** the plaintiff may seek to lead evidence about good reputation (*Mizikovsky v Queensland Television Ltd (No 3)* [2011] QSC 375) and/or the defendant about bad reputation: Tobin & Sexton at [26,575];
- **Special damage:** evidence, including expert evidence, may be led, in the same manner as in other causes of action: Tobin & Sexton at [26,555];
- **Splitting/inverting the case:** see Tobin & Sexton at [26,568]; *French v Triple M Melbourne Pty Ltd (Ruling No 2)* [2008] VSC 548.

[5-4070] Additional matters for conduct of the trial before a jury

Delineation of the role of judge and jury

The jury determines whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established: s 22(2). However, if an issue relating to defences is dealt with by the judge, rather than the jury, at general law, this continues to be the case under the *Defamation Act* 2005: s 22(5)(b). It is for the judge, however, to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount: s 22(3).

Empanelling the jury

Defamation Act s 21 provides that either the plaintiff or the defendant may elect for proceedings to be tried by a jury. The procedure for requisitioning a jury, and payment of the fee, is set out in UCPR rr 29.2 and 29.2A. The number of jurors is four, not 12 as in criminal trials. An application for a jury of 12 instead of four may be made: *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148. See *Jury Act* 1977 (NSW) s 20. The procedure for empanelment is similar to that in a criminal jury trial. Each party has two challenges.

Judge's opening remarks to the jury

The opening remarks that a judge makes in a defamation jury trial are similar to those made in criminal trials. It may be appropriate to raise with counsel whether to give a *Skaf* direction: *R v Skaf* (2004) 60 NSWLR 86; see *Dehsabzi v John Fairfax Publications Pty Ltd (No 4)* (2008) 8 DCLR (NSW) 175.

The questions to go to the jury

The jury is required to answer specific questions as to whether the imputations pleaded are conveyed, whether the imputations are defamatory, and disputed issues of fact relevant for the determination of the defence: *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511.

The questions are drafted by the parties. Any disputes about the questions which the jury must answer should be formulated and ruled upon by the trial judge, preferably before the trial has started.

Opening and closing addresses of counsel

While each party must be given reasonable time to address the jury the judge may take into account the temporal restraints of the trial: *Keramianakis v Regional Publishers Pty Ltd* (2007) 70 NSWLR 395.

Applications to discharge the jury during the trial

Applications to discharge the jury are commonly made, but rarely granted. The most common bases for such an application are:

- inflammatory language by counsel (*Lever v Murray* (unrep, 5/11/92, NSWCA));
- cross-examination outside the case as particularised (*Antoniadis v TCN Channel Nine Pty Ltd* (unrep, 3/3/97, NSWSC));
- misstatements by counsel as to the law (*Lee v Cha* [2005] NSWCA 279; *Lee v Cha* [2006] HCATrans 132).

Separate ruling on imputation meanings

An application may be made by a party (usually the defendant) for the jury to retire, prior to evidence on defence issues, to consider the meaning of the plaintiff's imputations: see Brown [17.2(3)(d)]. Care should be taken in making such an order if a common law defence of justification has been pleaded, as the jury would, for the purpose of determining the common law defence, need to go behind their findings as to the imputations pleaded by the plaintiff: *Fierravanti-Wells v Channel Seven Sydney Pty Ltd (No 3)* (2011) 13 DCLR (NSW) 307.

Delays during the trial

Adjournments due to unavailability of witnesses during a civil trial are dealt with on different principles to that of a criminal trial and are matters for the discretion of the judge: *Turner v Meryweather* (1849) 7 CB 251; *Singleton v Ffrench* (1986) 5 NSWLR 425.

Application to take a defence away from the jury

On an application by a party, the trial judge may take a defence (*Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 632) or the whole case (*Barbaro v Amalgamated Television Services Pty Ltd* (1989) 20 NSWLR 493) from the jury.

When a submission is made that an issue or a defence should be withdrawn from the jury, it is the trial judge's duty to determine whether there is any evidence on which the jury could reasonably find that the party opposing the motion has made out a case on the balance of probabilities. The judge has regard to the evidence favouring the party opposing the motion and disregards the evidence of the proponent of the motion: *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 47 per Clarke JA.

Summing up by the judge to the jury

It is the trial judge's duty to instruct on all issues raised by the pleadings and evidence, in an orderly and precise way, correctly stating the applicable law and how that law is to be applied: Brown at [17.2(2)(c)(v)]; *Singleton v Ffrench* (1986) 5 NSWLR 425. A helpful outline of what the trial judge should cover is set out by Lord Bingham of Cornhill CJ in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 961. A pro forma summing up for a jury in a civil trial is set out in this Bench Book at [3-0030].

It is acceptable for the trial judge to emphasise particular arguments by one side or to take such other steps as are necessary to maintain a reasonable equilibrium in the way in which issues go to the jury: *Illawarra Newspapers Pty Ltd v Butler* [1981] 2 NSWLR 502 at 509 per Samuels JA. While judges express opinions in other common law jurisdictions (Brown [17.2(3)(d)], and formerly did so in Australia (*Jackson v Brennan* (1911) 13 WALR 121; *Cunningham v Ryan* (1919) 27 CLR

294; *Seymour v Australian Broadcasting Corp* (1990) 19 NSWLR 219 at 225 per Glass JA), judges should be cautious about expressing views at any stage of the trial: *Channel Seven Sydney Pty Ltd v Mohammed* (2008) 70 NSWLR 669.

Any objection to the judge's summing up must identify the points of law or questions of fact with precision: *Buck v Jones* [2002] NSWCA 8.

The jury determines all disputed issues of fact (*Morgan v John Fairfax & Sons Ltd* (1988) 13 NSWLR 208) and not issues of law: *Singleton v Ffrench*, above.

The jury verdict

Where a jury is deadlocked, consideration may be given to giving a *Black* direction: *Criminal Trial Courts Bench Book*, 2nd ed, 2002 at [8-060]. A majority verdict may be taken: *Morgan v John Fairfax & Son Pty Ltd* (1990) 20 NSWLR 511.

If the jury, in answers to questions, has given answers which appear to indicate misunderstanding, the judge is entitled to question them and to give them an opportunity to amend the answers: *Australian Broadcasting Corp v Reading* [2004] NSWCA 411 at [111]. Where a jury verdict is asserted to be perverse, an application to set the verdict aside may be made. The procedure is set out in *Hall v Swan* [2009] NSWCA 371, one of a series of "perverse" Supreme Court s 7A jury verdicts. Apart from these s 7A verdicts, "perverse" or unreasonable verdicts in defamation are rare.

[5-4080] Common evidence problems

Rulings on evidence, such as the admissibility of business records, applications for exclusion or limitation of evidence pursuant to *Evidence Act* 1995 s 135 and issues of credit, generally proceed in the same manner as other civil trials, whether there is a jury or not. Some common problems in jury trials are:

- tender of a transcript of the matter complained of where it is a television or radio broadcast: *Foreign Media Pty Ltd v Konstantinidis* [2003] NSWCA 161 at [17]–[18] (foreign language publication); *Nuclear Utility Technology & Environmental Corporation Inc (Nu-Tec) v Australian Broadcasting Corporation* [2010] NSWSC 711;
- cross-examination outside the particulars, which may lead to an application to discharge the jury (*TCN Channel Nine Pty Ltd v Antoniadis* (1998) 44 NSWLR 682);
- admissibility of a criminal history, which is permissible under *Defamation Act*, s 42;
- whether the jury should hear evidence relevant only to the issue of damages, although damages are an issue for the trial judge (s 22(3)): *Greig v WIN Television Pty Ltd* [2009] NSWSC 876 at [10]–[12] (jury permitted to hear this evidence);
- tendency, credit and s 135 issues: *Blomfield v Nationwide News Pty Ltd* [2009] NSWSC 977 at 978, 979;
- preservation of ephemeral records, such as social media: a notation may be sought by a party requesting that social media or electronic records be kept pending the trial, see for example, *Cavric v Nationwide News Pty Ltd* [2015] NSWDC 107.

Directions may be made that the judgments are not published until after the jury has completed its role in the trial: *McMahon v John Fairfax Publications Pty Ltd* [2012] NSWSC 196 at 197,198.

[5-4090] Damages

The assessment of damages is an issue for the judge, whether or not a jury has been empanelled for the liability section of the trial: *Defamation Act*, s 22(3).

Section 35 imposes a cap on damages that can be awarded in "defamation proceedings" ($250,000 as at 1 January 2006, which is revised on 1 July of each year in accordance with the provisions of

s 35(3); see the table in Tobin & Sexton at [20,100] for the current maximum figure). The maximum amount of damages for non-economic loss is only to be awarded in the most serious case: s 35(2). The cap applies to an award in particular proceedings, whether or not there are multiple causes of action: *Davis v Nationwide News Pty Ltd* (2008) 71 NSWLR 606. It is unresolved whether the cap applied separately to each plaintiff in proceedings with multiple plaintiffs.

Damage is presumed once the publication of defamatory matter has been proved. The relevant heads include vindication (Tobin & Sexton at [20,020]), injury to feelings and to reputation (Tobin & Sexton at [20,025]), and consolation. The principles for compensatory damages are comprehensively reviewed by Tobin & Sexton at [21,001]–[21,180] and by George, ch 31–38. The plaintiff may claim special or aggravated compensatory damages, but exemplary damages are not available for publications where the place of publication is within the States and Territories of Australia: Tobin & Sexton at [22,180].

[5-4095] Aggravated compensatory damages

Aggravated compensatory damages (Tobin & Sexton at [22,001]–[22,210]; George, ch 33) must be the subject of pleading and particulars, and generally are claimed in relation to the conduct of the defendant at the time of publication, the mode and extent of publication, failure to apologise and retract, and the conduct of the litigation by the defendant (the most common basis for which is an unsuccessful claim of justification by a defendant).

As with aggravation of damages, the factors upon which a defendant may rely on the issue of mitigation of damages are many and various: Tobin & Sexton at [22,110]–[22,145]. The most common include partial success of a defence of justification (*Cerutti v Crestside Pty Ltd*, above) or contextual truth (*Holt v TCN Channel Nine Pty Ltd* (2012) 82 NSWLR 293; affirmed *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96), the proffer of an apology, or the award of damages for another publication having the same meaning or effect as the matter complained of: *Defamation Act* s 38.

The relationship between the cap of ordinary compensatory damages and aggravated compensatory damages under the *Defamation Act* 2005 s 35 and the analogous provision in the other States and Territories was controversial.

In *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 John Dixon J considered that the language of s 35 made it clear that, once the court was satisfied that an award of aggravated damages should be made in excess of the cap, the cap on damages no longer applied. The same approach was taken in *Rayney v The State of WA (No 9)* [2017] WASC 367 and was confirmed on appeal in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154, as is noted in *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201.

From 1 July 2021, following the commencement of the *Defamation Amendment Act* 2020, a different approach to the assessment of aggravated damages now applies. An award of ordinary compensatory damages can only be made up to the statutory cap on damages for non-economic loss: s 35(1)-(2). If the court is satisfied that an award of aggravated damages should be made, it may do so but must assess aggravated damages as a separate head of damages from ordinary compensatory damages: s 35(2B). This is so whether or not the award of aggravated damages would exceed the cap on damages for non-economic loss. The approach under statute to the assessment of aggravated damages differs from the approach at common law. Conventionally, at common law, damages for ordinary and aggravated compensatory damages were assessed together.

[5-4096] Special damages and injury to health

Claims for special damages in defamation may be brought where it is asserted that the publication of the matter complained of results in actual loss: see Tobin & Sexton at [21,165]. The range of

losses may be quite far-reaching, such as the cost of making films to combat the negative publicity engendered by the defamatory publication (*Comalco Ltd v ABC* (1985) 64 ACTR 1; *ABC v Comalco Ltd* (1986) 68 ALR 259) or the loss of film roles for an actress: *Wilson v Bauer Media Pty Ltd* [2017] VSC 521. Such a claim requires specific pleading and is generally supported by expert evidence. Such a claim differs from an "Andrews" claim (*Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225) for general loss of business, which is generally only supported by particulars and discovery: see Tobin & Sexton at [21,175].

Claims for damages for injury to health are rare: see Tobin & Sexton at [21,145]; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [77]–[78].

[5-4097] Derisory damages and mitigation of damages

While injury to reputation is presumed, even in relation to the most anodyne or limited publication, the circumstances of the publication may be such that only nominal damages should be awarded: *Beaven v Fink* [2009] NSWDC 218 (damages of $2,500 for slander to one person). Such awards are generally called "nominal" (*Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57; [2006] HCA 46 per Gleeson CJ and Crennan J at [19]) or "derisory" awards: *Holt v TCN Channel Nine Pty Ltd (No 2)* (2012) 82 NSWLR 293; [2012] NSWSC 968 per Adamson J at [9]. The most celebrated of these very small awards was the farthing damages award to the plaintiff in the litigation arising from the portion of Leon Uris's book, *Exodus*, Doubleday & Co, 1958, concerning the alleged conduct of experiments by a doctor in concentration camps during the Holocaust: *Dering v Uris* [1964] 2 All ER 660; [1964] 2 WLR 1298. An even smaller award (nil damages) was challenged in *Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* [2022] NSWCA 150, but Leeming JA (Simpson AJA and Mitchelmore JA concurring) at [282]–[285] considered an award of nil damages (made contingently by the first instance judge) to be not only possible but appropriate on the facts of the case.

Where a defendant has been successful in a defence of partial justification, the damages may be significantly reduced: *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96; [2014] NSWCA 90 (award of $5,000). The question of mitigation of damages may also arise where there has been partial success in a defence of justification: *Holt v TCN Channel Nine Pty Ltd*, above, at [32]; see *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282; [1988] 1 WLR 116 at 120. Tobin & Sexton at [21,087] note the question of whether adverse findings as to a plaintiff's credit may be taken into account is a question that cannot be considered closed, despite the NSWCA considering that such evidence was irrelevant in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.

[5-4098] Evidence of bad — and good — reputation

While evidence of bad reputation in the relevant sector of reputation may be given, courts have declined to permit evidence of specific acts of bad reputation to be pleaded where there is no plea of justification: see Tobin & Sexton [21,050]. The defendant is limited to particulars of general bad reputation, which must be given before trial: see Tobin & Sexton [21,055]–[21,080]. Evidence of prior criminal convictions may be given, but only if such particulars are given before trial: see Tobin & Sexton [21,090].

While it is not necessary for a plaintiff to lead evidence of good reputation, it is common to do so: see Tobin & Sexton [21,085].

[5-4099] Range of damages in defamation actions under the uniform legislation

A table of all defamation awards made under the uniform legislation (which totalled 300 as at 30 June 2022) is set out in Tobin & Sexton at [60,100].

Despite the setting aside of the claim for special damages in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674, the increasingly large awards of damages demonstrate that, despite the imposition of a cap on damages, damages awards, particularly in high-profile cases, are increasing generally. This may be due to some or all of the following factors:

- the increase in the cap in excess of the consumer price index: J Cashen, "Defamation cap rising well above inflation", *Gazette of Law and Journalism*, 10 December 2014;
- the change in judicial interpretation of the role of the cap on general damages from being a ceiling (*Attrill v Christie* [2007] NSWSC 1386) to being merely an indication of the top amount that can be awarded: *Cripps v Vakras* [2015] VSCA 193 per Kyrou J at [603]–[608]; *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 per McCallum J at [127]; *Sheales v The Age Co Ltd* [2017] VSC 380 per John Dixon J at [70]. The recent reform to the Model Defamation Provisions (see s 35(2)), which provides that the cap on damages should only be awarded in the most serious case, is intended to end this debate, by making it clearly that the cap on damages for non-economic loss introduces a range or scale of defamation damages, rather than acting as a cut-off;
- the change in judicial interpretation of the interrelationship between the cap on damages and aggravated damages: *Wilson v Bauer Media Pty Ltd* [2017] VSC 521;
- substantial claims for special damages: *Wilson v Bauer Media Pty Ltd*, above, ($3,917,472 awarded to actress for loss of opportunity; set aside on appeal in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674); *Rayney v The State of WA (No 9)* [2017] WASC 367 ($1.777 million awarded to barrister for loss of work; see also *Rayney v The State of WA* [2022] WASCA 44); and/or
- the increasing attraction of courts where the absence of jury trials and case management make the proceedings easier for inexperienced parties to conduct the proceedings. Proceedings for defamation appear to be increasingly brought in tribunals (*Bottrill v Bailey* [2018] ACAT 45), magistrates courts (*Walden v Danieletto* [2018] QMC 10; *Yuanjun Holdings Pty Ltd v Min Luo* [2018] VMA 7) and in the Federal Circuit Court of Australia (*Sarina v O'Shannassy* (No 5) [2022] FCCA 2911. Problems arising for the judiciary when dealing with appeals from magistrates courts may be seen in *Berge v Thanarattanabodee* [2018] QDC 121; *Small v Small* [2018] ACTSC 231; *Ferguson v SA* [2018] SASC 90; *Sangare v Northern Territory of Australia* [2018] NTSC 5 and *Sullivan v Greyfriars Pty Ltd* [2014] VSC 22 and *Sarina v O'Shannassy* [2021] FCA 1649.

[5-4100] Costs

The "unique aspects" of defamation actions (G Dal Pont, *Law of Costs*, 3rd edn, at [12.21]) have resulted in special costs provisions designed to promote settlement. Section 40, modelled on s 40A *Defamation Act* 1974 (see *Jones v Sutton (No 2)* [2005] NSWCA 203), provides that in awarding costs, the court has regard to:

- the way in which the parties have conducted the case (including misuse of a party's superior financial position);
- other matters considered relevant: s 40(1).

A significant factor may be whether the failure of a party to "make a settlement offer" or "agree to a settlement offer" (s 40(2)) is reasonable. The definition of "settlement offer" is set out in s 40(3) and, as it means "any" offer to settle, may presumably include invalid offers of compromise or "without prejudice" offers, as well as offers to amend, which are specifically referred to in s 40(3). In *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946 the court considered that the defendant's "walk away" offer (withdrawal of the action on the basis that each pay their own costs) was not reasonable at the time that it was made.

While the court still retains a wide discretion on issues of costs, courts in defamation proceedings have often been reluctant to enforce provisions to impose costs on an unsuccessful party who had prolonged a trial by deliberate false allegations, or continued proceedings where there was obviously no hope of success: Tobin & Sexton at [26,615], citing *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354 and *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534. In *Hyndes v Nationwide News Pty Ltd* [2012] NSWCA 349 the plaintiff lost the case, but did not have to pay indemnity costs despite rejecting six offers, all better than the result. Indemnity costs under s 40 may not apply to appeals because of the inherent difference between first instance and appeal costs: *Ten Group Pty Ltd (No 2) v Cornes* (2012) 114 SASR 106. Costs issues under the UDA take into account the need to promote a speedy and non-litigious method of resolving disputes and avoiding protracted litigation wherever possible: *Davis v Nationwide News Pty Ltd*, above, at [26]; *Haddon v Forsyth (No 2)* [2011] NSWSC 693 at [5].

If only a small amount of damages is awarded, that does not disentitle a plaintiff from an award of costs, although the size of the verdict may be taken into account when considering whether the defendant's failure to make a costs offer was "unreasonable" (s 40): *Holt v TCN Channel Nine Pty Ltd* (2012) 82 NSWLR 293 at [51]–[62] affirmed [2014] NSWCA 90, but cf *Milne v Ell* [2014] NSWCA 407 at [28]–[30]. Almost all Supreme Court verdicts have, in breach of the court's costs rules, fallen below the District Court jurisdiction limit (as counsel for Nationwide News Pty Ltd pointed out in *West v Nationwide News Pty Ltd* [2003] NSWSC 767). Following *West*, defamation proceedings were removed from the category of claims to which this costs rule applied: SCR Pt 52A r 33(1)(v); No 380 of 2003). This exemption has been continued under UCPR Pt 42.

[5-4110] Current trends

As noted at the commencement of this chapter, after decades, or indeed centuries, of relative stability, defamation law is currently undergoing profound change. The majority of publications now sued upon are internet or other electronic publications: *North Coast Children's Home Inc (t/as Child and Adolescent Specialist Programs and Accommodation (Caspa)) v Martin (No 2)* [2014] NSWDC 142; *Polias v Ryall* [2014] NSWSC 1692; *Wilson v Ferguson* [2015] WASC 15. Social media has had an impact on many aspects of defamation law; for example, in *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674, failure to publish the apology in the newspaper's Twitter account was one of the reasons for the court finding that the offer of amends was inadequate.

The full impact upon defamation law of electronic publication, human rights legislation and privacy rights in other common law jurisdictions such as the United Kingdom, Canada, New Zealand and the United States has yet to be felt in Australia.

While foreign judgments on issues such as hyperlinks have been able to be absorbed (see *Google LLC v Defteros* [2022] HCA 27) Australian courts (*Barach v University of NSW* [2011] NSWSC 431; *Manefield v Child Care NSW* [2010] NSWSC 1420; *Bristow v Adams* [2012] NSWCA 166 at [41]) have, to date, showed some reluctance in following decisions such as *Jameel v Dow Jones & Co Inc* [2005] QB 946 in striking out claims which do not disclose a real and substantial tort, although there are indications that such applications may succeed in the future: *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612 per Basten JA at [5], confirming the correctness of the principles applied by McCallum J in *Bleyer v Google Inc* (2014) 88 NSWLR 670, which is the landmark decision in this developing area of the law.

The impact of privacy law upon defamation law is another area where significant changes to the law are also likely. While a tort of privacy has received some recognition in Australia (*Doe v Australian Broadcasting Corp* [2007] VCC 281; *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706), some judges, such as Davies J, consider it is still "unclear" whether a tort of privacy exists in Australia (*Chan v Sellwood* [2009] NSWSC 1335 at [37]), although the NSWCA has stated to the contrary: *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364 at [124]; *Maynes v Casey* [2011] NSWCA 156.

In addition, as the Leveson Inquiry (*The Leveson Inquiry: Culture, Practice and Ethics of the Press* in the UK) and the Finkelstein Report (*Report of the Independent Inquiry into the Media and Media Regulation*, which was reported to the Australian Government on 28 February 2012) have made clear, the increased ease of electronic surveillance has made profound changes to news gathering techniques, resulting in a shift from complaints about false and defamatory publications to complaints of publication of truthful material which should remain private. The impact of electronic publication in general and social media in particular upon causes of action for defamation in the future will be considerable, and the adequacy of the uniform legislation to deal with limitation and proportionality issues will be strongly tested.

More recently, claims of publication of "fake news" reports of a sensational nature have resulted in the seeking of forms of relief other than damages, such as contempt of court (*Doe v Dowling* [2017] NSWSC 1037) or prosecution for a criminal offence: *Brown v Commonwealth DPP* [2016] NSWCA 333 (prosecution under s 474.17 Criminal Code (Cth)).

The release of the Statutory Review of Australia's uniform defamation legislation, mandated by s 49 of the *Defamation Act* 2005 (NSW), may lead to further consideration of law reform initiatives capable of considering these complex issues of law and technology.

[5-4200] Appendix 1 — *Defamation Amendment Act* 2020

Amendment of *Defamation Act* 2005

The following is a short summary of the essential changes (with references to the appropriate Questions set out in the CAG Discussion Paper):

- **Section 9** (Question 2 in the CAG Discussion Paper): The definition of "excluded" corporation has been revised (in s 9(6)) to define "employee" as any individual engaged in the day to day operations of the corporation other than as a volunteer. This will include a wide range of persons, such as independent contractors.
- **Section 10(2)** (a reform following from issues raised in the invitation set out in Question 18 in the CAG Discussion Paper): The court may determine the costs of an action despite the death of a party if it is in the interests of justice to do so.
- **Section 10A:** (Question 14 in the CAG Discussion Paper): The introduction of the serious harm threshold is one of the key reforms. The issue is for the judge, not the jury, and the issue may be dealt with at any time before or during the trial. Note the differing requirements for individuals and for excluded corporations. Concepts of proportionality have, however, been left to development through the common law.
- **Sections 12A, 12B, 14, 15 and 18** (Questions 4–6 in the CAG Discussion Paper)**:** As noted in Bulletin 76, the main changes to the role of concerns notices are that they must be served in all defamation actions, that a higher degree of precision is necessary in terms of content, and that the defence is one for the judge and not for a jury. The concerns notice will, by reason of these amendments, play a significantly greater role in defamation actions than has previously been the case. Note that a statement of claim cannot operate as a concerns notice and that the ratio to the contrary in *Mohareb v Booth* [2020] NSWCA 49 should be regarded as restricted to actions prior to the date of assent to the litigation.
- **Sections 21 and 22(5)(c)** (the role of the jury and jurisdictional/ jury issues: Questions 7 and 8 in the CAG Discussion Paper): Section 21 (Election for defamation proceedings to be tried by jury) now provides that an election to have defamation proceedings tried by jury is revocable if it is in the interests of justice (a previous draft did not permit revocation). Note also, in relation to juries, the amendments to restrict the role of the jury in certain defences; as set out above, whether the defence is for the judge or for the jury has been clarified in ss 10A and 18(3) (offer of amends and serious harm issues are a question for the judge); as noted below, the result is the opposite in s 30 (qualified privilege defence issues are a matter for the jury).
- **Section 23** (Question 17 in the CAG Discussion Paper): The operation of s 23, which is intended to prevent multiple actions against the same defendant for essentially the same publication, has been enlarged to extend to "associates" of previous defendants, such as employees, contractors or associated entities, at the time of the publication to which the previous proceedings related.
- **Section 26:** (Question 9 in the CAG Discussion Paper): The defence of contextual justification has been completely redrafted to ensure that it is interpreted in the same manner as was the case with its equivalent as set out in s 16 of the repealed *Defamation Act* 1974 (NSW).
- **Section 29A** (Question 11 in the Discussion Paper): This new defence is based on s 4 of the *Defamation Act* 2013 (UK), but adds a checklist, an amendment seen as controversial.
- **Section 30** (Question 11 in the CAG Discussion Paper): The existing defence is modified to allow for the s 29A defence, so that it will be more efficacious in relation to publications principally by non-journalists but which, by reason of the extent of publication (e.g. on social media) or the nature of the publication would fall outside the parameters of the common law defence. The five listed factors are not exhaustive and there is no requirement to establish public interest. The provision also clarifies that the application of the defence is a question for the jury (if a jury has been empanelled).

- **Section 30A** (Question 10 in the CAG Discussion Paper): A defence of scientific or academic peer review, adapted from s 6 of the *Defamation Act* 2013 (UK) has been added.
- **Section 31** (Questions 12 and 13 in the CAG Discussion Paper): Section 31(5) has been redrafted to define more precisely when an opinion is "based on proper material".
- **Section 32** (innocent dissemination: Question 15 in the CAG Discussion Paper): This is the subject of Stage 2 of the reforms; see "Discussion Paper: Attorneys-General Review of Model Defamation Provisions Stage 2".
- **Section 33:** (Question 14 in the CAG Discussion Paper): Despite the long and colourful history of the defence of triviality (also known as unlikelihood of harm), this defence has now been abolished. Initially a nineteenth century common law defence for slander only, it was extended to written publications as well when its statutory equivalent was included as s 13 of the *Defamation Act* 1974 (NSW), s 20 of the *Defamation Act* 1889 (Qld) and s 9(2) of the *Defamation Act* 1957 (Tas). The narrow judicial interpretation given both to this defence, as well as the imposition of the burden of proof on the defendant, rendered this defence unworkable. The serious harm requirement that effectively (now s 10A) brings with it seven years of interpretation by the courts of England and Wales; the certainty that those decisions have given this provision a settled character which will be more difficult to dislodge than the almost invariably unsuccessful triviality defence.
- **Section 35** (Question 16 in the CAG Discussion Paper): The amendments (s 35(2)–(2B)) clarify that the cap is a hard cap, to which aggravated damages may nevertheless be added, thereby overcoming a series of decisions to the contrary, including *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674.
- **Section 44 and Sch 4, cl 7**: These are amendments of an essentially administrative nature. Section 44 inserts email as a means for serving notice or other documents. Schedule 4, cl 7 confirms that the reforms only come into effect after the commencement of the amendment.

Amendment of *Limitation Act* 1969

- **Section 14B (Question 18 in the CAG Discussion Paper):** These new provisions will extend time where there could be a conflict between the limitation period and a concerns notice sent towards the end of the limitation period.
- **Section 14C (Question 14 in the CAG Discussion Paper):** One of the most welcome amendments will be the introduction of the single publication rule, where a cause of action is treated as having accrued on the first date of publication for the purposes of the limitation period. The date of first publication for electronic publications is the date the matter complained of was first uploaded for access and/or sent electronically to a recipient. The rule does not apply where subsequent publications are materially different.
- **Section 56A:** Amendments to the limitation provisions, although not referred to in the CAG Discussion Paper, will balance the restrictions on the limitation period imposed by the single publication rule, in that the plaintiff may apply to the court to extend the limitation period for a period of up to three years if it is established by the plaintiff that it is just and reasonable to do so. As noted above, the concerns notice extends the limitation period if delivered within 56 days before the expiry of the limitation period.
- **Section 73A and Schedule 5 cl 6 and 7**

The new legislation is in the early stages of consideration in other States and territories around Australia. The *Defamation (Miscellaneous) Amendment Bill 2020* (SA) was introduced into the South Australian Parliament on 24 September 2020 by Attorney-General, the Hon V A Chapman. The Bill amends the *Defamation Act 2005* (SA) and the *Limitation of Actions Act 1936* (SA). In the course of introducing the Bill, the Attorney-General stated that it was developed co-operatively with

all other Australian jurisdictions and is the first substantial amendment to the Defamation Act since it was initially passed in 2005. The Bill was described by the Attorney-General as a "major milestone in Australian defamation law": see www.timebase.com.au/news/2020/AT05121-article.html

There are two important points about the proposed new legislation to note:

- As set out above, technology-based aspects of defamation law, such as the defence of innocent dissemination, have been deferred for consideration to enable consultation on a wider basis with the States and territories as well as with the Commonwealth. The potentially different results for liability for publication under a range of civil and criminal proceedings is outlined in K Pappalardo and N Suzor, "The liability of Australian online intermediaries" (2018) 40(4) *Sydney Law Review* 469. As to the potential for differing results in terms of liability for publications which are asserted to be misleading and deceptive as well as defamatory, see the High Court of Australia's observations in *Trkulja v Google LLC* (2018) 263 CLR 149 concerning liability for statements of a misleading and deceptive nature.
- The transitional provisions: The transitional provisions for the new legislation differ from the transitional provisions they replace in that the one-year period of grace following publication (which meant that actions which straddled the date of the new legislation could still be brought under the repealed legislation). How should the transitional provisions be approached where publications (especially online publications) occur both before and after the relevant date for commencement of the transitional provisions?

The following factors should be considered:

- **The relevant date**: This date is generally likely to be 1 July 2021, but there may be differences between States and Territories as to the start date, depending upon what legislation is passed in Western Australia and the Northern Territory.
- **When was the matter published?:** The common law remains unaltered (except in relation to the single publication and limitation provisions) and it is the common law which provides the answer to this question (*Defamation Act* 2005, s 6). At common law, matter is published when it is communicated to a third party. Where the publication is online, that will be when the publication is downloaded and read.
- **When and in what circumstances does the single publication rule apply?:** The single publication rule applies only to the calculation of the limitation period and does not affect the date of accrual of actions (*Limitation Act* 1969, s 73). While this Act does apply the single publication rule to pre-commencement publications (Sch 5, cl 11(3)), the new transitional provisions do not work in the same way (see Sch 4, cl 2), which continued the repealed legislation's applicability to multiple publications of the same matter for post-commencement publications within 12 months.

This is likely to be a fertile source of litigation, as defendants will seek to argue that the new provisions requiring concerns notices and offering new defences apply: *Barilaro v Shanks-Markovina (No 3)* [2021] FCA 1100 at [11]–[13].

[5-4210] Appendix 2 — List of links to the amending legislation in each of the States and Territories

	Name of the Act	Date passed LA/LC	Assent dated	Parliament Website	Note
NSW	*Defamation Amendment Bill 2020*	05 Aug 2020/ 06 Aug 2020	11 Aug 2020	Parliament of NSW	
VIC	*Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020*	29 Oct 2020/ 10 Nov 2020	17 Nov 2020	Victorian Legislation	
SA	*Defamation (Miscellaneous) Amendment Bill 2020*	14 Oct 2020/ 17 Nov 2020	1 Dec 2020	Parliament South Australia	
QLD	*Defamation (Model Provisions) and Other Legislation Amendment Bill 2021*		24 Jun 2021	Queensland Legislation	Report No 9, 57th Parliament. Legal Affairs and Safety Committee, June 2021
TAS	*Defamation Amendment Bill 2021*	02 Sep 2021/ 27 Oct 2021		Parliament of Tasmania	Third Reading in Legislative Council on 26 October 2021
ACT	*Civil Law (Wrongs) Amendment Bill 2021*	23 June 2021 (passed)		ACT Legislation Register	Standing Committee on Justice and Community Safety, Scrutiny Report 5, 25 May 2021
WA		No bill was introduced			
NT		No bill was introduced			

[5-4220] Further references

Legislation

- *Broadcasting Services Act* 1992 (Cth), Sch 5 cll 3, 91
- *Civil Procedure Act* 2005
- Criminal Code (Cth) s 474.17
- *Defamation Act* 2005 ss 6(2), 9, 10, 14(2), 15, 16, 17, 18(2), 21, 22(3), 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 38, 40, 42
- *Evidence Act* 1995 s 135
- *Health Care Complaints Act* 1993 s 96
- *Law Reform (Miscellaneous Provisions) Act* 1946
- *Limitation Act* 1969 s 14B
- *Online Safety Act* 2021, s 235

Rules

- UCPR rr 5.2(2)(a), 14.22, 14.31, 14.32, 14.33, 14.34, 14.35, 14.36, 14.37, 14.38, 14.39, 14.40, 15.1, 15.21, 15.22, 15.23, 15.24, 15.25, 15.26, 15.27, 15.28, 15.29, 15.30, 15.31, 29.2, 29.2A, Pt 42

Practice Note

- Supreme Court Practice Note No SC CL 4 — Defamation List (commenced 5 September 2014)
- District Court Practice Note No 6 — Defamation List (commenced 9 February 2015)

Further references

Books

- R Brown, *Brown on Defamation* (Canada, United Kingdom, Australia, New Zealand United States), 2nd edn, Carswell, Canada, 1994
- M Collins, *Law of Defamation and the Internet*, 3rd edn, OUP, 2010
- G Dal Pont, *Law of Costs*, 3rd edn, LexisNexis, Sydney, 2013
- P George, *Defamation Law in Australia*, 3rd edn, LexisNexis, Sydney, 2017
- R Parkes et al, *Gatley on Libel and Slander*, 13th edn, Sweet & Maxwell, London, 2022
- D Rolph, *Defamation Law*, 1st edn, Thomson Reuters, Sydney, 2016
- T Tobin, M Sexton, J Gibson (Bulletin author), G Corish (editor, LexisNexis), *Australian Defamation Law and Practice*, LexisNexis, Sydney, 1991–
- *Gazette of Law and Journalism* (e-newsletter). There are also e-newsletters in other common law jurisdictions such as *Inforrm* (United Kingdom) and the *Media Law Prof Blog* (United States)
- R Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand United States)*, 2nd ed, Carswell, Canada, 1994–

Articles

- J Cashen "Defamation cap rising well above inflation", *Gazette of Law and Journalism*, 10 December 2014
- J Gibson, "Adapting defamation law reform to online publication" (2018) 22 *MALR* 119
- K Gould, "Hyperlinking and defamatory publication: a question of 'trying to fit a square archaic peg into the hexagonal hole of modernity'?" (2012) 36 *Aust Bar Rev* 137
- L Mullins, "Open justice v suppression orders: tales from the front line", *Gazette of Law and Journalism*, August 2017
- M Paltiel, "Navigating cyberspace — Australian precedent regarding internet liability" (2013) 16(2) *INTLB* 26
- K Pappalardo and N Suzor, "The liability of Australian online intermediaries" (2018) 40(4) *Sydney Law Review* 469
- D Rolph, "Irreconcilable Differences? Interlocutory injunctions for defamation and privacy" (2012) 17 *MALR* 170-200
- D Rolph, "A serious harm threshold for Australian defamation law" (2022) 51 *Australian Bar Review* 185

Blogs and newsletters

- K Barnett, "Trkulja v Google LLC", *High Court Blog*, The University of Melbourne, 3 July 2018
- *Gazette of Law and Journalism* (e-newsletter). There are also e-newsletters in other common law jurisdictions such as Inforrm (United Kingdom) and the Media Law Prof Blog (United States)
- *International Forum for Responsible Media*, Inforrm Blog, Table of Media Law cases, at http://inforrm.wordpress.com/table-of-cases-2/, accessed 6 September 2022

Reports

- The Council of Attorneys Generals' Review of Model Defamation Provisions Discussion Paper, 22 February 2019, at www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf, accessed 6 September 2022

[The next page is 5701]

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

Proof of damages

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.

Damages for malicious prosecution

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].

Damages for sexual assault

Sexual assault is an intentional tort; as such damages must be assessed under the common law. The restrictions and limitations on awarding of damages in the *Civil Liability Act* 2002 do not apply: s 3B(1), *Civil Liability Act* 2002, except that ss 15B and 18(1) as well as Pts 7 and 2A continue to apply: see further *Miles v Doyle (No 2)* [2021] NSWSC 1312 at [45].

Legal costs

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].

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.

Damages may not be reduced on account of contributory negligence

Contributory negligence does not operate at common law as a defence to an intentional tort, subject to the possible application of contributory negligence to the indirect consequences of intentional conduct. By virtue of s 3B of the *Civil Liability Act*, s 5R (contributory negligence) does not apply to an intentional act that was done with intent to cause injury. Thus damages may not be reduced on account of any contributory negligence. See *Irlam v Byrnes* [2022] NSWCA 81 at [19]; [58]; [237]–[238].

Legislation

- *Casino Control Act* 1992
- *Civil Liability Act* 2002, Pt 7, s 3B, s 5R, 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 was originally based on an extract from the NSW Law Reform Commission, Report 131 Compensation to relatives, Sydney, 2011, and is reproduced with permission. This has been updated by his Honour Judge Scotting of the District Court of NSW. This chapter was updated by the Personal Injury Commission in 2022.

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: The Personal Injury Commission was established on 1 March 2021 (s 6(1)). The legal instruments that govern the Commission's operations are now live on the Personal Injury Commission website.

[6-1000] Introduction

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

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

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

Workers' compensation—no fault schemes

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

Where a person is injured or killed arising out of or in the course of his or her employment in NSW, that person and his or her dependants can claim compensation which will be funded though statutory contributions.[2]

In general, injured workers in NSW are entitled to workers' compensation benefits and modified common law damages under the *Workers Compensation Act* 1987.

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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, s 154D; *Workers' Compensation (Dust Diseases) Act* 1942, s 6.

Workers suffering certain dust diseases are covered under their own compensation scheme.[3] Certain volunteers (fire fighters, emergency and rescue workers) are covered under their own scheme.[4]

[6-1010] General workers

In 2012 and 2015 workers' compensation reforms modified weekly payments arrangements for all new and existing workers' compensation claims. The amendments introduced in the *Workers Compensation Legislation Amendment Act* 2012 do not apply to certain categories of workers, namely, police officers, paramedics, firefighters and coal miners. These workers are referred to as "exempt workers". Claims by exempt workers are mainly managed as though the 2012 amendments did not occur.

The current scheme provides for the following weekly payments:[5]

- 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 (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 the 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.[6]
- 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.[7]

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

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[3] *Workers' Compensation (Dust Diseases) Act* 1942.
[4] *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987.
[5] *Workers Compensation Act* 1987, Div 2 Pt 3.
[6] *Workers Compensation Act* 1987, s 38(3A).
[7] Workers Compensation Act 1987, s 34.

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,[8] 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.[9]

The *Workers Compensation Act* 1987 provides the following further benefits for workers:

- the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services[10]
- lump sum permanent impairment compensation dependent on the degree of the impairment[11]
- lump sum compensation for pain and suffering if the claimant has at least a 10% impairment, limited to a maximum award of $50,000 (exempt workers only)[12]
- any reasonably necessary domestic assistance[13]
- compensation, in some circumstances, for gratuitous domestic assistance provided to the worker, and[14]
- compensation for property damage.[15]

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.[16] This is currently $849,300, and is to be apportioned between dependents,[17] or otherwise paid to the worker's legal personal representative.[18] Provision is also made for weekly payments for dependent children[19] and funeral expenses.[20]

This compensation scheme is regulated by State Insurance Regulatory Authority.[21] Insurance and Care NSW (icare)[22] acts on behalf of the Workers Compensation Nominal Insurer, the statutory insurer in NSW.[23]

The Personal Injury Commission resolves disputes in relation to workers compensation statutory entitlements, except for certain classes of injured person. The District Court of NSW has jurisdiction to resolve disputes about claims by coal miners, workers suffering dust diseases and volunteers.[24]

[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

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[8] *Workers Compensation Act* 1987, s 35 prior to amendments made by Act 52 of 2012.
[9] *Workers Compensation Act* 1987, s 37 prior to amendments made by Act 52 of 2012.
[10] *Workers Compensation Act* 1987, s 60.
[11] *Workers Compensation Act* 1987, s 66.
[12] *Workers Compensation Act* 1987, s 67.
[13] *Workers Compensation Act* 1987, s 60AA.
[14] *Workers Compensation Act* 1987, s 60AA(3).
[15] *Workers Compensation Act* 1987, Div 5 Pt 3.
[16] See generally *Workers Compensation Act* 1987, Pt 3 Div 1.
[17] *Workers Compensation Act* 1987, s 25(1)(a).
[18] *Workers Compensation Act* 1987, s 25(1).
[19] *Workers Compensation Act* 1987, s 25(1)(b) which sets a sum of $66.60 subject to indexation in accordance with *Workers Compensation Act* 1987, Pt 3 Div 6.
[20] *Workers Compensation Act* 1987, s 26.
[21] *State Insurance and Care Governance Act* 2015, Pt 3.
[22] *State Insurance and Care Governance Act* 2015, Pt 2.
[23] *Workers Compensation Act* 1987, , Div 1A Pt 7.
[24] *District Court Act* 1973, Div 8A Pt 3.

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").[25]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[26] 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.[27]

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;[28]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[29]
- payment for the commercial provision of domestic assistance;[30] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[31]

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,[32] which continues until re-marriage or the commencement of a de facto relationship,[33] or until the death of the spouse; and a[34]
- weekly payment to each surviving dependent child, currently payable at $158.40 per week,[35] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[36]

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").

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[25] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 5.
[26] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) ss 7–8.
[27] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8I.
[28] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2).
[29] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[30] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[31] *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.
[32] *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).
[33] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(bb).
[34] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(ii).
[35] *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).
[36] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(ba) .

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.[37] 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.[38] 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.[39]

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[40]) or independent contractors who were not covered by the workers' compensation scheme.[41] 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, , 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.

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[37] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8A.
[38] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[39] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(3).
[40] *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60.
[41] Although, see *Workers Compensation Act* 1987, s 20.

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;[42]
- 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 assessment of, or agreement that, there is permanent impairment of greater than 10%;[43]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[44]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[45]
- an exclusion of the damages payable for the loss of the services of a person;[46]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[47] 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;[48] and
- an exclusion of the award of exemplary or punitive damages.[49]

The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim resolution,[50] and that provide for an assessment process as a precondition to commencement of court proceedings.[51]

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.[52]

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

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[42]*Motor Accidents Compensation Act* 1999 (NSW) s 125; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 3.
[43]*Motor Accidents Compensation Act* 1999 (NSW) ss 131, 132.
[44]*Motor Accidents Compensation Act* 1999 (NSW) s 134; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 4.
[45]*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.
[46]*Motor Accidents Compensation Act* 1999 (NSW) s 142.
[47]*Motor Accidents Compensation Act* 1999 (NSW) s 127(2).
[48]*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.
[49]*Motor Accidents Compensation Act* 1999, s 144.
[50]*Motor Accidents Compensation Act* 1999, Pt 4.3.
[51]*Motor Accidents Compensation Act* 1999, s 108. See Pt 4.4 for details of the claims assessment process.
[52]*Motor Accidents Compensation Act* 1999, s 109.

where the injury or death arose as the result of a blameless accident.[53] 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.[54] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[55]

[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 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.[56] 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.[57] 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.[58]

Statutory benefits are payable for reasonable funeral expenses if the death of a person results from a motor accident. "The death of a person" includes a reference to the loss of a foetus of a pregnant woman, whether or not the pregnant woman died and regardless of the gestational age of the foetus.[59]

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 as a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[60] 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.

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[53]*Motor Accidents Compensation Act* 1999, Pt 1.2.
[54]*Motor Accidents (Lifetime Care and Support) Act* 2006, s 4.
[55]See *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 58; Lifetime Care and Support Guidelines 2018—Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme, accessed 20 April 2022.
[56]Note that journey claims were removed by the 2012 workers' compensation amendments.
[57]*Motor Accidents Injuries Act* 2017, s 1.6, "soft tissue injury" is separately defined.
[58]*Motor Accidents Injuries Act* 2017, s 4.11.
[59]*Motor Accidents Injuries Act* 2017, s 3.4(4), commenced 29 March 2022.
[60]*Motor Accidents Injuries Act* 201, s 7.23.

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.[61] 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.[62] 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.[63] 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.[64] 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.[65]

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

[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;[66]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[67]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[68]
- 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;[69]
- 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;[70]

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[61] *Motor Accidents Injuries Act* 2017, ss 4.11 and 4.13.
[62] *Motor Accidents Injuries Act* 2017, s 6.31.
[63] *Motor Accidents Injuries Act* 2017, s 6.32.
[64] *Motor Accidents Injuries Act* 2017, s 6.33.
[65] *Motor Accidents Injuries Act* 2017, s 6.34.
[66] *Civil Liability Act* 2002, s 12, (approximately $3,617).
[67] *Civil Liability Act* 2002, 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).
[68] *Civil Liability Act* 2002, 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).
[69] *Civil Liability Act* 2002, s 15C.
[70] *Civil Liability Act* 2002, s 16; Civil Liability (Non-economic Loss) Order 2010, O 3.

- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[71]
- 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;[72] and
- exemplary, punitive or aggravated damages cannot be awarded.[73]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[74] 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.[75]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[76]

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.[77]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[78]

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.[79]

Future losses are currently calculated according to the 5% actuarial discount rate.[80]

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.[81]

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.[82]

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[71] *Civil Liability Act* 2002, s 14.
[72] *Civil Liability Act* 2002, 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.
[73] *Civil Liability Act* 2002, s 21.
[74] *Civil Liability Act* 2002, s 29.
[75] *Civil Liability Act* 2002, s 30.
[76] *Civil Liability Act* 2002, 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.
[77] *Workers Compensation Act* 1987, s 151E.
[78] *Workers Compensation Act* 1987, s 151H.
[79] *Workers Compensation Act* 1987, s 151G.
[80] *Workers Compensation Act* 1987, s 151J.
[81] *Workers Compensation Act* 1987, s 151I.
[82] *Workers Compensation Act* 1987, s 151M.

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;[83]
- 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;[84] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[85]

[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;[86]
    - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[87]
    - 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.[88]

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.[89] 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,[90] 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

[83] *Workers Compensation Act* 1987, s 151A(1)(a).
[84] *Workers Compensation Act* 1987, 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.
[85] *Workers Compensation Act* 1987, s 151A(1)(c).
[86] *Civil Liability Act* 2002 (NSW) ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
[87] *Civil Liability Act* 2002 (NSW) s 15B. These are also known as *Sullivan v Gordon* damages.
[88] See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
[89] 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.
[90] *Workers Compensation Act* 1987, s 151A(1)(a). See above, para 1.54.

contribution between defendants, and questions arising under relevant policies of insurance.[91] 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.[92]

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;
- 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".[93] 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;[94]
- 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;[95]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[96]

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[91] *Dust Diseases Tribunal Act* 1989 (NSW) s 10.
[92] *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.
[93] 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.
[94] *Dust Diseases Tribunal Act* 1989 (NSW) s 25(3).
[95] *Dust Diseases Tribunal Act* 1989 (NSW) s 25A.
[96] *Dust Diseases Tribunal Act* 1989 (NSW) s 25B.

- 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;[97]
- the calculation of future losses by reference to a 3% actuarial discount table;[98]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[99]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[100] 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.[101]

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[102]
- 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.[103]

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.[104] 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.[105] In addition, unlike the general workers' compensation scheme,[106] 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.[107]

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.[108] In addition, where a worker has an entitlement to statutory workers'

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[97] *Dust Diseases Tribunal Act* 1989 (NSW) s 41.
[98] 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.
[99] *Dust Diseases Tribunal Act* 1989 (NSW) s 12A.
[100] 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)).
[101] *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.
[102] *Dust Diseases Tribunal Act* 1989 s 12B
[103] *Dust Diseases Tribunal Act* 1989 (NSW) s 11A.
[104] See *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[105] *Workers Compensation Act* 1987, s 151A(1)(b).
[106] See *Workers Compensation Act* 1987, s 151A(1)(a).
[107] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8E.
[108] *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.

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.[109]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[110]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[111] 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).[112]

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.

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").[113] 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.[114]

In an estate action, the economic loss damages recoverable comprise:[115]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[116] and provided by, the deceased to other people, prior to death;[117]
- the loss of the deceased's earning capacity to the date of death; and
- funeral expenses.[118]

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"),[119] nor do they include exemplary damages.[120]

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[109]See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.
[110]*Dust Diseases Tribunal Act* 1989 (NSW) s 12D.
[111]*Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.
[112]*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.
[113]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(1).
[114]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).
[115]See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.
[116]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.
[117]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.
[118]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(c).
[119]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(ii).
[120]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(i).

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[121]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[122] 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.[123] 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.[124]

[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,[125] 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.[126] Only one such dependency action can be brought.[127]

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 support,[128] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[129] Although the relevant provision does not explicitly limit the damages recoverable in this way,[130] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[131] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[132]

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.[133] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[134]

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[121]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).

[122]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.

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

[124]*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).

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

[126]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).

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

[128]*De Sales v Ingrilli* (2002) 212 CLR 338 at [91].

[129]*Compensation to Relatives Act* 1897 (NSW) s 3(2).

[130]*Compensation to Relatives Act* 1897 (NSW) s 3(1).

[131]For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.

[132]*Compensation to Relatives Act* 1897 (NSW) s 4(1).

[133]*Compensation to Relatives Act* 1897 (NSW) s 3(1).

[134]*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.

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.[135]

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.[136]

[The next page is 7001]

[135] *Walden v Black* [2006] NSWCA 170 at [96].

[136] 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, ss 151E(1), 151E(3), 151J.

Interest

[7-1000] Introduction

While interest up to judgment is often the subject of agreement, particularly after some judicial encouragement, a range of issues may and do arise. In more complicated situations, particularly where statutory limitations might apply, it is often the better course to receive submissions on interest after the resolution of the principal issues.

Whilst statutory limitations must be complied with it remains the position that "the award of interest should always be approached in a broad and practical way [and] should not be allowed to assume disproportionate importance…": *Cullen v Trappell* (1980) 146 CLR 1 at 22. However, for a case requiring detailed consideration of issues relating to interest up to judgment, see *Gadens Lawyers Sydney Pty Ltd v Symond* (2015) 89 NSWLR 60 at [167]–[186].

Interest after judgment, other than interest on costs, is not, usually at least, an issue for first instances judges and is not, itself, an amount for which judgment is given: *Najdovski v Crnojlovic (No 2)* [2008] NSWCA 281.

[7-1010] Interest up to judgment

Section 100 of the CPA provides that in proceedings for the recovery of money, including any debt or damages or the value of any goods, the court may include interest in the amount for which judgment is given at such rate as the court sees fit: s 100(1). The interest may be awarded on the whole or any part of the money and for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect. As to the expression "proceedings for the recovery of money" see *Lahoud v Lahoud* [2011] NSWCA 405 at [37]–[45].

Section 100(2) makes similar provision for the situation where, in proceedings for the recovery of a debt or damages, payment of the whole or part of the debt or damages has been made after the proceedings commenced but before or without judgment.

Section 100(3) provides that s 100 does not authorise the giving of interest on interest (s 100(3)(a)), the giving of interest on a debt when interest is payable as a right (s 100(3)(b)) or the giving of interest on proceedings for amounts less than a prescribed amount (s 100(3)(c)). Section 100 does not affect the damages recoverable for the dishonour of a Bill of Exchange (s 100(3)(d)).

Section 100(4) provides that in any proceedings for damages, the court may not order the payment of interest under the section in respect of the period for which an appropriate settlement sum was offered (or first offered) by the defendant unless the special circumstances of the case warrant the making of such an order.

Appropriate settlement sum means a sum offered in settlement of proceedings in which the amount for which judgment is given, including interest up to and including the date of the offer, does not exceed the sum offered by more than 10 per cent: s 100(5).

See also Practice Note No SC Gen 16 "Pre-judgment interest rates" and Practice Note DC (Civil) 15 "Pre-judgment interest rates".

[7-1020] Discretionary power

The power to award interest is a discretionary one. For applicable principles see *Ritchie's* [s 100.10]–[100.95], *Thomson Reuters* [CPA.100.30]–[CPA.100.100]. For an example of the application of these principles to both before and after interest, see *Maestrale v Aspite (No 2)* [2014] NSWCA 302.

[7-1030] Statutory limitations

There are a number of legislative provisions, including the CPA itself, which impose limitations or restrictions on the interest which may be awarded.

Section 100(3)(c) of the CPA

The text of the provision appears sufficiently above. A Local Court may not order the payment of interest up to judgment in any proceedings in which the amount claimed is less than $1,000: UCPR r 36.7(2).

Subsection 100(4) of the CPA

The text of the provision appears sufficiently above.

In other contexts, the issue of whether an offer of settlement is an appropriate one can raise difficult questions. However, for the purpose of s 100(4) an appropriate settlement sum is defined as set out above.

There remains, however, the question whether the special circumstances of the case warrant the making of an order for interest.

As to the meaning of special circumstances and applicable principles see *Ritchie's* [s 100.25].

[7-1040] Motor Accidents Compensation Act 1999

A plaintiff has only such right to interest on damages payable in relation to a motor vehicle accident as is conferred by s 137.

That section excludes any entitlement to interest on those components of an award calculated under s 128 (dealing with attendant care service) and any amount for non-economic loss: s 137(2), (3).

Other damages payable in relation to a motor accident are subject to the following provision: s 137(4):

(a) Interest is not payable unless:

  (i) information that would enable a proper assessment of the plaintiff's claim has been given to the defendant and the defendant has had reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the plaintiff's full entitlement to all damages of any kind but has not made such an offer, or

  (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the plaintiff that would enable a proper assessment of the plaintiff's full entitlement to all damages of any kind but has not made such an offer, or

  (iii) if the defendant is insured under a third party policy or is the Nominal Defendant, the insurer has failed to comply with its duty under s 83, or

  (iv) if the defendant has made an offer of settlement, the amount of all damages of any kind awarded by the court (without the addition of any interest) is more than 20 per cent higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) The highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the plaintiff's full entitlement to all damages of any kind.

(c) For the purposes of the subsection an offer of settlement must be in writing.

The amount of interest is to be calculated for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages: s 137(5)(a). It is

to be calculated in accordance with the principles ordinarily applied by the court for that purpose subject to the section: s 137(5)(b). The rate of interest is to be three quarters of the rate prescribed for the purposes of s 101 of the CPA: s 137(6).

Nothing in s 137 affects the payment of interest on a judgment or order of the court: s 137(1).

Despite earlier views, the award of interest, once the provisions of s 137(4) are satisfied, remains discretionary in accordance with principles applicable with respect to s 100 of the CPA: *Najdovski v Crnojlovic (No 2)* (2008) 51 MVR 334 at [11].

For a discussion on a number of potential issues arising from the language of subsection 4 see *Najdovski* at [12]–[25].

On the issue of reasonableness, Basten JA at [26] said that it should be accepted that:

> too great a willingness to treat an offer as "reasonable", and therefore not unreasonable, will allow defendants to escape too readily the obligation to pay for the cost of keeping the plaintiff out of his or her damages. Ultimately reasonableness depends upon an objective assessment of the circumstances and, where the material before the court does not materially differ from that available to the defendant at the relevant time, the judgment of the Court must be treated as, subject to recognition that no precise figure is necessarily correct, a baseline for determining the reasonableness of the offer.

See [7-1060] as to the applicability of s 18(1)(c) of the *Civil Liability Act* 2002.

[7-1045] Motor Accident Injuries Act 2017

A claimant has only such right to interest on damages payable in relation to a motor vehicle accident as is conferred by s 4.16.

No interest is payable on damages awarded for non-economic loss: s 4.16(2).

Other damages payable in relation to a motor accident are subject to s 4.16(3):

(a) Interest is not payable (and the court or claims assessor cannot order the payment of interest) on such damages unless:

  (i) information that would enable a proper assessment of the claim has been given to the defendant and the defendant has had a reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the full entitlement to all damages of any kind but has not made such an offer, or

  (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the claimant that would enable a proper assessment of the full entitlement to all damages of any kind but has not made such an offer, or

  (iii) if the defendant has made an offer of settlement, the amount of all damages of any kind that is awarded (without the addition of any interest) is more than 20% higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) The highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the full entitlement to all damages of any kind.

(c) For the purposes of this subsection, an offer of settlement must be in writing.

The amount of interest is to be calculated for the period from when the loss to which the damages relate was first incurred until the date on which the damages are awarded: s 4.16(4)(a). It is to be calculated in accordance with the principles ordinarily applied by a court for that purpose, subject to the section: s 4.16(4)(b). The rate of interest to be three-quarters of the rate prescribed for the purposes of CPA s 101: s 4.16(5).

Nothing in s 4.16 affects the payment of interest on a judgment or order of a court: s 4.16(6).

The discussion in [7-1040] as to discretion and issues arising under s 137(4) of the *Motor Accidents Compensation Act* 1999 apply to the similar, although not identical, terms of s 4.16.

See [7-1060] as to the applicability of s 18(1)(c) of the *Civil Liability Act* 2002.

[7-1050] Workers Compensation Act 1987

A plaintiff has only such right to interest on damages as is conferred by s 151M: s 151M(1).

Subsections 151M(4)–(7) adopt the same language and scheme as s 137(4)–(7) of the *Motor Accidents Compensation Act* 1999, except that s 137(4)(a)(iii), referring to a third party policy and the Nominal Defendant, is omitted.

While s 151M does not exclude interest on damages payable in respect of attendant care service or for non-economic loss, the schemes should otherwise be dealt with in the same way.

For an example of the application of s 151M, see *State of NSW v Skinner* [2022] NSWCA 9 at [132]–[154] where it was held the respondent was not entitled to pre-judgment interest as, inter alia, the appellant was entitled to have regard to the fact that there was an unresolved issue as to whether the case could proceed at all, having been commenced out of time, and the likelihood of any liability being established.

[7-1060] Civil Liability Act 2002

With respect to cases to which this Act applies, a court cannot order the payment of interest on damages awarded for non-economic loss (s 18(1)(a)), gratuitous attendant care services with some exceptions (s 18(1)(b)), or the loss of capacity to provide gratuitous services to dependants (s 18(1)(c)).

The provision that interest cannot be paid on damages awarded for the loss of capacity to provide gratuitous services to dependants applies to motor accidents: s 3B(2).

If interest is to be awarded, the amount of interest is to be calculated for the period from when the loss first occurred until the date when the court determines the damages: s 18(2)(a). It is to be calculated in accordance with the principles ordinarily applied by the court for that purpose (s 18(2)(b)). The interest rate is to be as provided by s 18(3), (4).

[7-1070] Interest after judgment

Section 101 provides for interest after judgment including interest on costs. Interest on costs is payable unless the court otherwise orders: s 101(4).

For a discussion of relevant issues see, *Ritchie's* [s 101.5]–[s 101.30], *Thomson Reuters* [CPA101.20]–[CPA 101.50], *Zepinic v Chateau Constructions (Australia) Ltd (No 2)* [2013] NSWCA 227 at [82]–[88], (just as a costs order must be sought at the time of judgment, or within any time limited by UCPR 36.16, so, too, must an interest on costs order); *Grills v Leighton Contractors Pty Ltd (No 2)* [2015] NSWCA 348; *Grima v RFI (Aust) Pty Ltd* [2015] NSWSC 332 (time from when interest should be paid) and *Tjiong v Tjiong (No 2)* [2018] NSWSC 1981 at [164] (an application for an award of interest on costs must be made, if the order proceeds to assessment, before the assessment is undertaken).

[7-1080] Rate of interest

Rates of interest are prescribed for interest after judgement: UCPR r 36.7 and Sch 5. However, there is no such rate for interest up to judgment. The rates in Sch 5 will usually be accepted as appropriate

without evidence: *Hexiva Pty Ltd v Lederer (No 2)* [2007] NSWSC 49 at [9]. However, a party contending that the rate should be different is entitled to do so but will need, generally at least, to produce evidence in support of such a rate. "The plaintiff's loss and its quantum are to be found as a fact and assessed on the evidence…": *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358. In undertaking this task it will generally be appropriate for the court to have regard to prevailing market rates.

An accepted method of calculating the interest on damages accruing progressively over a period of time is to halve the rate of interest, the period or the principal amount: *Cullen v Trappell*, as above, *Riddle v McPherson* (1995) 37 NSWLR 338 at 342 (Motor Accidents Act 1988, s 73(5)(a)).

Legislation

- CPA ss 100, 101
- *Civil Liability Act* 2002 ss 3B(2), 18
- *Motor Accidents Act* 1988, s 73(5)(a)
- *Motor Accidents Compensation Act* 1999 s 137
- *Motor Accident Injuries Act* 2017 s 4.16
- *Workers Compensation Act* 1987 s 151M

Rules

- UCPR r 36.7 Sch 5 (repealed)

Practice Notes

- Practice Note No SC Gen 16 — Pre-judgment interest rates
- Practice Note DC (Civil) 15 — Pre-judgment interest rates

[The next page is 8001]

Costs

Acknowledgement: the following material has been prepared by the Honourable Justice Paul Brereton, AM RFD of the NSW Court of Appeal.

[8-0000] Scope

This chapter is concerned with the exercise of the jurisdiction to make costs orders between parties to litigation (and also, in some circumstances, against third parties). It is not concerned with costs as between legal practitioners and their clients, or (except incidentally) with applications for security for costs (as to which see [2-5900]ff).

The purpose of a costs order is to compensate the person in whose favour it is made, not to punish the person against whom the order is made: *Northern Territory v Sangare* (2019) 265 CLR 164 at [25]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]. It is not inconsistent with this principle that costs orders also play an essential role in case management; though not "punitive", defaults in compliance with procedural directions will often merit a costs order, because of the additional cost which the default occasions to the innocent party.

The applicable law is provided by:

- the *Civil Procedure Act* 2005 ("CPA"), which authorises the making of orders with respect to costs: s 98, including gross sum costs orders: s 98(4)(c), capped costs orders: s 98(4)(d), and costs orders against legal practitioners: CPA s 99
- the *Uniform Civil Procedure Rules* 2005 ("UCPR"), which establish the general rule that costs "follow the event": UCPR r 42.1
- the *Legal Profession Uniform Law Application Act* 2014 ("LPULAA") and *Legal Profession Uniform Law,* or (for proceedings which commenced before 1 July 2015), the (now repealed) *Legal Profession Act* 2004 ("LPA")
- the common law, which continues to regulate some aspects of the law of costs; and
- specific statutory provisions for certain types of proceedings.

[8-0010] Power of the court to order costs

The CPA is the principal statutory source of the court's power to award costs, and confers on the court "full power" to determine by whom, to whom and to what extent costs are to be paid, on what basis, and at any stage of proceedings, unless there are statutory provisions to the contrary: CPA s 98; see also *Dal Pont* at 6.14–6.17. The court may exercise that power whenever the circumstances warrant, having regard to the scope and purpose of CPA s 98: *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Hamod v State of NSW* [2011] NSWCA 375 at [813].

However, costs being in the discretion of the court, the discretion must be exercised on a principled and judicial basis: *Northern Territory v Sangare* (2019) 265 CLR 164 at [24]; *Williams v Lewer* [1974] 2 NSWLR 91 at 95. As explained in *Sharpe v Wakefield* [1891] AC 173 at 179, to exercise discretion judicially requires adherence to "reason and justice, not according to private opinion ... according to law, and not humour", and is not to be "arbitrary, vague, and fanciful, but legal and regular". Consistency is "an essential aspect of the exercise of judicial power": *Northern Territory v Sangare* at [24].

CPA s 98 is expressly subject to, relevantly, "any other Act": s 98(1); *Smith v Sydney West Area Health Service (No 2)* [2009] NSWCA 62 at [11]. Instances of this include s 346 of the *Workplace*

Injury Management and Workers Compensation Act 1998, which makes specific provision for the award of costs in claims for work injury damages including costs in court proceedings for such claims: see [8-0170]; and *Defamation Act* 2005, s 40: see [8-0050].

[8-0020] The general rule: costs follow the event

The general rule is that if the court makes any order as to costs, it is to order that the costs follow the event, unless it appears that some other order should be made: UCPR r 42.1. This general rule, in the context of the purpose of a costs order, founds a "reasonable expectation" on the part of a successful party of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], [134]; *Northern Territory v Sangare* (2019) 265 CLR 164 at [25].

The general rule reflects the notion that justice to a successful party is not achieved if it comes at the price of being out-of-pocket, so that a party who is responsible for litigation should bear its costs. Underlying both the general rule that costs follow the event, and the qualifications to it, is the idea that costs should be paid in a way that is fair, having regard to the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant's responsibility because the plaintiff was caused to incur costs by the defendant's failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79.

It has been said that the "event" is not confined to the determination of the proceedings as a whole, or of particular causes of action, nor limited to issues in the technical pleading sense, but can extend to any disputed question of fact or law: *Reid Hewett & Co v Joseph* [1918] AC 717; *Williams v Stanley Jones & Co Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478; *Forster v Farquhar* [1893] 1 QB 564 at 569; *Hughes v Western Australian Cricket Association Inc* [1986] FCA 511; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. However, the prevailing approach is that the words "follow the event" generally refer to the event of the claim or counter claim, so that a successful party should have the whole costs of the proceeding, including the costs of an issue on which it has failed, unless in respect of that issue the successful party has "unfairly, improperly, or unnecessarily increased the costs": *Windsurfing International Inc v Petit* (1987) AIPC 90-441 at 37,861–37,862, although in an appropriate case, a costs order may be moulded to reflect the degree of success on distinct issues: *Lavender View v North Sydney Council (No 2)* [1999] NSWSC 775; *Uniline Australia Ltd (ACN 010 752 057) v Sbriggs Pty Ltd (ACN 007 415 518) (No 2)* [2009] FCA 920; *Leallee v the Commissioner of the NSW Department of Corrective Services* [2009] NSWSC 518; *Sahab Holdings Pty Ltd v Registrar-General [No 3]* [2010] NSWSC 403 at [36]; *Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed)* [2011] NSWSC 1425 at [54]–[60]. Thus, in most ordinary cases, the "real practical outcome" of a particular claim will provide sufficient guidance: *Windsurfing International Inc v Petit* at 37,861–37,862; *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [15].

However, the prima facie principle that costs follow the event is subject to the ability of the court to make further or other orders as required to achieve a just result: *Lombard Insurance Co (Australia) Ltd v Pastro* (1994) 175 LSJS 448; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 688; *Furber v Stacey* [2005] NSWCA 242. Discretionary reasons for departing from the rule may arise where the successful party has failed to better an offer of compromise made by the unsuccessful party: see [8-0030]; where excessive or disproportionate costs (such as the briefing of Senior Counsel for simple applications) have been incurred: see [8-0160]; or where the ultimately successful party has failed on issues of substance, especially where those issues have occupied a substantial part of the proceedings: see [8-0040]. There are some classes of proceedings in which the general rule is not applied, invariably or at all: see [8-0050]. The general rule may also

be displaced by contractual agreement: see [8-0060]. Other rules are necessary where there is no "event" because there is no final judgment on the merits, in particular where the parties settle the substantive dispute but are unable to resolve the question of costs: see [8-0070].

[8-0030] Departing from the general rule: depriving a successful party of costs

The discretion to depart from the general rule must be exercised judicially and "according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy": *Williams v Lewer* [1974] 2 NSWLR 91 at 95; *Oshlack v Richmond River Council* at [22]. If considering a departure from the ordinary rule, the court should have regard to the purpose, rationale and principles of fairness which inform the general rule, referred to above, in particular that the award of costs should reflect the relative responsibilities of the parties for the incurring of costs: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121]; *Turkmani v Visalingam (No 2)* [2009] NSWCA 279 at [13]. The onus lies on the unsuccessful party to demonstrate a basis for departing from the usual rule: *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [10].

Some of the more usual reasons for depriving a successful party of costs, in whole or in part, are discussed below. While these are useful illustrations of circumstances in which departure from the general rule may be justified, it remains a matter for the discretion of the court whether, in the circumstances of any particular case within the scope of those examples, it is appropriate to depart from the general rule: *Oshlack v Richmond River Council* at [69]; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [97]–[98].

Only in an exceptional case would a successful party not only be deprived of its costs but also ordered to pay the opponent's costs: *Knight v Clifton* [1971] Ch 700; *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 42 FLR 213 at 220; *Arian v Nguyen* [2001] NSWCA 5.

Disentitling conduct

Circumstances that may influence a court to depart from the general rule that costs follow the event include disentitling conduct on the part of the successful party: *Oshlack v Richmond River Council* at [40], [69]. Disentitling conduct in this context may be constituted by any conduct "calculated to occasion unnecessary expense" and need not necessarily amount to "misconduct": *Keddie v Foxall* [1955] VLR 320 at 323–324; *Lollis v Loulatzis (No 2)* [2008] VSC 35 at [29], nor even amount to "a most exceptional case, or a strong or exceptional case": *G R Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 at [20]. Instances include:

- where the successful party effectively invited the litigation: *Ritter v Godfrey* [1920] 2 KB 47
- where the successful party unnecessarily protracted the proceedings: *Lollis v Loulatzis (No 2)* at [29], and
- where the successful party pursued the matter solely for the purpose of increasing the costs recoverable.

The mere fact that a defendant strenuously defends a claim (and fails in some of those defences) does not entitle the plaintiff to all or some of the costs of proceedings in which the plaintiff does not succeed, or does not succeed to any material extent: *AMC Caterers Pty Ltd v Stavropoulos* [2005] NSWCA 79 at [4]–[6].

Late amendment

A successful party may be deprived of costs if its success is attributable to a ground raised only by a late amendment: *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137 (no costs awarded); *Faraday v Rappaport* [2007] NSWSC 253 at [25]–[30]; cf *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No 2)* [2018] NSWCA 266 at [40]–[49], [87]. Although it has been said that, as a general rule, where a

plaintiff makes a late amendment which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the cost of the action down to the date of amendment: *Beoco Ltd v Alfa Laval Co Ltd* at 154, citing *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 and *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA)); see also *Murrihy v Radio 2UE Sydney Pty Ltd* [2000] NSWSC 318. This "general rule" has emerged in the context that though the late amendment has resulted in some slight measure of success for the plaintiff, ultimately the true victor, having regard to the case as a whole, was the defendant; where that is not so, the plaintiff may still recover some, or even all, its costs: *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [17], [26], [27]; cf *Almond Investors Ltd v Kualitree Nursery Pty Ltd (No 2)* [2011] NSWCA 318 at [8].

Where the successful party is only nominally successful

Generally, the "event" will be regarded as going against a party who recovers only nominal damages: *Oshlack v Richmond River Council*, above, at [70]; *Ng v Chong* [2005] NSWSC 385, unless some other right is vindicated by the judgment notwithstanding that no substantial damages are recovered. Attention must be given, however, to the specific circumstances of each case: *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 874; *EKO Investments Pty Limited v Austruc Constructions Ltd* [2009] NSWSC 371 at [18]–[23]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [14], citing *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 at [100].

Quantum and proportionality

Even if success is more than merely nominal, the amount of the damages recovered may affect the question of costs: *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685, particularly if it falls below the threshold referred to in UCPR rr 42.34 or 42.35, in which case the successful plaintiff is entitled to its costs only if the court is satisfied that the proceedings should have been commenced and continued in that court: *Redwood Anti-Aging Pty Ltd v Knowles (No 2)* [2013] NSWSC 742 at [17]–[22]. UCPR r 42.35 provides that in proceedings in the District Court, where a plaintiff obtains a judgment in an amount of less than $40,000, an order for costs may, but will ordinarily not, be made, unless the court is satisfied the commencement and continuation of the proceedings in the District Court, rather than the Local Court, was warranted. UCPR r 42.34 makes similar provision in respect of proceedings in the Supreme Court where less than $500,000 is recovered.

Relevant considerations as to whether the commencement and continuation of the proceedings in the higher court were warranted include the complexity of the factual and/or legal issues: *Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd (No 2)* [2017] NSWCA 340 at [18]–[19]; the amount claimed, and the reasons for this; the amount actually recovered, and the reasons for this; the difficulty or otherwise of assessing the likely damages awarded; the nature of the proceedings in question, and how this impacts, if at all, upon the need to proceed in the higher court; the conduct and attitude of the parties to litigation; and the importance of the legal principle involved in the case as a matter of precedent: *Dal Pont* at 12.15; and *Singapore Airlines v Principle International* at [7]. In *McLennan v Antonios (No 2)* [2014] NSWDC 38, where the plaintiff had recovered only $12,000 in a claim under *Motor Accidents Compensation Act* 1999, a contention that no costs order should be made failed on the basis that the District Court was a specialist personal injuries and motor accidents court while the Local Court was not.

A significant disproportion between the amount for which judgment is recovered and the costs of the proceedings may warrant depriving an otherwise successful plaintiff of a usual costs order, including of a prima facie entitlement to indemnity costs arising from bettering an offer of compromise: *Jones v Sutton (No 2)* [2005] NSWCA 203.

It has been held that a party may apply under CPA and UCPR rr 12.7 and 13.4 to stay or to strike out the proceedings in their entirety, on the basis that the costs are out of all proportion to the object of resolving the issues between the parties, though such cases will be very rare: *Jameel v Dow Jones*

& Co Inc [2005] QB 946 at [67]-[76]; *Bleyer v Google Inc* (2014) 88 NSWLR 670; *Vizovitis v Ryan* [2012] ACTSC 155 at [37], referring to *Jones v Sutton (No 2)*. This view is not without controversy and has not been resolved at appellate level in Australia: see the later comments by McCallum JA in *Massarani v Kriz* [2020] NSWCA 252, referring to *Smith v Lucht* [2014] QDC 302; *Feldman v The Daily Beast Company LLC* [2017] NSWSC 831 at [15]–[18]; *Ghosh v NineMSN Pty Ltd* (2015) 90 NSWLR 595 at [44]; [55]; [56]; *Lazarus v Azize* [2015] ACTSC 344 at [23]; *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639 at [130]–[143]; *Watney v Kencian* [2017] QCA 116 at [61]; *GG Australia Pty Ltd v Sphere Projects Pty Ltd (No 2)* [2017] FCA 664 at [52]; *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612 at [5], [40]; *Armstrong v McIntosh (No 2)* [2019] WASC 379 at [115]; *Fox v Channel Seven Adelaide Pty Ltd (No 2)* [2020] SASC 180 at [11]-[21]; and *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126 at [40].

Public interest

That the proceedings involve some public interest aspect does not, of itself, warrant departure from the general rule that costs follow the event: *Oshlack v Richmond River Council* at [90]; *Re Kerry (No 2) — Costs* [2012] NSWCA 194 at [13], [15]; cf *CSR Ltd v Eddy* (2005) 226 CLR 1 at [78]–[81]. While it may be a relevant consideration that there is a divergence of authority on a particular issue, in private litigation the importance of the subject matter does not necessarily provide a basis in for refusing to award costs to the successful party: *Rinehart v Welker (No 3)* [2012] NSWCA 228 at [15]. Nor do the general vicissitudes of litigation warrant a departure from the principle, even where a judge's error necessitates an application to vary an order: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [59]–[62].

Indulgences

Where a party seeks and obtains some favour or dispensation from the court (such as leave to amend or an extension of time), and although the starting point remains the general rule under UCPR r 42.1, so that the inquiry is whether in the exercise of the court's discretion, that rule should be departed from or some other order preferred: *(Nowlan v Marson Transport Ltd* (2001) 53 NSWLR 116 at [37]), ordinarily (though not invariably) the party seeking the indulgence is required to pay the costs of the application irrespective of the outcome, unless the other party has unreasonably opposed it: *Holt v Wynter* (2000) 49 NSWLR 128 at [121]*; Nardell Coal Corporation v Hunter Valley Coal Processing* (2003) 178 FLR 400 at 435-6; *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 619 at [24], citing *The Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd (No 2)* [2007] NSWSC 797 at [6]. However, whether this was a general rule was doubted in *Fordham v Fordyce* [2007] NSWCA 129 at [50]; see also *The Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347 at [109]–[111] and [144]–[153]; and *Mamfredas Investment Group Pty Limited (formerly known as MAM Marketing Pty Ltd) v PropertyIT and Consulting Pty Ltd* [2013] NSWSC 929 at [85], where the existence of such an overarching principle was said to be "not clear". This rule is of particular application where the party seeking the indulgence requires relief from some relevant delinquency, in which case costs are ordinarily awarded in favour of the unsuccessful opposing party *(Pascoe v Edsome Pty Ltd (No 2)* [2007] NSWSC 544) whereas unsuccessful opposition to a reasonable application for leave to amend is in a different category and might result in no order, or even an order that the respondent pay the applicant's costs. An application to vary an order where the judge rather than a party has made an error is not an application for an indulgence: *Jaycar Pty Ltd v Lombardo* at [67].

Offers of compromise and Calderbank letters

The general rule is displaced where the result is no more favourable to a successful plaintiff than an offer of compromise made by the defendant in accordance with the rules of court. In such a case, unless the court otherwise orders, the plaintiff is entitled to an order against the defendant for the plaintiff's costs on the ordinary basis up to the date of the offer, but the defendant is entitled to an order against the plaintiff for its costs on the indemnity basis thereafter: UCPR r 42.15.

The general rule may be displaced as a matter of discretion where the result is no more favourable to the successful party than an offer made by the unsuccessful party in a Calderbank letter: *Calderbank v Calderbank* [1975] 3 All ER 333; *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103 at 108. However, unlike a formal offer of compromise, a Calderbank letter is merely a relevant consideration in the exercise of the discretion, and does not have an equivalent presumptive effect to an offer of compromise under the rules: *Commonwealth of Australia v Gretton* at [43]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [19], [46]–[47]; *Nobrega v Trustees for the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133 at [20]–[22]; *Skalkos v Assaf (No 2)* [2002] NSWCA 236 at [117]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [107]–[119]. One reason for this is that a party seeking to take advantage of an offer for the purposes of costs should be expected to comply with the procedures and safeguards provided by the rules of court. Nonetheless, as a matter of discretion, a *Calderbank* offer may justify a special order for costs, including an order for costs on an indemnity basis, if the final judgment is no more favourable than the offer, its rejection was unreasonable: *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [8]; *Jones v Bradley (No 2)* [2003] NSWCA 258 at [13]; *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37], and the offer sufficiently foreshadowed its use to support a special costs order: *Brymount Pty Ltd v Cummins (No 2)* [2005] NSWCA 69 at [10]–[21]; *Penrith Rugby League Club Ltd trading as Cardiff Panthers v Elliot (No 2)* [2009] NSWCA 356; *Nu Line Construction Group Pty Ltd v Fowler (aka Grippaudo)* [2012] NSWSC 816 at [9]–[14], [38]–[40].

See also "Offers of compromise and Calderbank letters" under [8-0130].

Offers of contribution

Where a party has made an offer to contribute under UCPR r 20.32, the court must take into account both the fact and the amount of the offer in exercising its discretion as to costs: UCPR r 42.18; *Simmons v Rockdale City Council (No 2)* [2014] NSWSC 1275; *Thornton v Wollondilly Mobile Engineering (No 2)* [2012] NSWSC 742 at [13]–[18]; *James Hardie & Co Pty Ltd v Wyong Shire Council* (2000) 48 NSWLR 679 at [23]. While such an offer is only "taken into account", which means that it does not have the presumptive effect of an offer of compromise, it is a useful tool for one defendant against another in litigation. The necessary consequence of acceptance of an offer of contribution is the application of r 20.27(3), being the ability to apply for judgment to be entered accordingly: *Charlotte Dawson v ACP Publishing Pty Ltd* [2007] NSWSC 542 at [23]. A defendant making an offer to contribute may seek costs, including indemnity costs.

[8-0040] Departing from the general rule: apportionment

Mixed success on multiple issues

Where the litigation involves multiple issues, the ultimately successful party may have failed on one or a number of the issues in the trial. Where the ultimately unsuccessful party has succeeded (and, as a corollary, the successful party has failed) on one or more substantial issues, the question often arises whether there should be a departure from the general rule given that "the event" is not necessarily limited to the final overall outcome, but can include individual issues in the proceedings: *Williams v Stanley Jones & Co Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478; see [8-0020]. In this context, courts do not usually apportion costs between issues, but act on the outcome of the proceedings as a whole, without attempting to differentiate between particular issues on which the successful party may not have succeeded: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. As the High Court cautioned in *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* [2015] HCA 53 at [6], there are "good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like". The severability of one issue on which the successful party failed is not, without more, sufficient to warrant departure from the general rule: *Hawkesbury District Health Service Ltd v Chaker (No 2)* [2011] NSWCA 30 at [14]. A successful party's entitlement to the whole

of the costs of the proceedings should not be discounted to allow for another party's success on a separate issue that played a very minor part in the proceedings as a whole: *Waters v PC Henderson (Australia) Pty Ltd* [1994] NSWCA 338; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [107]; *Macourt v Clark (No 2)* [2012] NSWCA 411 at [7].

However, the court must strike a balance between permitting litigants to canvas all issues, while not rewarding them for unreasonable conduct or encouraging the agitation of unnecessary issues: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16. These days apportionment to reflect the relative success of the parties is becoming more commonplace. Unreasonable or improper conduct is not a necessary condition for moderating a costs order to reflect a party's failure on a particular issue: *Short v Crawley (No 40)* [2008] NSWSC 1302 at [32]. The court may depart from the general rule if the unsuccessful party succeeds on significant issues: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [31]–[36]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]; *Sydney Ferries v Morton (No 2)* [2010] NSWCA 238 at [10]–[12]; *Roads and Traffic Authority (NSW) v McGregor (No 2)* [2005] NSWCA 453 at [20]; *Cross v Queensland Newspapers Pty Ltd (No 2)* [2008] NSWCA 120 at [13]; *Tarabay v Leite* [2008] NSWCA 259 at [76]. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [241]–[245], Kiefel and Keane JJ concluded that each side should bear its own costs on the basis that the plaintiff's limited success was largely "a Pyrrhic victory, given the rejection of substantial aspects of her case".

A court will generally only deprive the successful party of the costs relating to an issue on which it was unsuccessful when that issue was clearly dominant or separable: *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63]–[66]; *Waters v PC Henderson (Australia) Pty Ltd*. An issue or group of issues is "clearly dominant" when it is clearly dominant in the proceedings as a whole: *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [107]; cf *Correa v Whittingham (No 2)* [2013] NSWCA 471 at [26]–[30]; *Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue (NSW)* [2013] NSWCA 470 at [229]–[232] (cross-appeal not clearly dominant or separable); *Xu v Jinhong Design & Constructions Pty Ltd (No 2)* [2011] NSWCA 333 at [4] (contractual issues not clearly dominant or separable); *Turkmani v Visvalingan (No 2)* [2009] NSWCA 279 at [11] (contributory negligence not clearly separable from liability). Greater latitude is allowed in this respect to a defendant than to a plaintiff, so that the general rule may be departed from more readily against a successful plaintiff who has pressed additional issues which have failed, than against a successful defendant who has unsuccessfully raised additional issues: *Ritter v Godfrey* [1920] 2 KB 47; *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 81 ALR 166 at 169; *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 637; *Hendriks v McGeoch* [2008] NSWCA 53 at [104]; *Griffith v ABC (No 2)* [2011] NSWCA 145 at [16], [19]–[20], [38]–[39]; *Dal Pont* 8.8–8.9. Thus where a plaintiff's case fails, it may sometimes be appropriate to order the plaintiff to pay the costs of issues unsuccessfully raised by the defendant, even if those issues are severable, so long as the defendant acted reasonably in raising those issues; but it is less often the case that a defendant would be ordered to pay the costs of severable issues unsuccessfully raised by an otherwise successful plaintiff. However, the requirements of CPA s 56, that parties assist the court to facilitate the just, quick and cheap resolution of the real issues on the proceedings and take reasonable steps to resolve or narrow the issues in dispute, apply to defendants as well as plaintiffs. This is relevant to the exercise of the costs discretion: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [9]–[10].

The principles governing the making of a costs order to reflect the costs incurred in dealing with a particular issue on which the successful party in the proceedings did not succeed have been summarised, in the context of appellate proceedings, by the Court of Appeal in *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38] as follows:

- Where there are multiple issues in a case the court generally does not attempt to differentiate between the issues on which a party was successful and those on which it failed. Unless a

particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed: *Waters v P C Henderson (Aust) Pty Ltd* [1994] NSWCA 338.

- In relation to trials, it may be appropriate to deprive a successful party of costs or a portion of the costs if the matters upon which that party was unsuccessful took up a significant part of the trial, either by way of evidence or argument: *Sabah Yazgi v Permanent Custodians Limited (No 2)* [2007] NSWCA 306 at [24], so a similar approach is adopted on appeal.
- If the appellant loses on a separate issue argued on the appeal which has increased the time taken in hearing the appeal, then a special order for costs may be appropriate which deprives the appellant of the costs of that issue: *Sydney City Council v Geftlick & Ors (No 2)* [2006] NSWCA 374 at [27].
- Whether an order contrary to the general rule that costs follow the event should be made depends on the circumstances of the case viewed against the wide discretionary powers of the court, which powers should be liberally construed: *State of NSW v Stanley* [2007] NSWCA 330 at [18] per Hislop J (with whom Beazley and Tobias JJA agreed).
- A separable issue can relate to "*any disputed question of fact or law*" before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [34].
- Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion and mathematical precision is illusory. The exercise of the discretion depends upon matters of impression and evaluation: *James v Surf Road Nominees Pty Ltd (No 2)*, citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272.

See also *Elite Protective Personnel Pty Ltd & Anor v Salmon (No 2)* [2007] NSWCA 373; *City of Canada Bay Council v Bonaccorso Pty Ltd (No 3)* [2008] NSWCA 57 at [22]; *Turkmani v Visvalingham (No 2)* [2009] NSWCA 279; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [22]; *Avopiling Pty Ltd v Bosevski* (2018) 98 NSWLR 171 at [173]; *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [232]–[233].

Giving effect to apportionment

Orders to the effect that party A pay party B's costs of specified issues (and that party B pay party A's costs of other issues) create complexities for assessors. It is therefore undesirable to have multiple costs orders defined by reference to issues arising out of the one set of proceedings. It is preferable to make a single order that covers all of the issues, on what has often been referred to as a "broad axe" basis: *In the matter of Commercial Indemnity Pty Limited* [2016] NSWSC 1125, that Party B pay a percentage of Party A's costs of the proceedings: see Precedent 8.6 at [8-0200]. This avoids visiting on assessors a requirement to allocate work and costs between issues. The nature and extent of the apportionment is a discretionary one, and the court may take an impressionistic approach to apportionment, "on a relatively broad brush basis", rather than seeking to identify and quantify issues with precision: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [19]; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272; *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [11]; *Bostik Australia Pty Ltd v Liddiard (No 2)* at [38]. It has been said that the approach of analysing the percentage of costs between the issues by counting the proportion of paragraphs and pages devoted to each factual topic is "a highly artificial way of proceeding", giving "a false air of mathematical precision": *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [84]; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2)* [2019] NSWCA 173 at [32]. Nonetheless, such an analysis can sometimes provide useful assistance in apportionment, so long as its limitations are recognised.

If, for example, it is considered that issues on which (unsuccessful) Party B succeeded accounted for about 20% of the costs of the proceedings, and that Party A should not recover costs of those issues but should not have to pay Party B's costs of them, then the order would be that Party B pay 80% of Party A's costs of the proceedings. If it were considered that Party A should pay Party B's costs of the issues on which Party A failed, then Party B should pay 60% of Party A's costs of the proceedings.

Other cases for apportionment

Independently of issues of separability, the general rule may be departed from:

- where each party has had substantial success — in which case the court may make no order as to costs: *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 at [40]
- where the plaintiff has incurred unnecessary costs — including the unnecessary retainer of senior counsel, or through significant credit issues: *Jones v Sutton (No 2)* [2005] NSWCA 203 at [64]; alternatively, the successful party's costs may be capped: UCPR r 42.4; *Nudd v Mannix* [2009] NSWCA 32 at [26]–[27]; *Re Sherbourne Estate (No 2)* (2005) 65 NSWLR 268; see [8-0160], and
- where the shortcomings and delinquencies of the unsuccessful party are equalled or exceeded by those of the successful party: *Rural & General Insurance Broking Pty Ltd v APRA* [2009] ACTSC 67, in which the conduct of the practitioners on both sides, and their clients, was said to be "a sorry affair" and contributed to there being only limited costs orders upon the discontinuance of hopeless proceedings: at [173] and contributed to there being only limited costs orders upon the discontinuance of hopeless proceedings.

[8-0050] Displacement of the general rule: particular types of proceedings

In some types of proceedings, common law principles, convention, and/or statutory provisions have the consequence that the application of the general rule is qualified, modified or displaced [see *Dal Pont* at 8.71–8.92].

Probate

In probate proceedings, subject to two well-recognised exceptions, the general rule that costs follow the event usually applies, the exceptions being:

1. where the testator had been the cause of the litigation, and
2. where the "circumstances led reasonably to an investigation concerning the testator's will": *Brown v M'Encroe* (1890) 11 LR (NSW) Eq 134 at 145-6; *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709; *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [13]–[14]; *Grynberg v Muller; Estate of Bilfeld* [2002] NSWSC 350 at [32]ff; *Re Estate Late Hazel Ruby Grounds* [2005] NSWSC 1311 at [30]; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 at [125]; *Walker v Harwood* [2017] NSWSC 228 at [52]–[57].

However, this general rule may be displaced by discretionary considerations: *Simpson v Hodges* [2008] NSWSC 303 at [55], and in a proper case the costs of both parties may be borne by the estate: *Williamson v Spelleken* [1977] Qd R 152; or a certain percentage of costs may be borne by the estate: *McCusker v Rutter* [2010] NSWCA 318.

Even where it is appropriate that the estate bears the costs, the estate does not automatically bankroll the legal costs of every party who wishes to be heard. This needs to be borne in mind by parties who desire to participate in the proceedings but whose interests are already adequately protected — parties and their legal representatives must take reasonable steps to avoid duplicated or unnecessary legal representation: *Milillo v Konnecke* [2009] NSWCA 109 at [125]–[128];

Re Dowling; sub nom NSW Trustee and Guardian v Crossley [2013] NSWSC 1040. Additionally, orders may be made fixing (or "capping") the maximum costs, founded on the principle of proportionality: see [8-0160].

Executors acting honestly and with propriety are entitled to costs not recoverable from another party from the estate, on an indemnity basis: *Milillo v Konnecke* at [130]; *Diver v Neal* [2009] NSWCA 54 at [80]; *Warton v Yeo* [2015] NSWCA 115: see also [8-0100].

Family provision

Section 99, *Succession Act* 2006 provides that the court may order that the costs of proceedings for a family provision order, including costs in connection with mediation, be paid out of the estate or notional estate, or both, in such manner as the court thinks fit. The section also authorises regulations making provision for or with respect to the costs in connection with family provision proceedings, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person, and provides that the section and any regulations made under it prevail to the extent of any inconsistency with the legal costs legislation.

It has been said that such proceedings stand apart from cases in which costs follow the event; that costs in family provision cases generally depend on the overall justice of the case; that even in the case of an unsuccessful application, it may be that no order is made as to costs, particularly if it would have a detrimental effect on the applicant's financial position; and that there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate: *Singer v Berghouse* [1993] HCA 35 (Gaudron J, refusing an application for security for costs). However, usually success is evaluated in such cases in the ordinary way, and where an application for a family provision order succeeds, the usual order is to the effect that plaintiff's costs on the ordinary basis and the defendant/executor's costs on the indemnity basis be paid out of the estate: see Precedent 8.8 at [8-0200]. Where an application fails, usually the plaintiff is ordered to pay the defendant/executor's costs on the ordinary basis, unless there is some reason, such as failure to better an offer of compromise, for making an indemnity order.

In a successful appeal, the usual order is for costs of both parties to be paid out of the estate: *Coates v NTE&A* (1956) 95 CLR 494; *Re Hall* (1959) 59 SR NSW 219; *Bowcock v Bowcock* (1969) 90 WN (Pt 1) NSW 721; *Hutchinson v Elders Trustee Co* (1982) 8 Fam LR 267; *Hunter v Hunter* (1987) 8 NSWLR 573; *Churton v Christian* (1988) 12 Fam LR 386, sometimes on an indemnity basis: *Dehnert v Perpetual Executors* (1954) 91 CLR 177; *Goodman v Windeyer* (1980) 144 CLR 490, although on rare occasions the respondent may be ordered to pay the appellant's costs: *Hughes v NTE&A* (1979) 143 CLR 134; typically where it is perceived that the respondent has not acted properly — for example, by giving untruthful evidence: *Cooper v Dungan* (unrep, 25/3/76, HCA) or by failing to adduce evidence which it was bound to adduce: *Dijkhuijs v Barclay* (1988) 13 NSWLR 639. In *Barnaby v Berry* [2001] NSWCA 454, where the appellant failed at first instance but received an enlarged legacy on appeal, the court ordered that all costs be paid out of the estate. In *Barns v Barns* (2003) 214 CLR 169, where the appellant failed at first instance and on intermediate appeal, upon her ultimate success, all costs were ordered to be paid out of the estate. However, in *Blackmore v Allen* [2000] NSWCA 162 and *Marshall v Carruthers* [2002] NSWCA 86, costs followed the event. Each party may be left to bear its own costs where the estate is small: *Re Salathiel* [1971] QWN 18. See generally de Groot and Nickel, *Family Provision in Australia and New Zealand*, 5th edn, 2016; and *Jvancich v Kennedy (No 2)* [2004] NSWCA 397.

De-facto property division

In proceedings in the Family Court, the starting point is that each party "shall bear his or her own costs", although costs orders may be made in an appropriate case: *Family Law Act* 1975, s 117. While the NSWCA previously considered that, in claims under the *Property (Relationships) Act* 1984, "the starting point should be that each party should bear its own costs" (*Kardos v Sarbutt (No 2)* [2006] NSWCA 206) this approach has now been rejected in favour of the general rule that

costs should follow the event: *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 at [35]–[40]; *Baker v Towle* [2008] NSWCA 73 at [12], [82]. When an application for property adjustment is refused, the event will be clear and, upon a straightforward application of r 42.1, the defendant will have the costs of the application unless the court makes some other order; but where an order for adjustment is made, the costs order made will rarely, if ever, depend simply upon which party commenced proceedings, and the "event" will depend on the facts and circumstances, pleadings and issues, in each case: *Baker v Towle* at [20]–[25].

Care proceedings

The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify doing so: *Children and Young Persons (Care and Protection) Act* 1998, s 88. Where there are such circumstances, the power extends to awarding indemnity costs: *Director-General of the Department of Human Services v Ellis-Simmons* [2011] NSWChC 5. No such requirement for "exceptional circumstance" applies before costs orders can be made in review or appellate proceedings in the Supreme Court: *Re Kerry (No 2)* [2012] NSWCA 194, citing *Wilson v Department of Human Services; re Anna (No 2)* [2011] NSWSC 545 at [106].

Land and Environment Court

For costs in the NSW Land and Environment Court, see *Dal Pont* 8.81–8.88 and Ritchie's at [42.1.105].

Defamation

Section 40 *Defamation Act* 2005 provides that in awarding costs in defamation proceedings, the court may have regard to the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and any other matters that the court considers relevant. Unless the interests of justice require otherwise, a court must, if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff, order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff. If defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant, it must order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

[8-0060] Where the general rule does not apply: costs are agreed by the parties independently of the "event"

Leases, mortgages, guarantees, insurance policies and other commercial contracts often contain provisions for costs to be payable by a party in the event of non-performance, often on an indemnity basis: *Re Shanahan* (1941) 58 WN (NSW) 132; *Re Adelphi Hotel (Brighton) Ltd* [1953] 2 All ER 498; *AGC (Advances) Ltd v West* (1984) 5 NSWLR 301; *Heaps v Longman Australia Pty Ltd* [2000] NSWSC 542; *State of NSW v Tempo Services Pty Ltd* [2004] NSWCA 4 at [21]; *Rail Corp NSW v Leduva Pty Ltd* [2007] NSWSC 800 at [18]; *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356 at [112]–[115]. Courts will normally exercise their costs discretion in accordance with the contractual provision: *Gomba Holdings (UK) Ltd v Minories Finance Ltd* [1993] Ch 171. Indemnity costs will be ordered as a matter of discretion on the basis of a contractual obligation of this kind if the contractual obligation is sufficiently plain and unambiguous: *Kyabram Property Investments Pty Ltd v Murray* [2005] NSWCA 87 at [12]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [32]–[38].

[8-0070] Where there is no final judgment: discontinuance and compromise

Dismissal and discontinuance

Where a plaintiff discontinues without the consent of the defendant, or where the plaintiff's claim is dismissed in whole or in part, the plaintiff must pay the defendant's costs of the proceedings to the extent to which they have been discontinued or dismissed, unless the court otherwise orders: UCPR rr 42.19 and 42.20; and see *Foukkare v Angreb Pty Ltd* [2006] NSWCA 335 at [68]*; Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA 365; *Scope Data Systems Pty Ltd v Agostini Jarrett Pty Ltd* [2007] NSWSC 971; *Oberlechner v Watson Wyatt Superannuation Pty Ltd* [2007] NSWSC 1435 at [10]; *Norris v Hamberger* [2008] NSWSC 785. If the court strikes out a defence, in whole or in part, the defendant must pay the plaintiff's costs of the proceedings in relation to those matters in respect of which the defence has been struck out, unless the court otherwise orders: UCPR r 42.20(2).

While these rules do not create a presumption, and are merely default provisions, they reflect the general rule that an unsuccessful party should pay the costs of a successful party, and the discontinuing party must make an application to be relieved of the obligation to pay costs, and show some sound positive ground or good reason for departing from the default position: *Fordyce v Fordham* (2006) 67 NSWLR 497 at [84]; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32 at [53]–[54] and [69]–[74] (in which the court also discussed circumstances in which a court might or might not depart from the consequence provided by the rule: at [56]–[63] and [75]–[81]); *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2014] NSWCA 107 at [21]–[29]. The discretion to "otherwise order" may be exercised where the discontinuing party has obtained practical extra-curial success; but will generally not be exercised where the plaintiff effectively abandons its claim: *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624; *Cummins v Australian Jockey Club Ltd* [2009] NSWSC 254 at [22]. Unsatisfactory conduct of the discontinued proceedings, such as failure to comply with case management requirements (*Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352) or commencing the abandoned proceedings in circumstances amounting to an abuse of process (*Packer v Meagher* [1984] 3 NSWLR 486 at 500) may found an order that the costs of the defendant be paid on the indemnity basis: see [8-0130].

Stay

Where proceedings are commenced in a court contrary to a contractual provision for arbitration or alternative dispute resolution, the proceedings may be stayed or dismissed and the plaintiff ordered to pay the costs: *Haniotis v The Owners Corporation Strata Plan 64915 (No 2)* [2014] NSWDC 39, and the cases summarised there. As to whether this extends to indemnity costs, see [8-0130].

Compromise

Where proceedings are resolved by compromise without a hearing on the merits, but the parties cannot agree on the question of costs, courts avoid embarking on a trial to determine only the question of costs, and ordinarily will make no order as to costs, with the intent that each party bears its own costs, unless it appears that one party has effectively capitulated, or that one party has acted unreasonably in bringing or defending the proceedings: *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624; *Harkness v Harkness (No 2)* [2012] NSWSC 35 at [16]. In rare cases it may be appropriate to make an order for costs without a contested hearing on the merits, if the court can be almost certain which party would have succeeded: *Ferguson v Hyndman* [2006] NSWSC 538; see also *Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission of NSW* [2006] NSWCA 129; *Indyk v Wiernik* [2006] NSWSC 868; *Oberlechner v Watson Wyatt Superannuation Pty Ltd* [2007] NSWSC 1435 at [9]–[10]; *Foley v Australian Associated Motor Insurers Ltd* [2008] NSWSC 778; *Muhibbah Engineering (M) BHD v Trust Company Ltd* [2009] NSWCA 205.

[8-0080] Where there are multiple parties

Prima facie, all the unsuccessful parties should bear the successful party's costs. Unless the costs order specifies otherwise, an order for costs against two or more parties renders each of them jointly and severally liable to pay the relevant costs: *Rushcutters Bay Smash Repairs Pty Ltd v H McKenna Netmakers Pty Ltd* [2003] NSWSC 670, citing *Ryan v South Sydney Junior Rugby League Club Ltd* [1955] 2 NSWLR 660 at 663. However the court may, as a matter of discretion, apportion liability between multiple parties: *Mulcahy v Hydro-Electric Commission* (unrep, 2 July 1998, FCA). This is more likely to be appropriate when one of the multiple parties conducts a separate or distinct case.

Where there are multiple successful defendants, whose interest is identical and there is no possible conflict of interest between them, and who are separately represented, the court will not normally allow more than one set of costs; but this is subject to at least three provisos:

1. If a conflict of interest appears possible but unlikely, the defendants should make any necessary enquiries from the plaintiff as to the way in which their case is to be put if this would resolve the possibility of conflict between defendants: *Re Lyell* [1941] VLR 207.
2. There may be circumstances in which, although the defendants are united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation.
3. Even if defendants are acting reasonably in maintaining separate representation for some time or for some purposes, they may still be deprived of part of their costs if they act unreasonably by duplicating costs on any particular matter or at any particular time: *Statham v Shephard (No 2)* (1974) 23 FLR 244 at 246–247; *Milillo v Konnecke* [2009] NSWCA 109 at [109]–[110].

Where the plaintiff succeeds against one defendant but not the other, and both are jointly represented by the same solicitors and counsel, there is a "rule of thumb" that the successful defendant should recover a proportionate share of the "common" costs referable to the claim pressed against each defendant, as well as any associated only with the claim against the successful defendant. However, while this rule of thumb is convenient for the "ordinary case", it is not to be automatically applied in every case: *King Network Group Pty Ltd v Club of the Clubs Pty Ltd (No 2)* [2009] NSWCA 204 at [25]–[35], citing *Korner v H Korner & Co Ltd* [1951] Ch 10 at 17.

Multiple plaintiffs must be represented by the same solicitor: *Herbert v Badgery* (1893) 14 LR (NSW) Eq 321; *Lewis v Daily Telegraph Ltd* (No 2) [1964] 2 QB 601, unless (as not uncommonly occurs in family provision proceedings) the court, balancing questions of costs and the problems that might arise with a lawyer acting for conflicting interests, considers that justice requires separate representation. Thus, absent leave, an insured and insurer cannot have separate representation, even if there are "insured" and "uninsured" elements to the claim: *Carter v Marine Helicopters Ltd* (1995) 9 ANZ Ins Cas 61-299 at 76-347 (New Zealand High Court), applied by Einstein J in *Sydney Airport Corporation Pty Ltd v Baulderstone Hornibrook Engineering Pty Ltd* [2006] NSWSC 1106 at [19]. See generally *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356 at [5]–[11]. Where leave is granted, it may be conditioned on only one set of costs being recoverable.

Bullock orders and Sanderson orders

Where the plaintiff succeeds against one or more defendants but fails against others, application of the general rule that costs follow the event would require the plaintiff to pay the costs of the successful defendant(s), despite having won the case. While this may sometimes be appropriate, there are circumstances in which the court may make special orders so that the costs of the successful defendant(s) are ultimately borne, indirectly or directly, by the unsuccessful defendant/s: *Gould v Vaggelas* (1985) 157 CLR 215. A "Bullock order" requires the unsuccessful defendant(s) to reimburse the plaintiff for any costs the plaintiff has to pay to the successful defendant(s): *Bullock v London General Omnibus Company* [1907] 1 KB 264; (see Precedent 8.3 at [8-0200]). A "Sanderson order" requires the unsuccessful defendant/s to pay the costs of the successful

defendant/s, leaving the plaintiff out of the process entirely, and has obvious advantages for a plaintiff in cases of an insolvent unsuccessful defendant, as well as eliminating administrative and procedural steps: *Sanderson v Blyth Theatre Co* [1903] 2 KB 533; *Coombes v Roads and Traffic Authority (No 2)* [2007] NSWCA 70 at [42]; see Precedent 8.4 at [8-0200].

Bullock and Sanderson orders should only be made where it was reasonable and proper for the plaintiff to join the defendant(s) against which it failed: *Gould v Vaggelas* at 230, 247 and 260; *Stevedoring Industry Finance Committee v Gibson* [2000] NSWCA 179, citing *Lackersteen v Jones* (No 2) (1988) 93 FLR 442; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [176]–[193], [296]–[299]; *Nominal Defendant v Swift* [2007] NSWCA 56; *Council of the City of Liverpool v Turano (No 2)* [2009] NSWCA 176 at [15]. That requirement will typically be satisfied where claims against two defendants are interdependent, or where it is necessary to join both in circumstances where only one may be liable. Conversely, it will not be satisfied where the successful defendant is joined only for the purpose of spreading the potential net of liability so as to obtain an additional defendant who might be able to afford to pay: *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 at [105]–[111]. However, there is no additional requirement that the causes of action must be substantially connected or interdependent: *Nationwide News Pty Ltd v Naidu* (No 2) [2008] NSWCA 71 at [16]–[18]; *ACQ v Cook (No 2)* (2008) 72 NSWLR 318.

A second precondition is that there must also have been something in the conduct of the unsuccessful defendant that makes it appropriate to make the order: *Gould v Vaggelas* at 230 per Gibbs CJ; *Sved v Council of the Municipality of Woollahra* (1998) NSW Conv R 55-842 at 56,605; *Stevedoring Industry Finance Committee v Gibson* [2000] NSWCA 179, citing *Lackersteen v Jones (No 2)* (1988) 93 FLR 442; *Almeida v Universal Dye Works Pty Ltd (No 2)* [2001] NSWCA 156; *Coombes v Roads and Traffic Authority (No 2)* at [9]ff; *Council of the City of Liverpool v Turano (No 2)* [2009] NSWCA 176 at [15]; *Stephens v Giovenco (No 2)* [2011] NSWCA 144 at [18]; *Sneddon v Speaker of the Legislative Assembly* [2011] NSWSC 842 at [36], citing *Furber v Stacey* [2005] NSWCA 242 at [116]–[117]; *Simmons v Rockdale City Council (No 2)* [2014] NSWSC 1275. This requires that the unsuccessful defendant have done something, beyond a mere denial of liability, that makes it fair to impose on it liability for the costs of the successful defendant — such as creating circumstances of uncertainty as to who is the proper defendant: *Dominello v Dominello (No 2)* [2009] NSWCA 257 at [15]–[27], citing *Roads and Traffic Authority v Palmer (No 2)* [2005] NSWCA 140 at [35]. This "something more" need not amount to "misconduct" but it must be conduct sufficient to make it fair to visit the liability on it: *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [29]. Examples of such conduct can include the making of a "very reasonable" offer to the unsuccessful defendant, no offer being made by the unsuccessful defendant, and the length and costs of the proceedings had the unsuccessful defendant not defended the case: *Stephens v Giovenco; Dick v Diovenco (No 2)* [2011] NSWCA 144 at [19]. However it can include conduct that predates joinder, so long as that conduct is relevant to the fairness, or reasonableness, of making a costs order against the unsuccessful defendant: *Almeida v Universal Dye Works Pty Ltd (No 2)* at [33].

Concurrent tortfeasors

Where a defendant has identified a concurrent tortfeasor (for the purposes of *Civil Liability Act* 2002, s 35A), and the plaintiff joins that party, costs issues are determined in accordance with s 35A, whether or not the plaintiff succeeds against the alleged concurrent tortfeasor: *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195 at [9]; *Sydney Water Corporation v Asset Geotechnical Engineering Pty Ltd (No 2)* [2013] NSWSC 1604 at [27]–[29].

Cross-claims

A defendant/cross-claimant who fails against a cross-defendant, whether or not it has succeeded against the plaintiff, is generally ordered to pay the cross-defendant's costs: *Dal Pont* at [11.33].

Where the plaintiff fails against the defendant, and the defendant's cross-claim against a third party consequently fails, the plaintiff may, but will not necessarily, be ordered to pay the

cross-defendant's costs, or indemnify the defendant in respect of the costs it is required to pay the cross-defendant. However, although a defendant and a cross-defendant are adversarial parties, and a plaintiff resisting an order for costs on the basis of identity of their interests has an evidentiary onus to negative any conflict of interests, where there is a substantial identity of interests, the cross-defendant should co-operate with the defendant to avoid duplication of effort and costs, and the plaintiff may be relieved of part or all of those costs if the cross-defendant fails to do so: *Furber v Stacey* [2005] NSWCA 242 at [57]–[59] (cross-defendant awarded only one-quarter of costs against an unsuccessful plaintiff).

It is within the legitimate scope of the power under CPA s 98 to award costs in favour of a plaintiff against a cross-defendant not joined by that plaintiff, where the conduct of that cross-defendant was the real cause of the litigation: *Vameba Pty Ltd v Markson* [2008] NSWCA 266.

[8-0090] Self-represented litigants (including lawyers)

Generally

Legal costs may only be recovered by a party in relation to costs of legal practitioners. However, a litigant in person may recover reasonably incurred disbursements and witness expenses, including costs and disbursements for legal work done by others: *Malkinson v Trim* [2003] 2 All ER 356, but not travelling expenses or loss of earnings: *Cachia v Hanes* (1994) 179 CLR 403; *Dal Pont* 7.28–7.29. Ultimately, this is a question of quantification on assessment, not one of liability (for costs), and unless it is apparent that there could be no entitlement, there is no reason why an order for costs should not be made in favour of a successful self-represented litigant, leaving it to the assessor to quantify the precise entitlement.

Self-represented lawyers

Previously, legal practitioners acting on their own behalf in legal proceedings were not in the same position as a litigant in person, under the "Chorley exception": *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872, considered in *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47; see also *Wang v Farkas* (2014) 85 NSWLR 390; *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538 at [24]–[34]. However, in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, the High Court said that the exception was not only anomalous, but exalted the position of legal practitioners in the administration of justice to such an extent that it was an affront to the fundamental value of equality of all persons before the law. As such, it was held that the *Chorley* exception should not be recognised as a part of the common law of Australia. However, in *Spencer v Coshott* (2021) 106 NSWLR 84, it was held that the abrogation of the *Chorley* exception by the High Court in *Bell Lawyers Pty Ltd v Pentelow* did not deny recovery of costs by a solicitor litigant who is represented by an incorporated legal practice of which he or she is the principal and the sole director and shareholder, because of the separate legal personality of an incorporated legal practice.

[8-0100] Representative, nominal and inactive parties

Generally speaking, any party to litigation, including those who act in a representative capacity, is amenable to a costs order, but representative parties are often entitled to indemnity from the relevant estate or fund.

Tutors

Ordinarily, a tutor for a disabled party is personally liable for any costs order against that party; indeed, one of the reasons why a tutor is required is so that there is a person answerable for costs: *Yakmore v Handoush (No 2)* (2009) 76 NSWLR 148 at [45]; *Dal Pont* at 22.68. However, although one of the reasons for the appointment of a tutor for a disabled person is to have a person on the

record that is personally liable for the costs of the litigation, that is not the sole function or purpose of the appointment of the tutor, which includes the protection of the person with the disability and of the processes of the court: *Smith v NRMA Insurance Ltd* [2016] NSWCA 250 at [29]–[36], citing *NSW Ministerial Insurance Corporation v Abuafoul* (1999) 94 FCR 247 at [27]–[29], and *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 at [552]. An order protecting a tutor from personal liability for costs may be made as an incidental term of an order appointing a tutor under UCPR r 7.18(1)(b), or pursuant to the power conferred by UCPR r 2.1, or in the inherent power in the parens patriae jurisdiction. Under UCPR r 42.24, if the court appoints a solicitor to be the tutor of a person under legal incapacity in connection with any proceedings, the court may order that the costs incurred by the solicitor in performance of the duties of tutor be paid by the parties to the proceedings or any of them, or out of any fund in court in which the person under legal incapacity is interested. The court may make orders for the repayment or allowance of the costs as the case requires.

Executors, trustees and mortgagees

Under UCPR r 42.25, a person who is or has been a party to proceedings in the capacity of trustee or mortgagee is entitled to be paid his or her costs of the proceedings, in so far as they are not payable by any other person, out of the fund held by the trustee or the mortgaged property. The court may, however, otherwise order if the trustee or mortgagee has acted unreasonably, or the trustee has in substance acted for its own benefit rather than for the benefit of the fund.

If a legal personal representative acts properly, their costs and/or the costs which they are ordered to pay in an unsuccessful defence of the estate may be ordered to be paid out of the estate: *Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 709–710; see generally *Halsbury's Laws of England*, 4th ed, vol 17, pars 917–919, vol 37, par 721. However, if, in conducting a proceeding, the executor is not acting merely in that capacity but in substance prosecuting or defending his or her own interests, that principle does not apply: *Nowell v Palmer* (1993) NSWLR 574 at 581–582. These principles apply not only to personal representatives but to fiduciaries generally: *Miller v Cameron* (1936) 54 CLR 572 at 578–579; *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [47].

An executor who commences or defends an action in the capacity of executor is ordinarily entitled to be indemnified out of the estate for the costs incurred in doing so, even if the litigation is unsuccessful, the executor's conduct is found to have been mistaken, and the other party in the litigation is held to be entitled to an order for costs: *Drummond v Drummond* [1999] NSWSC 923 at [43]. As a rule, a trustee is allowed their costs out of the trust estate if their conduct has been honest, even though it may have been mistaken: *Miller v Cameron* at 578; *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 562; see also *Re Weall; Andrews v Weall* (1889) 42 Ch D 674 at 677, where Kekewich J spoke of the "tenderness which the Court is anxious to exhibit towards trustees honestly exercising discretion in discharge of their duties, often difficult and still more often thankless", and *Re Jones; Christmas v Jones* [1897] 2 Ch 190 at 197, where the same judge said that "a man who fulfils the difficult duties of an administrator, executor or trustee is, in common sense and common justice, entitled to be recouped to the very last penny everything that he has expended properly — that is to say, without impropriety — in his character of administrator, executor or trustee".

However, this does not apply where the executor has acted improperly*: Drummond v Drummond* at [44]–[45]; *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 562. Cases of impropriety include an executor taking or defending proceedings in breach of trust, or conducting the proceedings in such a way that the court, on a general view of the case, regards the executor's conduct as "not honestly brought forward", or "where the claim is of monstrous character, that is, one which no reasonable man could say ought to have been put forward": *Re Jones* [1897] 2 Ch 190 at 198; or where the trustees acted without "reasonable prudence": *Re Weall* at 678–679.

The rule relates only to costs incurred in the administration and distribution of the estate, as distinct from costs incurred by an executor in furtherance of a personal interest: *Drummond v Drummond* at [47]; *Miller v Cameron* at 578–579; *Re Jones* [1897] 2 Ch at 197–198; *Plimsoll v Drake (No 2)*

(unrep, 8/6/95, SCT). Executors who pursue personal interests in litigation are "not fighting for the estate any more than if they were not executors at all": *Skrimshire v Melbourne Benevolent Asylum* (1894) 20 VLR 13 at 18. Thus an executor who prosecutes or defends proceedings in the capacity of creditor or beneficiary of the estate rather than in the capacity as executor is not entitled to recoup the costs of the litigation from the estate simply because they are also an executor. A trustee who defends an action for their removal may be representing their own interests and not those of the trust estate: *Miller v Cameron* at 578–579, though this is not necessarily invariably so; likewise one who unsuccessfully demands a release before distributing the trust estate to the beneficiaries: *Plimsoll v Drake (No 2)*.

Liquidators

Analogous principles apply to liquidators in relation to proceedings in which they participate in their own name: *Re Buena Vista Motors Pty Ltd (In Liq) and the Companies Act* [1971] 1 NSWLR 72, in which Street J ordered a liquidator who brought an unsuccessful claim to pay the opponents' costs but to be indemnified out of the company's assets since, although "the claim had been unsuccessful, it could not be characterized as frivolous or vexatious. Nor could the liquidator be said to have been acting unreasonably in bringing the claim forward for litigation" (at 73). See also *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [47]; the same principles apply also in respect of proceedings which they conduct in the name of the company: *Mead v Watson as Liquidator for Hypec Electronics* [2005] NSWCA 133 at [11] ff; see also *Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652; *Joubert v Campbell Street Theatre Pty Ltd (in liq)* [2011] NSWCA 302. A liquidator whose determination is challenged and who, rather than taking no active part in the proceedings, actively defends his or her decision, becomes an adverse party and is liable for costs: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341; *Lewis v Nortex Pty Ltd (in liq)* at [34].

A liquidator who successfully contests an allegation of impropriety is entitled to costs out of the company funds, to the extent that they are not recoverable from the other party: *National Trustees Executors and Agency Co of Australasia Limited v Barnes* (1941) 64 CLR 268 at 279; *Expo International Pty Ltd v Chant (No 2)* (1980) 5 ACLR 193 at 197–198; *Lewis v Nortex Pty Ltd (in liq)* at [49].

Submitting parties

Ordinarily, a submitting party who genuinely takes no part in the proceedings will not be ordered to pay costs: *Highland v Labraga (No 3)* [2006] NSWSC 871 at [19]–[23]. However, this may be otherwise where the submitting party does in fact take some active part in the proceedings: *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147 at [66]; *Hornsby Shire Council v Valuer General of NSW* [2008] NSWSC 1281 at [3]–[8]; see also *Mahenthirarasa v State Rail Authority of NSW (No 2)* (2008) 72 NSWLR 273, where the submitting party, while not actively opposing the orders sought, did not consent to them and thus occasioned the incurring of additional costs and was ordered to pay costs; cf *Lou v IAG Limited* [2019] NSWCA 319 where, in similar circumstances, by majority, no costs order was made. Similarly, in an application for preliminary discovery, it may be appropriate not to order costs against an unsuccessful but "innocent" respondent who does not oppose the application: *Totalise plc v Motley Fool Ltd* [2002] 1 WLR 1233; *Bio Transplant Inc v Bell Potter Securities Ltd* [2008] NSWSC 694; cf *Airways Corporation of New Zealand v Koenig* [2002] NSWSC 521, where the application was opposed.

Relators

The court may make an order for costs against a relator: *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518 at 524.

Interveners

An order may be made against an amicus curiae in an exceptional case: *Dal Pont* at 22.75-76.

Interpleaders

All participants in interpleader proceedings may claim their costs from the fund, where they do no more than present evidence and reasonable arguments as to how that fund should be distributed. Where their involvement goes further and amounts to raising issues that add to the costs of the litigation, on which they are unsuccessful, they may be deprived of costs on those issues, or may be ordered to pay costs: *Westpac Banking Corp v Morris* (unrep, 2/12/98, NSWSC).

[8-0110] Non-parties

The power to make costs orders extends to orders against non-parties: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

Non-party orders were formerly rare, but the repeal of UCPR r 42.3 (formerly Supreme Court Rules 1970, Pt 52A r 4), removed restrictions on the making of costs orders against non-parties: *Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652 at [24]–[25]. However, the power is to be exercised with restraint: *Yu v Cao* [2015] NSWCA 276 at [136]–[139]; *HM&O Investments Pty Ltd (in Liq) v Ingram* [2013] NSWSC 1778 at [9]–[15], and having regard to principles of procedural fairness: *Flinn v Flinn* [1999] 3 VR 712, which sets out the procedure for notice to the non-party.

Most cases of costs orders against a non-party involve circumstances in which the non-party has effective control of the litigation: *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 (litigation funder); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661(professional indemnity insurer); *Younan v GIO General Limited (ABN 22 002 861 583) (No 2)* [2012] NSWDC 149 (plaintiff's de facto partner the true plaintiff); *McVicar v S & J White Pty Ltd (No 2)* (2007) 249 LSJS 110 at [17]–[26]; *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 (directors of a corporate party). However, such control is usually not of itself sufficient to warrant such an order; there must be something additional in the conduct of the non-party that makes it just that it should bear the costs: *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* (fraudulent insurance claim); *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 and *Melbourne City Investments Pty Ltd v Leightons Holdings Limited* [2015] VSCA 235 (abuse of process). Orders will also been made against a non-party (such as a solicitor) who conducts litigation in the name of another without proper authority: *Hillig v Darkinjung (No 2)* [2008] NSWCA 147 at [47]; and against non-parties who by some delinquency increase the costs, such as by failing to attend court in answer to a subpoena: see UCPR r 42.27.

These categories are not closed: *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210] (per Basten JA); see also *Yates v Boland* [2000] FCA 1895; *Gore v Justice Corporation Pty Ltd*; *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 (approved by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] All ER (D) 420 (Jul); and see Leeming JA's summary of the principles in *PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM* [2018] NSWCA 168 at [22]–[39].

Legal aid providers

While courts are reticent to order costs against government bodies such as legal aid providers, such parties may be subject to costs orders in an extreme case: *Collins and the Victorian Legal Aid Commission* (1984) FLC ¶91-508; *Marriage of Millea and Duke* (1992) 122 FLR 449.

[8-0120] Legal practitioners

Inherent power

The Supreme Court has inherent power to make costs orders against legal practitioners, derived from its supervisory jurisdiction: *Myers v Elman* [1940] AC 282; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [85]–[86]; *Re Felicity, FM v Secretary Department of Family and Community*

Services (No 4) [2015] NSWCA 19 at [18]–[20]. The object of the court's inherent power is primarily compensatory, so as to indemnify or compensate, and thus protect, the party or parties who have suffered: *Dal Pont* at 23.2; *Myers v Elman* at 289. While the principles that inform the exercise of this inherent power should not be conflated with those relevant to the statutory powers of the court contained in CPA s 99 and *Legal Profession Uniform Law Application Act* 2014, Sch 2, to order a legal practitioner to pay a party's costs (*Whyked Pty Ltd v Yahoo 7 Pty Ltd* [2008] NSWSC 477 at [12]–[20]), similar circumstances are likely to be relevant in both cases. As to the continued existence of the Supreme Court's inherent power, see *Re Felicity; FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [18]–[20]; *King v Muriniti* (2018) 97 NSWLR 991.

Civil Procedure Act 2005, s 99

Section 99 empowers the court to make a "wasted costs order" against a legal practitioner personally, where costs have been incurred by serious neglect, incompetence or misconduct of the practitioner, or improperly or without reasonable cause in circumstances for which the practitioner is responsible. This statutory power is available to the District Court and Local Court, which do not enjoy inherent jurisdiction, as well as to the Supreme Court : *Knaggs v J A Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 485.

As to the construction of s 99 and the "voluminous case law" with respect to the making of costs orders against legal practitioners in different statutory contexts (which was partially cautioned against), see *Re Felicity* at [21]–[24] and *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 at [7]–[11]. The court has a right and a duty to supervise the conduct of its solicitors, and to visit with consequences any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which the solicitor is engaged professionally. The jurisdiction is exercised where it is demonstrated that the solicitor has failed to fulfil their duty to the court and to realise their duty to aid in promoting in their own sphere the cause of justice. The order is for payment of costs thrown away or lost because of the conduct complained of and is frequently exercised in order to compensate the opposite party in the action. Such an order may be made on the indemnity basis: *Mitry Lawyers v Barnden* [2014] FCA 918 at [112].

Where a solicitor is employed by another, the client's retainer is with the employer, and regardless of who is on the record, the firm may be liable: *Kelly v Jowett* (2009) 76 NSWLR 405; at [69]–[71]; *Re Bannister & Legal Practitioners Ordinance* 1970-75; *Ex Parte Hartstein* (1975) 5 ACTR 100; *Re Fabricius & McLaren and Re Legal Practitioners Ordinance* 1970 (1989) 91 ACTR 1; *Knaggs v J A Westaway & Sons Pty Ltd*. Thus the jurisdiction may be exercised even where there has been no personal complicity by the solicitor charged: *Kelly v Jowett* at [61]–[62], [65]; *Re Jones* (1870) 6 Ch App 497; *Myers v Elman* [1940] AC 282; *Harley v McDonald* [2001] UKPC 18; [2001] 2 AC 678.

Conduct which has been held to justify an order that a practitioner personally pay costs includes:

- commencing or conducting proceedings which are an abuse of process: *Young v R (No 11)* [2017] NSWLEC 34
- raising untenable defences, for the purpose of delay: *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56
- signing a certificate on a false affidavit of discovery: *Myers v Elman* [1940] AC 282 (a case involving the inherent power)
- repeatedly putting untenable submissions: *Buckingham Gate International v ANZ Bank Ltd* [2000] NSWSC 946 at [18]–[19]
- attempting to re-agitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* [2008] NSWCA 194 at [208]–[216]

- prosecuting an appeal which has no prospects of success: *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 at [17]
- acting in ignorance of the rules: *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SPA* (unrep, 9/6/89, HCA), and
- unpreparedness, resulting in a hearing date being vacated, or in time being wasted during the hearing: *Stafford v Taber* (unrep, 31/10/94, NSWCA).

Breach of the practitioner's duty to ensure proceedings are conducted efficiently and expeditiously may sound in a personal costs order: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [8]-[11]; *Ashmore v Corporation of Lloyds* [1992] 2 All ER 486; *Whyte v Brosch* (1998) 45 NSWLR 354 (late submissions). In considering the exercise of the discretion under s 99, the court may take into account a legal practitioner's failure to comply with the obligations imposed by CPA ss 56(3), (4) and (5), which require the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings: *Kendirjian v Ayoub* at [208]–[210]. The obligations of legal practitioners to conduct litigation reasonably are described in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd ACN 086 674 179 (No 5)* [2014] NSWSC 437 at [64]–[77].

Before such an order is made, the practitioner must first be given a reasonable opportunity to be heard: CPA s 99(2). The court may refer the matter to a costs assessor for inquiry and report: CPA s 99(3).

Legal Profession Uniform Law Application Act 2014, Sch 2

Schedule 2, cl 5 LPULAA, which applies in all courts, permits the making of costs orders against solicitors personally where legal services are provided in a claim for damages "without reasonable prospects of success". The court is empowered to order that the practitioner repay costs to a party in the proceedings, or otherwise indemnify that party in respect of their costs. The exercise of the power remains discretionary: *Lemoto v Able Technical Pty Ltd* at [130], and the due administration of justice should not be impaired by the "too liberal exercise" of this power: *Lemoto* at [126]. Where a practitioner believes he or she has available material providing a proper basis for alleging a fact, provided the belief was reasonable, the proceedings cannot be said to have been commenced "without reasonable prospects of success": *Fowler, Corbett & Jessop v Toro Constructions Pty Ltd* [2008] NSWCA 178 at [86]–[88]. Practitioners will be exposed to liability only when their belief that the material to support the claim "unquestionably fell outside the range of views which could reasonably be entertained" as to the objective justification for the proceedings: *Lemoto* at [131]–[132], approving the "fairly arguable" test proposed by Barrett J in *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284.

However, the requirement that the practitioner have a "reasonable belief" is a continuing one: see *Lemoto* at [127], so that if circumstances change as a result of which the belief becomes no longer reasonable, then continuing to prosecute a claim may attract liability: *Eurobodalla Shire Council v Wells* [2006] NSWCA 5 at [31] (order made under the prior equivalent of this clause: s 348 of the *Legal Profession Act* 2004, where barrister and solicitor were found "reckless" in continuing to prosecute an appeal; see also *Nadarajapillai v Naderasa (No 2)* at [17].

The practitioner must be afforded procedural fairness before such an order is made: *Lemoto* at [151]ff; see also *Mitry Lawyers v Barnden* at [43]. The appropriate procedure for the making of an application and the giving of notice to the practitioner, is described in *Lemoto* at [8]–[10] and [143]–[149] and involves a three-stage process of some complexity: *De Costi Seafoods (Franchises) Pty Ltd v Wachtenheim (No 5)* [2015] NSWDC 8 at [42]–[45].

[8-0130] Basis for assessment: ordinary or indemnity costs

In NSW, two bases for costs orders are now recognised. CPA s 98(1)(c) provides that the court may award costs on the ordinary basis or on the indemnity basis. The ordinary basis subsumes what was

formerly the common fund basis, and the indemnity basis what was formerly the solicitor-client basis, so that, at least in NSW, there is no longer any distinction, as between parties, between costs on the solicitor/client basis and costs on the indemnity basis. Although in *Firth v Hale-Forbes (No 2)* [2013] FamCA 814 at [80]–[85] a distinction between the two was recognised, the terms are widely regarded as interchangeable: *Rapuano (t/as RAPS Electrical) v Karydis-Frisan* [2013] SASCFC 93 at [92]–[93]; *Secure Funding Pty Ltd v StarkSecure Funding Pty Ltd v Conway* [2013] NSWSC 1536 at [9]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [36]. The CPA and UCPR contain no reference to the common fund basis or the solicitor-client basis.

Ordinary basis

Absent special order, a costs order implicitly contemplates costs assessed on the "ordinary" basis. On the ordinary basis, a party is entitled to recover "a fair and reasonable amount" for the legal costs and disbursements that were reasonably incurred in the conduct of the proceedings: LPULAA, ss 74–80; see also UCPR r 42.2 and CPA s 3.

Indemnity basis

The court may order that costs be assessed on the indemnity basis. "Indemnity basis" means the basis set out in r 42.5, which, in any case other than where costs are payable out of property held or controlled by a person who is party to the proceedings, provides that all costs are to be allowed other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount.

The discretion to award indemnity costs must be exercised judicially: *Mead v Watson* [2005] NSWCA 133 at [8] and with caution: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [47]; *Ng v Chong* [2005] NSWSC 385 at [13]. For those reasons the discretion should be the subject of careful reasoning: *Degmam Pty Ltd (In Liq) v Wright (No 2)* [1983] 2 NSWLR 354. Although it has been said that there is no fixed rule or rationale as to when an indemnity order might be made (*Harrison v Schipp* [2001] NSWCA 13 at [139]), except that it requires a "sufficient or unusual feature" (*Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233–234), such an order is appropriate where the party entitled has been wantonly or recklessly caused to incur costs. That will often be the case where the party liable is guilty of some "relevant delinquency": *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [44]. This does not mean moral delinquency or some ethical shortcoming, but "delinquency" bearing a relevant relation to the conduct of the case: *Ingot Capital Investment v Macquarie Equity Capital Markets Ltd (No 7)* [2008] NSWSC 199 at [24]; *Liverpool City Council v Estephan* [2009] NSWCA 161 at [95]. As to the relevant principles relating to the making of indemnity costs orders, see the summary in *In the Matter of Indoor Climate Technologies Pty Ltd* [2019] NSWSC 356 at [8]. An award of indemnity costs remains compensatory and not punitive: *Hamod v State of NSW* [2002] FCAFC 97. A formal warning of an intention to claim indemnity costs may enhance the prospects of obtaining one: *Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd* (1995) 36 NSWLR 242, citing *Insurers' Guarantee Fund NEM General Insurance Association Ltd (In Liq) v Baker* (unrep, 10/2/95, NSWCA). Such warnings should not be lightly made.

The power to make an indemnity costs order is an important case management tool, as it promotes the making of settlement offers and discourages the litigation of cases where there are no reasonable prospects of success (*Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [111]), or where a reasonable offer of settlement has been made. The following are the most common circumstances in which such orders are made, but the categories are not closed: *Colgate-Palmolive Pty Ltd v Cussons* at 257.

Hopeless cases

A party who commences, continues or defends proceedings which have no prospect of success, such as where the claim (or defence) is "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile, may be ordered to pay the other party's costs on the indemnity basis:

Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2) [2009] NSWCA 12 at [4]; *Hillebrand v Penrith Council* [2000] NSWSC 1058 (limitation period obviously expired). It is not a necessary condition that the party responsible be impugned with a collateral or improper purpose: *J-Corp P/L v Australian Builders Labourers Federation Union of Workers (No 2)* [1993] FCA 70 at [303]. However, mere weakness of an arguable case is insufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 542.

Abuse of process

Costs may be awarded on an indemnity basis where the proceedings amount to an abuse of process: *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362, such as where they are commenced other than in good faith, or for an ulterior or collateral purpose: *Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352; *Packer v Meagher* [1984] 3 NSWLR 486 at 500.

Unreasonable conduct or "relevant delinquency"

This covers a wide range of conduct, both leading to and in the course of the conduct of the proceedings. Evidence of actual misconduct is not required. Examples of the former include unfounded allegations of fraud or improper conduct: *Maule v Liporoni (No 2)* [2002] NSWLEC 140 at [39]; refusal to withdraw an improper caveat: *Martin v Carlisle* [2008] NSWSC 1276; deliberate or high-handed conduct: *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277. Instances of the latter include failure to provide proper discovery: *Masha Nominees Pty Ltd v Mobil Oil Australia Pty Ltd (No 2)* [2006] VSC 56 at [17]–[21]; making multitudinous amendments: *Qantas Airways Ltd v Dillingham Corporation Ltd* (unrep, 14/5/87, NSWSC); behaviour which causes unnecessary anxiety, trouble or expense, such as failure to adhere to proper procedure: *FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61-384; disregard of court orders: *O'Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 at [35]; perverse persistence by an unrepresented litigant with a hopeless application: *Rose v Richards* [2005] NSWSC 758; and unnecessarily prolonging the proceedings: *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354 at 358.

Fraud and misconduct

A party against whom serious misconduct is established may be ordered to pay costs on the indemnity basis, such as fraud: *Gate v Sun Alliance Ltd* (1995) 8 ANZ Ins Cas ¶61-251 at 75,817–75,818; perjury or contempt: *Berkeley Administration Inc v McClelland* [1990] FSR 565 at 568–569; *Ivory v Telstra Corporation Ltd* [2001] QSC 102 or other dishonest conduct: *Vance v Vance* (1981) 128 DLR (3d) 109 at 122.

Offers of compromise and Calderbank letters

A party who fails to better an offer of compromise is liable to pay indemnity costs from the date of the offer unless the court otherwise orders: UCPR r 42.13–42.15. Failure to accept a Calderbank offer which is not bettered may have similar consequences, although in such a case the consequences are discretionary and do not flow from the rules; see "Offers of compromise and Calderbank letters" at [8-0030].

Arbitration or dispute resolution clauses

There are two lines of authority as to whether there is a presumption that a party who unsuccessfully challenges an order for referral or stay where there is an arbitration or dispute resolution clause should pay indemnity costs:

- in favour of indemnity costs: *A v B (No 2)* [2007] 1 All ER (Comm); *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (S) at [18]
- against indemnity costs: *Ansett v Malaysian Airline System (No 2)* [2008] VSC 156 at [22]; *John Holland Pty Ltd v Kellog Brown & Root Pty Ltd (No 2)* [2015] NSWSC 564 at [20]–[24]; *In the matter of Ikon Group Ltd (No 3)* [2015] NSWSC 982; *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [No 2]* [2015] FCA 1046.

The controversy has not yet been resolved by an intermediate appellate court, but the weight of authority in Australia favours the latter view: see *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (S) at [23]–[25], holding that while commencement of proceedings in breach of an arbitration agreement may be a relevant factor in exercising the court's discretion to award costs, there is no justification for a general rule that costs should be awarded on an indemnity basis where proceedings are commenced in breach of an arbitration agreement.

[8-0140] Costs orders may be made at any stage of the proceedings

By CPA s 98(3), an order as to costs may be made at any stage of proceedings, or after conclusion of the proceedings.

Security for costs

In certain circumstances, generally involving a risk that a costs order against the plaintiff, if unsuccessful, may not be enforceable, a defendant (or cross-defendant) may apply for security for costs. At the conclusion of the litigation, the security is paid out to the party entitled to costs: *The "Bernisse" and The "Elve"* [1920] P 1; *Huon Shipping and Logging Co Ltd v South British Insurance Co Ltd* [1923] VLR 216; see also *Kiri Te Kanawa v Leading Edge Events Australia Pty Ltd* [2007] NSWCA 187 as explained by Hamilton J in *Lym International Pty Ltd v Chen* [2009] NSWSC 167 at [18]–[20]); *Dal Pont* at 28.65. A defendant intending to apply for security for costs should generally do so promptly after the institution of proceedings. For security for costs, see [2-5900]ff.

Preliminary costs

In some classes of litigation, of which matrimonial proceedings are the paradigm, a party unable to fund proceedings may apply for a preliminary costs order, to place them in funds to enable them to conduct the proceedings. Such an order is taken into account in the final relief: see *Breen v Breen* (unrep, 7/12/90, HCA); *Parker v Parker* (unrep, 4/8/92, NSWSC).

Interlocutory applications

The disposition of an interlocutory application is usually a discrete event in proceedings, and typically involves consideration of the costs of the application. For interlocutory costs orders, see [8-0150].

When the trial is adjourned or aborted

The adjournment or abortion of a trial may require consideration of the costs thereby occasioned. Where a trial has been aborted and a new trial is ordered, the general rule is that the costs of the first trial await the result of the retrial, as costs in the cause: *Brittain v Commonwealth of Australia (No 2)* [2004] NSWCA 427 at [30]; *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [62]. However, it is not a prerequisite for departing from such a course that the party seeking a costs order demonstrate wrongdoing was responsible for the trial's early termination: *Nudrill Pty Ltd v La Rosa* [2010] WASCA 158 at [15]; *Brittain v Commonwealth of Australia (No 2)* at [33]. Whether any special costs order is necessary if a trial is adjourned part-heard will depend on the facts of the case: *Canturi Corporation Pty Ltd v Gagner Pty Ltd* [2008] NSWDC 151.

Upon final judgment

In a straightforward case, the trial judge may deal with the question of costs in the substantive judgment. Such a course is desirable, where the prima facie costs order is fairly clear, because it may avoid the time and costs of a further hearing on the question of costs. Such an order does not preclude a party from seeking a special or different costs order (such as an indemnity order, based

on an offer of compromise of which the court will not previously be aware): costs orders may be reconsidered on application made before (under UCPR r 36.16(1)) or within 14 days after (under r 36.16(3A)) the order is entered, and reconsideration may be appropriate if the order was made without the parties having had a proper opportunity to make relevant submissions before the order was made: *Harris v Schembri* (unrep, 7/11/95, NSWSC). A costs order may also be varied in an appropriate case under the "slip rule", on application under r 36.17: *Roads and Traffic Authority v Palmer (No 2)* [2005] NSWCA 140 at [25]. However, where there is room for argument about the costs order, or a party seeks an opportunity to be heard, it is prudent expressly to reserve liberty to apply, within a specified time, to set aside or vary the costs order.

If the proper costs order is not prima facie apparent, or apportionment may be appropriate, or if the parties have foreshadowed that they wish to be heard on the question of costs, then after giving judgment in the proceedings it will be appropriate to proceed to hear, then or at a later time, submissions on the question of costs. Trial judges should not defer hearing or determining costs applications merely because an appeal is contemplated or pending. Where there is a dispute as to the appropriate costs order, the judge should rule on the issue, including any application for indemnity costs, and it should not be deferred pending the outcome of a foreshadowed appeal: *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 at [54]. Stays of costs assessments may be ordered if there is doubt as to whether costs, if paid, could be repaid if the appeal is successful and there are reasonably arguable grounds of appeal: *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4)* [2007] FCA 1594 at [8].

Where the question of costs is not addressed and determined, the court is not *functus officio* in respect of costs, and an order for costs can be made after judgment: *NSW Ministerial Insurance Corporation v Edkins* (1998) 45 NSWLR 8. Costs orders against non-parties may also be made after the entry of judgment between the parties: *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd (No 1)* (1993) 45 FCR 224; *Akedian Co Ltd v Royal Insurance Australia Ltd* [1999] 1 VR 80 at 98; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39; [2005] 1 NZLR 145; [2005] 4 All ER 195 (PC).

The typical orders in a straightforward case are, (where the plaintiff succeeds) that the defendant pay the plaintiff's costs; or (where the defendant succeeds) that the plaintiff pay the defendant's costs (or that there be judgment for the defendant, with costs; or that the proceedings be dismissed, with costs): see Precedent 8.1 and 8.2 at [8-0200]. For orders where there are multiple defendants, see [8-0080] and Precedents 8.3, 8.4 and 8.5 at [8-0200].

It is implicit in an order that Party B pay Party A's costs that the quantum, unless agreed, be determined by assessment, and quite unnecessary to specify that that the costs be "as agreed or assessed". But because, absent agreement, the costs must be quantified by a costs assessor, it is important that the costs the subject of the order, whether interlocutory or final, be described in clear and certain terms, in order to ensure that the parties and the costs assessor can easily ascertain the precise scope of the costs to be paid: *Hogan, In the Marriage of* (1986) 10 Fam LR 681 at 686.

Cost of the proceedings

Unless a special order is made, the costs of any application or other step in proceedings form part of the general costs in the proceedings. A general costs order thus includes any reserved costs, and any in respect of which no previous order has been made, except where the court has specifically made "no order as to costs" UCPR r 42.7, and see *Dal Pont* at [6.21]–[6.27]. A general costs order does not disturb or include previous special costs orders, and if it is intended to vary a previous interlocutory costs orders, that must be expressly stated.

Court-ordered mediations

A general costs order for the "costs of the proceedings" includes the costs of a court-ordered mediation under CPA s 28: see *NSW Civil Procedure Handbook* at [r Pt42.290].

[8-0150] Interlocutory costs orders

The court has power under CPA s 98(3) to make orders for costs at any stage of proceedings. Costs issues arise not only at the final hearing, but also in connection with interlocutory applications, such as applications for interlocutory injunctions, determination of preliminary questions, and applications for discovery. An interlocutory costs order may be reconsidered at any later stage of the proceedings. If an interlocutory costs order is not made, the costs of the relevant application fall to be dealt with as part of the general costs in the proceedings.

Particular interlocutory costs orders

Common interlocutory costs orders include:

That party X pay party Y's costs of the motion

This order may be appropriate where party Y is substantially successful on the interlocutory application, and is considered to be entitled to costs of the application regardless of the ultimate outcome of the proceedings. It is more often appropriate where a defendant succeeds on the motion, as such a motion will have occasioned additional costs even if the plaintiff ultimately succeeds in the proceedings, whereas a plaintiff who succeeds on an interlocutory application will not necessarily be entitled to its costs if the proceedings ultimately fail in their entirety. "Costs of the motion" include all the costs of and incidental to the particular interlocutory application before the court, including costs "reasonably connected" with the application, such as preparation and taking out the relevant orders: *Re Hudson; Ex parte Citicorp Australia Ltd* (1986) 11 FCR 141 at 144; *Dal Pont* at [1.23], and are not confined to "costs of the day" (which catch only the costs associated with the appearance on the day in question).

That party X pay party Y's costs thrown away by the [amendment/adjournment]

This formula catches the costs which have been incurred and are wasted by reason of an adjournment or amendment, typically where the same or similar work (such as drafting a responsive pleading, or preparing for argument) may have to be undertaken a second time.

That costs of the motion be costs in the proceedings

This order has the effect that the costs of the motion will be treated as costs of the substantive proceedings generally, and will form part of the costs dealt with by the general costs order: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorp (No 2)* [2007] NSWCA 142 at [18]. This is the default position if no special costs order is made (see "No costs order", below), and for that reason is strictly unnecessary, but is nonetheless commonly made for clarity and certainty. It may be appropriate where the motion does not give rise to an "event" distinct from the proceedings as a whole, or was necessarily or reasonably brought or opposed to prepare the substantive proceedings for hearing, or where the true merits of the application may not be apparent unless seen in the context of the final result: *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664.

That costs of the motion be the [plaintiff's/defendant's] costs in the proceedings

This order means that if the party in whose favour it is made ultimately obtains a general order for costs in the substantive proceedings, then that order includes the costs of the motion; but if the other party obtains a general costs order, then neither party receives the costs of the motion. It is appropriate where the successful party on the motion should have the costs of the motion only if it also succeeds on the substantive proceedings. An order that costs of the motion be the plaintiff's costs in the proceedings is the usual order in the Equity Division of the Supreme Court where a plaintiff succeeds on a contested application for an interlocutory injunction: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorp (No 2)* at [23]–[26].

That costs of the motion be reserved to the trial judge

This order means that the costs of the motion may be determined separately by the trial judge upon completion of the proceedings, and if not so separately determined will be costs in the proceedings. It is generally undesirable that questions of costs be left to a judicial officer who has not heard and determined the application to which those costs relate. However, where the hearing is imminent, or the issue is related to trial issues, the making of the costs order may be left to the trial judge, especially if it will be the same judge.

No costs order, and "no order as to costs"

Where no specific order is made in respect of costs of interlocutory proceedings, the costs become costs in the proceedings and are caught by any general costs order ultimately made in the proceedings. A general order in respect of costs of the proceedings catches not only the costs of the final hearing, but all interlocutory proceedings except insofar as there is an order to the contrary: UCPR r 42.7; *Dal Pont* at [1.19]. The absence of any specific costs order is to be distinguished from the court specifically making "no order as to costs", which amounts to the expression of a contrary intent and means that no party is to receive costs of the motion, regardless of the ultimate outcome, so that each must bear its own costs: *Trikas v Rheem (Australia) Pty Ltd* [1964] NSWR 645 at 646. Such costs "lie where they fall": *Wentworth v Wentworth* [1999] NSWSC 638.

Time for assessment and payment of interlocutory costs orders

Unless the court otherwise orders (for example, by specifying *"such costs to be payable forthwith"*), the costs of an interlocutory application are not payable until the end of the proceedings: UCPR r 42.7(2). One reason for this is to reduce the likelihood of multiple costs assessments in respect of the one proceeding, though the rule does not preclude assessment (as distinct from enforcement) in the interim: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2)* at [49], observing that the rule does not prevent the parties from taking "steps to quantify any such order, but that is a different matter to the question of enforceability": *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674 at [5]; *Eastmark Holdings Pty Ltd v Kabraji (No 2)* [2012] NSWSC 1255 at [43]; cf *Zisti v Bartter Enterprises Pty Ltd* [2013] NSWCA 146 at [73]; *Sturesteps v Khoury* [2015] NSWSC 1041 at [209]; *Mundi v Hesse* [2018] NSWSC 1548 at [59]–[62].

The court may "otherwise order" that an interlocutory costs order be payable forthwith: *Solarus Products v Vero Insurance (No 4)* [2013] NSWSC 1012; *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [171]–[173]; *Australian Securities and Investments Commission v Rich* [2003] NSWSC 297. The discretion may be exercised at any time prior to the conclusion of the proceedings: *Showtime Touring Group Pty Ltd v Mosley Touring Inc* [2013] NSWCA 53 at [29].

The discretion to order the immediate payment of interlocutory costs is wide; "[i]n the end, the demands of justice are the only determinant": *Fiduciary Ltd v Morningstar Research Pty Ltd* at [7]; *Gattelleri v Meagher* [1999] NSWSC 1279 at [9]; *Plaza West Pty Ltd v Simon's Holdings (NSW) Pty Ltd (No 2)* [2011] NSWSC 556 at [13]; *Pavlovic v Universal Music Australia Pty Ltd (No 2)* [2016] NSWCA 31. The practice that interlocutory costs orders were payable only upon completion of the proceedings is a relic of times when personal injury litigation formed the overwhelming business of the courts, and is more commonly departed from in commercial litigation. Because an order that costs be paid forthwith is an exception, it will only be made in a case that is out of the ordinary, as such an order "has the capacity to stultify proceedings particularly brought by persons with limited resources, and also has the risk of operating unfairly where, over the course of the proceedings, there may be orders which are made that one or other party should pay the costs of the other from time to time": *In the matter of Elsmore Resources Ltd* [2014] NSWSC 1390 at [5]; *Hargood v OHTL Public Co Ltd (No 2)* [2015] NSWSC 511 at [8]. The court must consider whether the costs in question should be paid prior to the conclusion of the litigation, or whether one occasion of enforcement of costs orders at the end of a case, with costs orders going different ways being set off, is preferable: *Richards v Kadian (No 2)* [2005] NSWCA 373 at [7].

The discretion to "otherwise order" that interlocutory costs be payable forthwith has been exercised in a variety of circumstances, including:

Where the decision relates to the determination of a discrete or self-contained question: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1 at [11]–[13]; *Richards v Kadian* [2005] NSWCA 373 at [6]–[7]. Examples include an unsuccessful application for summary judgment: *Perpetual Trustee Co v McAndrew* [2008] NSWSC 790; an application for discovery, or a Mareva order: *McNamara Business and Property Law v Kasermidis (No 3)* [2006] SASC 262; an unsuccessful application to administer interrogatories: *Megna v Marshall* [2005] NSWSC 1326 at [26]; an application for contempt: *Ark Hire Pty Ltd v Barwick Event Hire Pty Ltd* [2007] NSWSC 488 at [46]–[49]; a security for costs application: *Young v Cooke (No 2)* [2018] NSWSC 1787; and a successful application to restrain solicitors acting for the opponent: *Chinese Australian Services Society Co-Operative Ltd v Sham-Ho* [2012] NSWSC 241. Where non-parties have appeared in relation to challenges to subpoenas, the court may make orders for costs which are assessable forthwith. However, steps reasonably taken in the management of the proceedings towards a hearing, such as a directions hearing, should be treated as costs in the proceedings generally: *Metlife Insurance Ltd v Visy Board Pty Ltd (Costs)* [2008] NSWSC 111 at [11]–[12].

Where the costs are significant and there is likely to be a delay in the conclusion of the proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [11]–[13]; particularly if the receiving party is impecunious and the application diverted funds from the substantive cause: *Reserve Rifle Club Inc v NSW Rifle Assn Inc* [2010] NSWSC 351; *Hardaker v Mana Island Resort (Fiji) Ltd (No 2)* [2019] NSWSC 1100 at [24]–[25]. This may be the case where liability has been separately determined (under UCPR r 28.2): *Herbert v Tamworth City Council (No 4)* (2004) 60 NSWLR 476 at [30] (costs of hearing on liability payable forthwith where liability established but assessment of damages could be delayed for a decade).

Where the costs were incurred by unreasonable or unnecessary conduct: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [11]–[13] (costs abnormally increased by service of very voluminous material at the last moment, the vast bulk of which was not referred to on the application); *Vitoros v Raindera Pty Limited* [2014] NSWSC 99 at [20] (multiple appearances necessitated by plaintiff's repeated defaults); *Seven Network Ltd v News Ltd* [2005] FCA 1630 at [8] (wrongful suppression of material documents unnecessarily incurring costs in defending a claim for legal professional privilege); *Stokes v McCourt* [2013] NSWSC 1014 at [164]–[165] (delays in conduct of the principal proceedings suggested that defendant was conducting a "war of attrition" through interlocutory disputes). The court will take into account the extent to which the parties have failed to facilitate the overriding purpose of the just, quick and cheap resolution of the real issues in the proceedings as required by CPA s 56, must take into account the matters set out in ss 56 and 57, and may have regard to the checklist in s 58(2)(b): *Bevillesta Pty Ltd v D Tannous 2 Pty Ltd* [2010] NSWCA 277 at [37]–[39]; *Australian Securities and Investments Commission v Rich* [2003] NSWSC 297 at [85]; *Seven Network Ltd v News Ltd* [2005] FCA 1630 at [8].

Where the costs order involves third parties, such as legal practitioners: See *Bagley v Pinebelt Pty Ltd* [2000] NSWSC 830 at [7] (wrongful lodgement of caveat by barrister); *North South Construction Services Pty Ltd v Construction Pacific Management Pty Ltd* [2002] NSWSC 286 at [35]–[36] (abuse of process by non-party).

Considerations that may tend against an "otherwise order" for costs to be payable forthwith include that the party is legally aided: *Richards v Kadian (No 2)* at [5], or that the final outcome is sufficiently uncertain that it is preferable to defer the question of costs to the trial judge, or to make costs of the interlocutory application costs in the cause: *Megna v Marshall* at [27]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1. Cases in which the court has declined to make a "forthwith" order include *Cameron v Ofria* [2007] NSWCA 37 at [12] (successful application to strike out cross claim, characterised as ordinary interlocutory application in the general course of proceedings); *Hargood v OHTL Public Co Ltd (No 2)* [2015] NSWSC 511 (failed application

for stay and likely two years before conclusion of proceedings insufficient to depart from usual rule); *Hall v Swan* [2013] NSWSC 1758 at [11]–[15] (delay in service of expert reports); *Eastmark Holdings Pty Ltd v Kabraji (No 2)* [2012] NSWSC 1255 at [42]–[46] (several motions heard together, discretionary factors tending in both directions).

Failure to pay interlocutory costs orders

Where a party fails to pay a series of interlocutory costs orders that are payable forthwith, orders for a stay of proceedings under CPA s 67, security for costs and/or dismissal in the event of non-compliance with such orders may be made, but generally only in a special case, such as where the costs are substantial, or the failure to pay is unreasonable, or the party is acting vexatiously: *Morton v Palmer* (1882) 9 QBD 89; *Re Wickham* (1887) 35 Ch D 272; *Graham v Sutton, Carden & Co* [1897] 2 Ch 367; *Trkulja v Dobrijevic (No 2)* [2016] VSC 596 (13 costs orders totalling over $150,000); *Kostov v Zhang; Kostov v Fairfax Media Publications Pty Ltd* [2017] NSWDC 7 (Court of Appeal order for gross sum costs order of $15,000).

[8-0160] Quantification of costs

Where an order is made that party A pay party B's costs, the quantum of party A's liability is usually ultimately resolved by assessment, failing agreement. Costs as between party and party (now called "ordered costs": see LPULAA, s 74) are for the most part not regulated, and are assessed on the ordinary basis or the indemnity basis (as to which, see [8-0130]. For circumstances in which costs are regulated, see [8-0170].

Capping of costs

CPA s 98(1)(b), and UCPR r 42.4(1), provides that the court may "cap" costs, and this may be on the application of a party or of its own motion, and prospectively or retrospectively: *Dal Pont* 7.42–7.47; *Nudd v Mannix* [2009] NSWCA 327; *Nicholls v Michael Wilson Partners Ltd (No 2)* [2013] NSWCA 141. However, it is preferable that any such order be made prospectively and not retrospectively: *Re Sherborne Estate (No 2); Vanvalen v Neaves* (2005) 65 NSWLR 268 at [22]–[26], [31]; *Dal Pont*, 7.42–7.49; JP Hamilton, "Containment of costs: litigation and arbitration" (presentation, 1 June 2007); Practice Note SC Eq 7. This power has most often been exercised in proceedings where the parties are effectively litigating from the same purse, such as family provision or de facto property litigation.

Gross sum costs orders

Although the quantification of a costs order is usually left to the process of assessment, CPA 98(4)(c) provides that at any time before costs are referred for assessment the court may make an order for a specified gross sum, instead of assessed costs.

The guiding principle as to the making of a lump sum costs order was outlined in *Harrison v Schipp* (2002) 54 NSWLR 738 at [22], namely, that the power "should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available". Further principles were elaborated in *Hamod v State of NSW* [2011] NSWCA 375 at [813]–[820]. Together, these decisions are frequently cited as the leading statements of principle: see, eg, *Colquhoun v District Court of NSW (No 2)* [2015] NSWCA 54 at [6]–[7] (a decision of particular relevance in circumstances where there is inadequate evidence as to the appropriate sum to be ordered); *South Western Sydney Local Health District v Gould (No 2)* [2018] NSWCA 160 at [11]; *Riva NSW Pty Ltd v Mark A Fraser and Christopher P Clancy trading as Fraser Clancy Lawyers (No 4)* [2018] NSWCA 327 at [73].

Although courts were initially reluctant to make such orders, they have become increasingly common: *Poulos v Eberstaller (No 2)* [2014] NSWSC 235; *Chaina v Presbyterian Church (NSW) Property Trust (No 26)* [2014] NSWSC 1009 at [43]–[57]. At first they were utilised in "megalitigation" cases, where the assessment of costs would likely be protracted and expensive:

Idoport Pty Ltd v NAB Ltd [2005] NSWSC 1273; see also *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640, but they are now made in a wide variety of circumstances, including where there has been contumelious conduct by a party (*Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99), or where the financial circumstances of the party ordered to pay costs are poor: *Hamod v State of NSW* at [813]–[820]. Such orders are now increasingly made where the subject matter of the litigation is a modest sum in comparison to the costs involved, or to avoid "satellite litigation" about costs: *O'Rourke v P & B Corporation Pty Ltd* [2008] WASC 36 at [5]; *Lambert v Jackson* [2011] FamCA 275 at [59] (lump sum costs orders made on an indemnity basis by reason of conduct of the litigation); *Vumbaca v Sultana (No 2)* [2013] NSWDC 195 at [7]; *Colquhoun v District Court of NSW* [2014] NSWCA 460 at [62] (appeal from Children's Court, in which unsuccessful party had contested every point, and the costs order to which the other parties were entitled should not be rendered nugatory by the prospect of disproportionate disputation by him); or even in litigation with no special features: *Poulos v Eberstaller (No 2)*.

When making a gross sum order, the court must determine a reasonable amount. The assessment of any lump sum to be awarded must represent a review of the successful party's costs by reference to the pleadings and complexity of the issues raised on the pleadings; the interlocutory processes; the preparation for final hearing and the final hearing, but the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment: *Hamod v State of NSW* at [819], citing *Smoothpool v Pickering* [2001] SASC 131; *Harrison v Schipp* (2002) 54 NSWLR 738 at 743; *Hadid v Lenfest Communications Inc* [2000] FCA 628 at [35]; *Auspine Ltd v Australian Newsprint Mills Ltd* [1999] FCA 673; see also *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99 at [28], [38]. This typically involves an assessment of the different components of the costs, including the rates and hours billed per lawyer, in the context of the litigation as a whole. An example of this can be seen in *Zepinic v Chateau Constructions (Aust) Ltd (No 2)*, where junior counsel's fees were deemed reasonable because the rates were not excessive, it was appropriate for counsel to be briefed to appear, and it was sensible and efficient for counsel to draft and settle written submissions; however, another lawyer's fees were deemed to be disproportionately high, because the matter was neither large nor complex and it could and should have been resolved promptly by summary dismissal.

A discount (typically in the order of 10–20% in the case of an indemnity order, and 30–35% in the case of a party/party order) is usually applied when calculating a gross sum costs order, for two main reasons: first, because on assessment, even on the indemnity basis, a successful party invariably recovers something less than its actual costs, typically 15% where the assessment is on an indemnity basis; and secondly, the necessarily broad-brush approach of the court to assessment on a lump sum basis — involving some risk that the sum includes costs that would not be recovered on assessment — coupled with the savings to the costs creditor in time and costs through avoiding a detailed assessment, and the loss to the costs debtor of the opportunity to scrutinise and object to a detailed bill, has resulted in a practice of applying a discount on lump sum assessments: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119; *Idoport Pty Ltd v NAB, Idoport Pty Ltd v Donald Robert Argus* [2007] NSWSC 23 at [13]; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* at [38]; *In the matter of Aquaqueen International Pty Ltd* [2015] NSWSC 500 at [18]; *Hancock v Rinehart (lump sum costs)* at [56]–[57].

However, that does not mean that the court must apply a percentage discount to the sum sought by the successful party, and the court "must be astute not to cause an injustice to the successful party" by applying "an arbitrary 'fail safe' discount on the costs estimate submitted to the court". If the court can be confident that there is little risk that the sum includes costs that might be disallowed on assessment, the case for a discount is seriously undermined, and where a gross sum is assessed on an indemnity basis, and there is no evidence of unreasonableness, it may be inappropriate to apply any discount, although one may nevertheless be appropriate if there is evidence that the successful party errs on the side of excessive use of legal services: *Beach Petroleum* at 164–165; *Norfeld*

v Jones (No 2) [2014] NSWSC 199 at [7]–[10]; *Harvey v Barton (No 4)* [2015] NSWSC 809 at [48] ; *Hancock v Rinehart (Lump sum costs)* at [57]–[59]; *In the matter of Beverage Freight Services Pty Ltd* [2020] NSWSC 797 at [24], [36].

CARC Guideline

The Costs Assessors Review Committee (CARC) has published a "Guideline for Costs Payable" between parties under court orders (whether "ordered costs" under the new legislation or "party/party costs" under the repealed legislation). This Guideline, which is available on the Supreme Court website, is intended to provide guidance for assessors as to what might reasonably be allowed in respect of certain types of work and hourly rates, but does not have the effect of a mandatory scale. By analogy it may assist courts in quantifying costs.

[8-0170] Regulated costs

In some situations, costs are fixed, limited or regulated by or under statutory provisions, including *Legal Profession Uniform Law Application Act* 2014, ss 59 and 61, *Workplace Injury Management and Workers Compensation Act* 1998, and *Motor Accidents Compensation Act* 1999.

Costs on default judgment and the enforcement of judgments

The costs recoverable for the undefended recovery of a liquidated debt, and for the enforcement of a judgment by a judgment creditor, are fixed under s 59(1)(d) and (e) of LPULAA and Pt 5, reg 24 of the *Legal Profession Uniform Law Application Regulation* 2015. The scales as to the costs recoverable in such matters are set out in Sch 1 for each court.

Claims for personal injury damages

LPULAA Sch 1 limits the recoverable costs for legal services in respect of certain claims for personal injury damages where the damages recovered do not exceed $100,000: LPULAA Sch 1, cl 2. These provisions do not preclude the awarding of costs on an indemnity basis if a reasonable offer of compromise is not accepted: Sch 1, cl 5. Applications may be made to the court under CPA s 98, UCPR rr 42.15 and 42.20 by a plaintiff for costs outside the cap: *Hurcum v Domino's Pizza (No 2)* (2007) 4 DCLR 194 (failed allegation of fraud which complicated and delayed personal injury proceedings). The costs cap applies to a defendant, including one who brings a cross-claim, but not to a cross-defendant in proceedings for contribution: *Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty Ltd* (2006) 65 NSWLR 717 at [50], [52].

The cap applies if the amount recovered on a claim for personal injury damages does not exceed $100,000, whether the claim is in negligence or for an intentional tort such as assault, but does not include claims for false imprisonment, which is not a "personal injury": *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; *NSW v Williamson* (2012) 248 CLR 417 at [7], [8]; [44].

Where damages are merely indirectly related to the death of or injury to a person, such as damages for professional negligence connected to proceedings about the death of or injury to a person, they do not fall within the definition of "personal injury damages" in s 11. The claim for damages must be a claim for the personal injury suffered: *New South Wales v Williamson* (2012) 248 CLR 417. In *Osei v PK Simpson* (2022) 106 NSWLR 458, where an injured plaintiff later sued his legal representatives, it was held that as the claim was for professional negligence and not damages for personal injury, the cap under Sch 1, cl 2 of the LPULAA does not apply.

Claims for work injury damages

The *Workplace Injury Management and Workers Compensation Act* 1998 ("the WIM Act"), s 346, applies to costs (including disbursements) payable by a party in or in relation to a claim for work injury damages, including court proceedings for work injury damages, and authorises regulations making provision for or with respect to the awarding of costs to which it applies. The regulations

may provide for the awarding of costs on a party/party basis, on a practitioner and client basis, or on any other basis. A party is not entitled to an award of costs to which the section applies, and a court may not award such costs, except as prescribed by the regulations or by the rules of the court concerned. In the event of any inconsistency between the provisions of the regulations under this section and rules of court, the provisions of the regulations prevail to the extent of the inconsistency. For the purpose of s 346, the relevant regulation is *Workers Compensation Regulation* 2016 ("the Regulation"), Pt 17. "Work injury damages" are defined in s 250 as damages recoverable from a worker's employer in respect of:

(a) an injury to the worker caused by the negligence or other tort of the employer, or

(b) the death of the worker resulting from or caused by an injury caused by the negligence or other tort of the employer,

whether the damages are recoverable in an action for tort or breach of contract or in any other action, but does not include motor accident damages.

In such claims, the WIM Act and the Regulation govern the costs to be awarded, to the exclusion of the discretion conferred by CPA s 98. Thus, a court can only award costs as prescribed by the Regulation or by the UCPR, but in the event of any inconsistency, the Regulation prevails. The scheme of the Regulation allows no scope for an award of indemnity costs: *Chubs Constructions Pty Ltd v Chamma* [2009] NSWCA 98 at [11]–[31]. This is to be distinguished from proceedings for workers' compensation, as s 112 of the WIM Act allows the Personal Injury Commission to make orders on an indemnity basis.

Similarly, the UCPR rules relating to offers of compromise do not operate once a Certificate of Mediation Outcome has been issued under WIM Act, s 318B. So far as costs in court proceedings are concerned, the parties are "fossilised" in their respective positions at the conclusion of the mediation. The same position applies throughout the court proceedings, including any appeal: *Smith v Sydney West Area Health Service (No 2)* [2009] NSWCA 62 at [11]–[20]; *Pacific Steel Constructions Pty Ltd v Barahona (No 2)* [2010] NSWCA 9 at [12]–[16]; see also *Chubs Constructions Pty Ltd v Sam Chamma (No 2)* (2010) 78 NSWLR 679 at [37]–[40]; *Sneddon v The Speaker of the Legislative Assembly* [2011] NSWSC 842 at [15]–[24].

Claims under the Motor Accidents Compensation Act 1999

Costs in respect of claims covered by the *Motor Accidents Compensation Act* 1999, for accidents that occur after 5 October 1999, are regulated by Ch 6 (ss 148–153) of that Act: *Najjarine v Hakanson* [2009] NSWCA 187. Section 152(2) provides that the rules of court relating to offers of compromise apply to any such offer made in those proceedings. This extends to *Calderbank* offers: *Arnott v Choy (No 2)* [2010] NSWCA 336 at [9]–[14]. Otherwise, subject to the rules of court, the costs of such proceedings are to follow the event and are payable on a party/party basis: s 152(3). However, the provisions of Ch 6 regulate costs in court claims brought under the MAC Act in a way that does not otherwise permit for the operation of the rules of court: *San v Rumble (No 2)* [2007] NSWCA 259 at [15].

[8-0180] Interest on costs

For actions commenced before 24 November 2015, an application can be made under CPA s 101(4) for interest on costs: *Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99 at [39]–[45]; see also *Short v Crawley (No 45)* [2013] NSWSC 1541; *Alawadi v Widad Kamel Farhan trading as The Australian Arabic Panorama Newspaper (No 3)* [2016] NSWDC 204. Although it has been said that some positive basis for the application should be established (*Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd (No 2)* (2013) 84 NSWLR 436 at [38]; *McKeith v Royal Bank of Scotland Group Plc; Royal Bank of Scotland Group Plc v James (No 2)* [2016] NSWCA 260 at [55]), and interest on costs has been refused where it was not sought at trial and there has been

delay (*T&T Investments Australia Pty Ltd v CGU Insurance Ltd (No 2)* [2016] NSWCA 372) or for insufficiency of evidence (*Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd (No 2)* at [59]–[60]), it is not necessary to demonstrate circumstances out of the ordinary to warrant such an order: *Drummond and Rosen Pty Ltd v Easey (No 2)* [2009] NSWCA 331 at [4]. The better view is that interest on costs should now be seen, like interest on a judgment, as no more than appropriate compensation for the time value of money, for the period while a party is out of pocket: *Drummond and Rosen Pty Ltd v Easey (No 2)* at [4]; *Grace v Grace (No 9)* [2014] NSWSC 1239 at [57]–[72]; *Richtoll Pty Ltd v WW Lawyers (in Liq) Pty Ltd (No 3)* [2016] NSWSC 1010 at [12]–[17]. Such orders, which have become increasingly commonplace, have often adopted the complex formula set out in *Lahoud v Lahoud* [2006] NSWSC 126 which required the attribution of payments between the client and the solicitor to particular parts of the party/party costs.

An interest order under CPA s 101(4) can be made after the costs order has been made, at least so long as it is made before there is a judgment for costs effected by registration of the certificate of assessment: *Timms v Commonwealth Bank of Australia (No 3)* [2004] NSWCA 25 at [11] (Beazley JA, observing, in respect of the former *Supreme Court Act* 1970*,* s 95(4), that a claim for interest under the section is "part of the claim that a party has in relation to costs", and not a separate and independent course of action, and that if no application for interest were made and determined before entry of judgment for costs, the claim merged with the judgment, as had occurred in that case when final judgment for costs was obtained upon filing the costs certificate); *Seiwa Australia Pty Ltd v Seeto Financial Circumstances Pty Ltd (No 2)* [2010] NSWSC 118; *Simmons v Colly Cotton Marketing Pty Ltd* [2007] NSWSC 1092; *Lucantonio v Kleinert (Costs)* [2011] NSWSC 1642 at [26]–[29].

For actions commenced on or after 24 November 2015, CPA s 101 now provides that interest runs on a costs order at the prescribed rate from the date of the order (unless stated otherwise in the court order): s 101(4) and (5). This means that, for actions commenced on or after 24 November 2015, interest on costs from the date of the order is the default position, but the court retains a discretion to otherwise order — including to order that interest run from an earlier date. If the court does so (which may well be appropriate if the party entitled has been paying its lawyers throughout), then rather than invoking the complex *Lahoud* formula, although it is in principle impeccable, it is preferable to adopt an approach analogous to that used for interest on damages and select an approximate mid-point from which interest will run.

[8-0190] Appeals

Leave to appeal is required for appeals to the Court of Appeal on a question of costs alone: *Supreme Court Act* 1970, s 101(2)(c). For leave to be granted something more than arguable error is necessary; there must be "an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable": *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235 at [46]; see, eg, *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]–[38]; *The Age Company Ltd v Liu* (2013) 82 NSWLR 268 at [13]; and *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [28].

If a trial judge's exercise of discretion in relation to costs miscarries, the costs order may be set aside and the Court of Appeal may then exercise the discretion afresh: *McCusker v Rutter* [2010] NSWCA 318; *State of NSW v Quirk* [2012] NSWCA 216 at [165]–[181] (factors justifying appellate intervention), or remit the matter to the trial judge for redetermination.

As to costs on appeal generally, see *Dal Pont*, Ch 20.

Applications for payment from the Suitors' Fund Act 1951

The *Suitors' Fund Act* makes provision for payments to relieve litigants of the burden of costs arising out of erroneous decisions of lower courts. The legislation generally applies in the context

of appeals, which include proceedings for judicial review: *Ex Parte Parsons; Re Suitors' Fund Act* (1952) 69 WN (NSW) 380; *Lou v IAG Limited t/as NRMA Insurance* [2019] NSWCA 319, from a decision of a court or tribunal, which includes a claims assessor under the *Motor Accidents Compensation Act*: *Australia Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497 at 513–4; *Lou v IAG Limited t/as NRMA Insurance*. Certificates have been granted in the District Court in the course of judgments handed down after hearing appeals from tribunals: *Perla v Danieli* [2012] NSWDC 31; *Patel v Malaysian Airlines Australia Ltd (No 2)* [2011] NSWDC 4, and a Local Court appeal: *Jolly v Houston* (2009) 10 DCLR (NSW) 110. See *Dal Pont*, Ch 21.

[8-0200] Precedent costs orders

The following are recommended forms to be adopted in making costs orders:

Precedent 8.1 — Final costs order (where the plaintiff succeeds): *that the defendant pay the plaintiff's costs*.

Precedent 8.2 — Final costs order (where the defendant succeeds): *that the plaintiff pay the defendant's costs* **OR** *that there be judgment for the defendant, with costs* **OR** *that the proceedings be dismissed, with costs.*

Precedent 8.3 — Bullock order (where the plaintiff succeeds against the first defendant but fails against the second defendant): (1) *that the plaintiff pay the second defendant's costs;* (2) *that the first defendant pay the plaintiff's costs, including any costs which the plaintiff is liable to pay the second defendant under the preceding order.*

Precedent 8.4 — Sanderson order (where plaintiff succeeds against first defendant but fails against second defendant): (1) *that the first defendant pay the plaintiff's costs;* (2) *that the first defendant pay the second defendant's costs.*

Precedent 8.5 — Ordinary order where plaintiff succeeds against single or multiple defendants: *that the defendant(s) pay the plaintiff's costs.*

Precedent 8.6 — Apportionment: *that the defendant pay 80% of the plaintiff's costs.*

Precedent 8.7 — Indemnity costs from date of offer of compromise: *that the defendant pay the plaintiff's costs, on the ordinary basis until <date> and thereafter on the indemnity basis.*

Precedent 8.8 — Family Provision (where the plaintiff succeeds): (1) *that the defendant pay the plaintiff's costs;* (2) *that the defendant be entitled to be indemnified out of the estate in respect of the defendant's costs, including the costs payable to the plaintiff under the preceding order.*

Precedent 8.9 — Forthwith: *"… such costs to be payable forthwith".*

Precedent 8.10 — no order as to costs: It is inappropriate to make an order that a party pay its own costs: *Liverpool City Council v Estephan* [2009] NSWCA 161 at [75]. However, parties often desire some express provision to make clear that there is no associated costs liability; this may be addressed by a notation: *"It is noted that there is no order as to costs, to the intent that each party bear its own costs".*

Legislation

- CPA, ss 3, 5(1), 56–60, 98, 99, 101
- *Children and Young Persons (Care and Protection) Act* 1998, s 88
- *Civil Liability Act* 2002, s 35A
- *Defamation Act* 2005 (NSW) s 40
- *Family Law Act* 1975 (Cth) s 117(2)

- *Legal Profession Act* 2004 (rep)
- Legal Profession Uniform General Rules 2015
- *Legal Profession Uniform Law Application Act* 2014 Sch 2, ss 59, 61
- *Legal Profession Uniform Law Application Regulation* 2015
- *Motor Accidents Compensation Act* 1999, Ch 6
- *Property (Relationships) Act* 1984
- *Succession Act* 2006, s 99
- *Suitors Fund Act* 1951
- Workers Compensation Regulation 2016, Pt 17
- *Workplace Injury Management and Workers Compensation Act* 1998, ss 112, 250, 318B, 346

Rules

- UCPR rr 16.9, 36.10, 42.2, (former) 42.3, 42.4, 42.5, 42.7, 42.14, 42.15, 42.24, 42.25, 42.27, 42.34 and 42.35

Further references

- G Dal Pont, *Law of Costs*, 4th ed, LexisNexis Butterworths, 2018
- Ritchie's Uniform Civil Procedure NSW (LexisNexis Butterworths)
- The Hon John P Hamilton QC, The Hon Justice Geoff Lindsay, Michael Morahan OAM and Carol Webster SC, General Editors, *NSW Civil Procedure Handbook* 2014 (Lawbook Co, 2014; commentary on Pt 42 – Costs prepared by Peter Johnstone, President of the Children's Court of New South Wales)
- MJ Beazley, "Calderbank offers 2", paper delivered at the "'Without Prejudice' Offers and Offers of Compromise" NSW Young Lawyers Civil Litigation Committee Seminar, 26 September 2012, at <www.supremecourt.justice.nsw.gov.au/Documents/beazley260912.pdf>
- MJ Beazley, "Calderbank offers", paper delivered at the Australian Lawyers Alliance Hunter Valley Conference, 14–15 March 2008 at <www.supremecourt.justice.nsw.gov.au/Documents/beazley140308.pdf>
- Justice Hamilton, "Containment of Costs: Litigation and Arbitration" (1 June 2007)
- Costs Assessors Review Committee, "Guideline for Costs Payable", Supreme Court of New South Wales website

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