Judicial Commission of New South Wales

# CIVIL TRIALS BENCH BOOK

**Update 50**

**December 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 50**

## Update 50, December 2022

The following changes have been incorporated into this update:

**[1-0400] Closed court, suppression and non-publication orders**

It is noted at **[1-0410] Court Suppression and Non-publication Orders Act 2010** that Sch 5, cl 91 of the *Broadcasting Services Act* 1992 (Cth) has been replaced by s 235 of the *Online Safety Act* 2021.

**[2-1400] Cross-vesting legislation**

The cases of *Guan v Li* [2022] NSWCA 173 and *Boensch v Pascoe* [2016] NSWCA 191 have been added at **[2-1400] Cross-vesting**.

**[2-4600] Persons under legal incapacity**

At **[2-4630] Tutors/Guardians ad litem**, the decision of *CM v Secretary, Dept Communities and Justice* [2022] NSWCA 120 has been added. It is noted here that the legislative power to appoint a guardian ad litem for both a child or young person in s 100 of the *Children and Young Persons (Care and Protection) Act* 1998 is framed in different terms from the power in s 101 to appoint a guardian ad litem for a parent.

**[5-1000] The Special Statutory Compensation List**

At **[5-1030] Police Regulation (Superannuation) Act 1906**, the case of *SAS Trustee Corporation v Colquhoun* [2022] NSWCA 184 has been added. In that case, the Court of Appeal, having regard to the legislative history of s 9A(4) of the *Police Regulation (Superannuation) Act* 1906 found no narrowing of the range of circumstances that the appellant could consider in determining whether an application should be backdated.

**[5-3500] Trans-Tasman proceedings**

The case of *Zurich Insurance PLC v Koper* [2022] NSWCA 128 which considered the constitutional validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act* 2010 (Cth) has been added at **[5-3510] Service in New Zealand of initiating documents issued by Australian courts and tribunals.**

**[5-7000] Intentional torts**

At **[5-7188] Misfeasance in public office,** the case of *Toth v State of NSW* [2022] NSWCA 185, which includes a discussion of what is required to succeed in a claim for misfeasance in public office, has been added.

**[5-8500] Applications for judicial review of administrative decisions, including decisions of tribunals**

For a discussion of the consequence of s 69 (3) and (4) of the *Supreme Court Act* 1970, the case of *Malek Fahd Islamic School Ltd v Minister for Education and Early Childhood Learning* [2022] NSWSC 1176 has been added at **[5-8505] Jurisdiction**.

## [7-0000] Damages

This chapter has been extensively revised and updated by his Honour Judge A Scotting of the District Court of NSW.

**Judicial Commission of New South Wales**

# CIVIL TRIALS BENCH BOOK

**Update 50**

**December 2022**

**FILING INSTRUCTIONS OVERLEAF**

*Judicial Commission of New South Wales*

*Level 5, 60 Carrington Street, Sydney NSW 2000*

*GPO Box 3634, Sydney NSW 2001*

# FILING INSTRUCTIONS

## Update 50

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

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

| *Tab Card* | *Discard Old Pages* | *Insert New Pages* |
|---|---|---|
| **Preliminary** | | |
| | 229–235 | 229–235 |
| **Procedure generally** | | |
| | 875–876 | 875–876 |
| | 1765–1771 | 1765–1771 |
| **Particular proceedings** | | |
| | 5251–5259 | 5251–5259 |
| | 5551–5555 | 5551–5555 |
| | 5851–5867 | 5851–5867 |
| | 5951–5955 | 5951–5954 |
| **Damages** | | |
| | 7051–7093 | 7051–7094 |

# Closed court, suppression and non-publication orders

## [1-0400] The principle of open justice

The principle of open justice is one of the most fundamental aspects of the system of justice in Australia and the conduct of proceedings in public is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public: *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 (CA) per Spigelman CJ at [18].

There are a number of statutory exceptions to this principle and the most significant of these are discussed at [1-0410], [1-0430] and [1-0440]. These exceptions can be divided into three broad groups: those conferring a power on a court to make suppression or non-publication orders in particular circumstances, those requiring or enabling the closing of a court and those that either require the making of an order for non-publication or prohibit publication of information.

The various statutory provisions protect the privacy interests of particular participants in the court system. Privacy interests are also the concern of the Supreme Court of New South Wales "Identity theft prevention and anonymisation policy" 2010 (accessed 2 August 2011), which provides guidance as to the publication of personal or private information in court judgments, and must be adhered to by a judge's staff and the staff of the Reporting Services Branch.

It is generally desirable that consideration of whether orders should be made under any of the statutory provisions be dealt with at the outset of the proceedings, and, when a prohibition is to remain in force (as it often does) to advise everyone, including the entire jury panel, of the legal position.

## [1-0410] Court Suppression and Non-publication Orders Act 2010

The *Court Suppression and Non-publication Orders Act* 2010 commenced on 1 July 2011 and confers broad powers on courts to make suppression or non-publication orders: s 7. Such orders may be made at any time during proceedings or after proceedings have concluded: s 9(3).

The two types of orders are defined in s 3. A "non-publication order" prohibits or restricts the publication of information (but does not otherwise prohibit or restrict the disclosure of information), and a "suppression order" prohibits or restricts the disclosure of information (by publication or otherwise).

"Party" is broadly defined in s 3 and includes the (alleged) complainant or victim in criminal proceedings, and any person named in evidence given in proceedings.

Effect is given to the open justice principle in s 6 of the Act which requires a court deciding whether to make a suppression or non-publication order, to take into account that "a primary objective of the administration of justice is to safeguard the public interest in open justice".

Section 6 should not impede the court from making an order when it is of the opinion that one of the grounds in s 8 is made out. Its importance will vary depending on the extent that any such order will interfere with the principle of open justice: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [9]. In *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136, the Court of Appeal rejected a submission that this meant that the principle of open justice under s 6 does not need to be considered if one of the grounds in s 8 is established. The court held that first, s 6 imposes an obligation upon the court in unambiguous language, reinforcing the common law position and there is nothing in the language of s 8 to entitle a court to disregard that obligation. Second, s 8(1)(e) proceeds on the basis that the public interest in open justice is not disregarded, but rather, needs to be substantially outweighed if that paragraph is to be satisfied; see *Misrachi v The Public Guardian* [2019] NSWCA 67 at [11]. Third, s 12(2) requires the duration of

an order to be limited "for no longer than is reasonably necessary to achieve the purpose for which it is made". That limitation reflects the ongoing importance of safeguarding the public interest in open justice: *DRJ v Commissioner of Victims Rights* at [30], [33], [38].

## Power to make orders

While s 7 empowers a court to make suppression or non-publication orders, the section, and the Act, is silent on the question whether an order under s 7 can bind third parties. It was assumed in the *Court Suppression and Non-publication Orders Bill* 2010, NSW, Legislative Assembly, Debates, 29 October 2010, p 27195, that the power under s 7 can extend to "bind all members of the public". At common law, there were conflicting views as to whether a court could make non-publication orders binding on anyone not present in the courtroom: see, for example, *Hogan v Hinch* (2011) 243 CLR 506 at [23]; *Commissioner of Police NSW v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 at [43]–[44]; and *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [89]. Section 7 resolved that conflict in favour of a wide power: *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [25].

A limitation on that power based upon Constitutional validity previously arose from Sch 5 of the *Broadcasting Services Act* 1992 (Cth): *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*, above, at [81]–[96]. Schedule 5, cl 91 of the *Broadcasting Services Act* 1992 (Cth), was replaced (as of 23 January 2022) by s 235 of the *Online Safety Act* 2021 (Cth), which is in the same form.[1]

A court can make a suppression or non-publication order on its own initiative or on application by a party to the proceedings: s 9. Those persons entitled to be heard on an application include, in s 9(2)(d), a "news media organisation".

## Suppression or non-publication order must be "necessary"

Section 8(1) of the Act sets out the grounds upon which an order can be made and each is prefaced in terms of "necessity". At common law, necessity arose only in "wholly exceptional" circumstances: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [45] per Spigelman CJ. A "high level of strictness" applied in determining whether it was really necessary to exercise the power to suppress disclosure or publication: *O'Shane v Burwood Local Court (NSW)* (2007) 178 A Crim R 392 at [34]; *John Fairfax Publications Pty Ltd v Ryde Local Court* at [40]-[45]. In *BUSB v R* (2011) 209 A Crim R 390, Spigelman CJ addressed the test of necessity in the context of a screening order and said where the test impinged on a fundamental principle of the administration of criminal justice, in that case the right to confront accusers, "the test must be applied with a higher level of strictness": at [33].

However, see the discussion as to the meaning of "necessary" in s 8 in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* at [45]–[51]. Bathurst CJ agreed at [8] that the meaning of "necessary" depends upon its context and upon the particular grounds relied upon and the factual circumstances giving rise to the order in question. The Chief Justice said: "Although it is not sufficient, in my opinion, that the orders are merely reasonable or sensible, I agree that the word 'necessary' should not be given a narrow meaning." Undue weight should not be placed upon practices which preceded the commencement of the Act: *State of NSW v Plaintiff A* [2012] NSWCA 248 at [94].

Under s 8(1), an order may be made when the court thinks it is necessary:

(a) to prevent prejudice to the proper administration of justice,

(b) to prevent prejudice to the interests … in relation to national or international security,

(c) to protect the safety of any person,

---

1 The *Online Safety (Transitional Provisions and Consequential Amendments) Act* 2021, Sch 2, cl 30, which repealed Sch 5 of the *Broadcasting Services Act* 1992, commenced 23 January 2022.

(d) to avoid causing undue distress or embarrassment to a party to, or witness in, criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Div 10 of Pt 3 of the *Crimes Act* 1900),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

The correct approach to the interpretation of s 8(1)(c) of the *Court Suppression and Non-Publication Orders Act* 2010 is the "calculus of risk" approach [not "probable harm"], which requires the nature, imminence and degree of likelihood of harm to the relevant person when determining whether an order is necessary to protect the safety of the person: *AB (A pseudonym) v R (No 3)* (2019) 97 NSWLR 1046 at [55]-[58]; *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [26] ]-[27], [36]-[37]. There is nothing in the statutory wording of the section to indicate that it is intended to be limited to physical safety. The wording is apt to include psychological safety, including aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm, consequent on the worsening of a psychiatric condition: *AB (A pseudonym) v R (No 3)* at [59].

In sexual assault proceedings, a court may make an order under s 8(1)(d) only if there are exceptional circumstances: s 8(3). See See *Qiangdong Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159, where it was said reluctance at being publicly associated with a criminal trial was not a basis for a non-publication order: at [49]–[51].

Section 8(1)(e) permits an order when the court thinks it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

For a detailed examination of s 8 see *Reinhart v Welker* [2011] NSWCA 425. For issues on the construction of s 8(1)(c), see *D1 v P1* [2012] NSWCA 314 at [49]–[55]. Some species of litigation are inimical to the notion that anything that occurs in a court should be publicly available. Examples includes injunctions to prevent publication of confidential information, or a trade secret, or disputes as to privilege. It is also clear the interests of justice to which the court may have regard when determining an application for a non-publication order include those beyond the immediate litigation. Examples include orders which, if not made, will deter future applicants from coming forward: *DRJ v Commissioner of Victims Rights* at [36]–[39]. Adoption applications are also ordinarily heard in the absence of the public.

**Take-down orders**

The internet has created challenges in criminal and civil jurisdictions when a court is considering the kinds of non-publication and suppression orders that might be directed to the media or other publishers of online content. In the criminal justice system, the overriding need to protect the fairness of a trial may result in "take-down" orders of specified content from the internet. Jurisdictional questions and questions about the efficacy of such orders may arise. See further *Criminal Trial Courts Bench Book* at [1-354].

A take-down order will fail the necessity test under s 8(1) if it is futile. However, an order will not necessarily be futile merely because the court is unable to remove all offending material from the internet or elsewhere, or the material is available on overseas websites: *AW v R* [2016] NSWCCA 227 at [17]; *Nationwide News Pty Ltd v Quami* (2016) 93 NSWLR 384 at [83]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76].

When information on the internet is involved, relevant internet service providers must be identified and given the opportunity to remove relevant material before an order is sought. The test of necessity will not usually be satisfied unless such a request has been made and the parties, after a reasonable opportunity, have failed, or have indicated they do not intend, to remove the relevant material: *Fairfax Digital* at [98].

A take down order may be made as a means of preventing the continuation of scandalising contempt. There is no reason to refuse to make the order because it may be an ineffective way to stop the scandalising behaviour, if it goes only part of the way to remedying the perceived problem; or if it is only of limited utility: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [25]; *AB (A pseudonym) v R (No 3)* [2019] NSWCCA 46 at [116]–[117]. In *Dowling*, the court upheld a finding of contempt against the applicant for breach of non-disclosure and suppression orders when he published allegations on his website and uploaded to YouTube an audio visual recording of court proceedings and provided a hyperlink to the recording on his website.

Once a ground under s 8(1) is made out, the court has no discretion to refuse to make the order; it must be made: *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [33]; *AB (A pseudonym) v R (No 3)* [2019] NSWCCA 46 at [117]–[118].

### Content of suppression and non-publication orders

See also Checklist for suppression orders in *Criminal Trial Courts Bench Book* at [1-359].

An order must specify:

- the grounds on which it was made: s 8(2)
- any exceptions or conditions it is subject to: s 9(4)
- the information to which it applies: s 9(5)
- the place to which it applies, which may be anywhere in the Commonwealth. An order can only apply outside New South Wales where the court is satisfied that it is necessary to achieve the purpose of the order: s 11
- the period for which the order applies: s 12.

In certain circumstances, it may be necessary to take appropriate steps to ensure the media is notified of either a suppression or non-publication order. In the Supreme and District Court this is done by the associate notifying the Supreme Court's Public Information Officer.

The appropriate treatment of judgments relating to suppression matters is discussed in *D1 v P1 (No 2)* [2012] NSWCA 440 at [6]–[7].

### Review and appeals

Orders made under the Act are subject to review and, by leave, appeal: ss 13–14. The court that made the order can review it on its own initiative, or on the application of a person entitled to apply for review: s 13(1).

An appeal, by leave, may be heard against a decision concerning an order: s 14(1). The powers of an appellate court on review are set out in s 14(4). An appeal is by way of rehearing and fresh evidence may be given: s 14(5). The hearing on appeal is a hearing de novo: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* at [7].

## [1-0420] Common law in relation to suppression and non-publication orders

In *BUSB v R* (2011) 209 A Crim R 390, which concerned the District Court's power to make screening orders, Spigelman CJ confirmed that the implied powers of a court are directed to preserving its ability to perform its functions in the administration of justice: at [28]. The *Court Suppression and Non-publication Orders Act* 2010 does not limit or otherwise affect any inherent jurisdiction a court has to regulate its proceedings or deal with contempt of court: s 4.

Given the broad power conferred by the Act and given the myriad statutory provisions concerning the suppression or non-publication of material and the circumstances in which a court might be closed, it is difficult to determine what of the common law remains effective. The common law in relation to the open justice principle and the test of necessity will still inform the relevant parts of the Act.

## [1-0430] Other statutory provisions empowering non-publication orders

The *Court Suppression and Non-publication Orders Act* 2010 does not limit the operation of a provision under any other Act permitting a court to make orders of this kind: s 5. The following provisions empower a court, in specified circumstances, to make suppression or non-publication orders. This list is not exhaustive.

*Evidence (Audio and Audio Visual Links) Act* 1998, s 15 empowers a "recognised court" to prohibit or restrict the publication of evidence given in the proceedings or the name of a party to or witness in the proceedings.

*Surveillance Devices Act* 2007, s 42(5)–(6) require a court to make an order prohibiting or restricting publication of information revealing details of surveillance device technology or methods of installation, use or retrieval of devices, unless the interests of justice otherwise require.

*Evidence Act* 1995, s 126E(b), in Pt 3.10 Div 1A entitled "Professional confidential relationship privilege" empowers a court to make suppression orders where the court forms the view such an order is necessary to protect the safety and welfare of a "protected confider" (defined in s 126A(1)). Given such an order constitutes a diminution of the operation of the principle that justice should be administered in open court, the justification for such an exception should be narrowly construed: *Nagi v DPP* [2009] NSWCCA 197 at [30].

*Lie Detectors Act* 1983, s 6(3) provides that a court may forbid publication of unlawfully obtained evidence from lie detectors.

In adoption information proceedings, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person: s 186(2) of the *Adoption Act* 2000.

The Supreme Court may order the non-publication of any report relating to the evidence or other proceedings or of any order made on an application for the appointment of a receiver under s 107(2) of the *Conveyancers Licensing Act* 2003. A similar power to make non-publication orders is conferred by s 140(2) of the *Property and Stock Agents Act* 2002 in relation to an application for the appointment of a receiver.

Other statutory provisions include:

- family law provisions like s 121 *Family Law Act* 1975 (Cth)
- child protection provisions like s 29(1)(f) and s 105 *Children and Young Persons (Care and Protection) Act* 1998, and s 25 *Status of Children Act* 1996
- minors protection provisions like s 43(5) *Minors (Property and Contracts) Act* 1970
- health law related provisions like Sch 2, cl 7 of the *Mental Health Act* 2007.

## [1-0440] Self-executing provisions

A number of statutory provisions prohibit the publication of information in particular circumstances. Listed below are some examples of such provisions:

- *Evidence Act* 1995, s 195 prohibits the publication of prohibited questions (either disallowed under s 41 or because an answer would contravene the credibility rule or it was a question to which the court refused to give leave under Pt 3.7 "Credibility"). The express permission of the court is required before such prohibited questions can be published.
- *Status of Children Act* 1996, s 25 prohibits the publication of particulars identifying any person by, or in relation to whom, an application for a declaration of parentage or for an annulment order (in relation to parentage) under Pt 3 Div 2 or Div 3 of the Act, has been brought.

*Court Security Act* 2005, s 9A(1) provides that a person must not use any device to transmit sounds or images from a room or other place where a court is sitting to any person or place outside; by posting entries containing the sounds, images or information on social media sites or any other website or broadcasting or publishing by means of the Internet; or by making the sounds, images or information accessible to any person outside that room or other place. Note the exceptions in s 9A(2).

## [1-0450] Closed court

Pursuant to s 71 CPA, civil proceedings may be conducted in the absence of the public in certain circumstances, including where the presence of the public would defeat the ends of justice (s 71(b)), if the business does not involve the appearance before the court of any person (s 71(e)), or if the court thinks fit (s 71(f)). Other designate circumstances are outlined in s 71.

An order to close the court is considered a serious departure from the principle of open justice and should not be made if some less drastic mechanism, such as the use of pseudonyms or sealed envelopes would achieve the necessary purpose. Orders to close the court may be made subject to certain conditions.

An order to close the court to protect trade secrets or confidential commercial information may be valid in certain exceptional circumstances: *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 per Street CJ at 307. The validity of the order was not really determined in that case, as the parties did not dispute that aspect of the earlier proceedings. However, on appeal, the request to close the court to protect confidential commercial information was refused. It was decided that the confidentiality could be maintained by avoiding detailed reference to the information during the appeal and other such strategies without having to close the court: *David Syme & Co Ltd v General Motors-Holden's Ltd* per Street CJ at 296–297.

### Legislation

- *Adoption Act* 2000, s 186(2)
- *Children and Young Persons (Care and Protection) Act* 1998, ss 29(1)(f), 105
- CPA, s 71
- *Conveyancers Licensing Act* 2003, s 107(2)
- *Court Security Act* 2005, s 9A
- *Court Suppression and Non-publication Orders Act* 2010, ss 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14
- *Evidence Act 1995*, ss 41, 126A, 126E(b), 195
- *Evidence (Audio and Audio Visual Links) Act* 1998, s 15
- *Family Law Act* 1975 (Cth), s 121
- *Lie Detectors Act* 1983, s 6(3)
- *Mental Health Act* 2007, Sch 2, cl 7 (repealed)
- *Minors (Property and Contracts) Act* 1970, s 43(5)
- *Online Safety Act* 2021 (Cth), s 235
- *Property and Stock Agents Act* 2002, s 140(2)
- *Status of Children Act* 1996, s 25
- *Surveillance Devices Act* 2007, s 42(5)-(6)

## Further references

- J Spigelman, "Seen to be done: the principle of open justice" (2000) 74 *ALJ* 290 (Pt 1) and 378 (Pt 2).
- B Fitzgerald and C Foong, "Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications" (2013) 37 *Aust Bar Rev* 175.

**[The next page is 283]**

# Cross-vesting legislation

## [2-1400] Cross-vesting

In 1987, the Commonwealth and each of the States passed legislation, identically described as the *Jurisdiction of Courts (Cross-Vesting) Act* 1987, purporting to confer jurisdiction on the Federal and Family Courts and on the Supreme Courts of other States and Territories to hear and determine matters arising under State or Territorial law and providing for the transfer of proceedings between those courts. In *Re Wakim, Ex parte McNally* (1999) 198 CLR 511, the High Court held that, in so far as the State Acts purported to confer jurisdiction in State matters on the Federal or Family Courts, they were invalid, but that left untouched the provisions in the Commonwealth Act relating to conferral of federal jurisdiction on State courts (authorised by Ch III of the Constitution); the conferral by the States of jurisdiction in State matters on the courts of other States and Territories and the provisions for transfer of proceedings between such courts. The preamble to the Act stated, inter alia, that inconvenience and expense had occasionally been caused to litigants by jurisdictional limits in federal, State and Territory courts and it was desirable to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court.

Section 4 of the NSW Act confers jurisdiction in "State matters" (as defined in s 3) on the Supreme Court of another State or Territory or the State Family Court of another State. Note that for the purposes of the Act, "State" includes the Australian Capital Territory and the Northern Territory, and those entities are excluded from the term "Territory": s 3.

### Transfer of proceedings

Section 5(1) provides for the transfer of proceedings from the Supreme Court to the Federal Court or Family Court; s 5(2) provides for the transfer of proceedings from the Supreme Court to the Supreme Court of another State or Territory; s 5(3) for the transfer of proceedings in the Supreme Court of another State or Territory to the NSW Supreme Court; s 5(4) for the transfer of proceedings from the Federal or Family Court to the Supreme Court; and s 5(5) provides for the transfer of proceedings arising out of, or related to, proceedings previously transferred.

The conditions to be satisfied before proceedings are transferred in relation to applications under s 5(1) and (2), are set out in the relevant subsections. Note that following *Re Wakim, Ex parte McNally*, above, s 5(1) and (4) were amended and s 5(9) inserted to limit the proceedings which can be transferred so as to give effect to that decision. See also *Hopkins v Governor-General of Australia* (2013) NSWCA 365. For an application of s 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987, see *Eberstaller v Poulos* (2014) 87 NSWLR 394; *Boensch v Pascoe* [2016] NSWCA 191; *Guan v Li* [2022] NSWCA 173.

Where proceedings are pending in a NSW court, other than the Supreme Court or a tribunal, such proceedings may be transferred into the Supreme Court so that consideration may be given to whether such proceedings should be transferred to another court in accordance with the Act: s 8.

The applicant for transfer carries at least a persuasive onus (*James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [100]) but the plaintiff's choice of tribunal and the reasons for it are not to be taken into account: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400. Other relevant considerations include:

- the place or places where the parties and/or witnesses reside or carry on business;
- the location of the subject matter of the dispute;
- the importance of local knowledge to the resolution of the issues;

- the law governing the relevant transaction, especially if the matter involves the construction of State legislation: *Australian Consolidated Investments Ltd v Westpac Banking Corporation* (1991) 5 ACSR 233;
- the procedures available in the different courts;
- the likely hearing dates in the different courts;
- whether it is sought to transfer the proceedings to a specialised court, for example, the Family Court: *Lambert v Dean* (1989) 13 Fam LR 285;
- an exclusive jurisdiction clause nominating the courts of a particular State for the resolution of disputes: *West's Process Engineering Pty Ltd (Administrator Appointed) v Westralian Sands Ltd* (unrep, 6/8/97, NSWSC).

See generally *BHP Billiton Ltd v Schultz*, above, and *James Hardie & Coy Pty Ltd v Barry*, above.

As to cases where different limitation periods are applicable, see cases noted at *Ritchie's* [44.5.35].

## [2-1410] Sample order

> I order that proceedings no 1234 of 2006 in this court be transferred to the Supreme Court of Victoria. Costs of the proceedings to date and of this application to be costs in the cause.

## Legislation

- *Jurisdiction of Courts (Cross-Vesting) Act* 1987 ss 3, 4, 5(1), 5(2), 5(3), 5(4), 5(5), 5(9), 7(5), 8
- UCPR rr 44.2–44.5

**[The next page is 925]**

# Persons under legal incapacity

## [2-4600] Definition

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

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

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

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

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

## [2-4610] Commencing proceedings

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

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

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

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

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

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

## [2-4620] Defending proceedings

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

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

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

## [2-4630] Tutors/Guardians ad litem

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

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

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

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

Consequent upon the decision in *Choi v NSW Ombudsman* (2021) 104 NSWLR 505 at [44], a legislative amendment now permits the Tribunal (NCAT) to order that a person be represented by a guardian ad litem without naming a particular person to be appointed: s 45(4C) *Civil and Administrative Tribunal Act* 2013 (commenced 8 December 2021). Similar amendments were made to the *Adoption Act* 2000, s 124AA and the *Children and Young Persons (Care and Protection) Act* 1998, s 101AA regarding the appointment of a guardian ad litem. . The guardian ad litem is taken to be appointed when the court receives a written notice from the administrator of the Guardian Ad Litem Panel naming the person selected to be the guardian ad litem. The power to appoint a guardian ad litem for a child or young person in s 100 of the *Children and Young Persons (Care and Protection) Act* 1998 is framed in different terms from the power in s 101 to appoint a guardian ad litem for a parent: see *CM v Secretary, Dept Communities and Justice* [2022] NSWCA 120 at [30].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## [2-4660] The end of legal incapacity

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

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

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

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

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

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

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

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

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

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

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

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

## [2-4700] Compromise

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

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

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

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

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

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

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

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

## [2-4710] NSW Trustee and Guardian Act 2009

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

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

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

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

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

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

## [2-4720] Directions to tutor

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

## [2-4730] Money recovered

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

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

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

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

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

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

## [2-4740] Sample orders

### Removal of tutor

I order:

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

### Appointment of tutor and addition of party

I order:

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

### Approval of settlement

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

By consent, I make the following orders:

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

   OR

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

*Notes*

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

## Legislation

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

## Rules

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

**[The next page is 1825]**

# The Special Statutory Compensation List

*Acknowledgement: the following material has been prepared by His Honour Judge G Neilson of the District Court of New South Wales.*

## [5-1000] The Special Statutory Compensation List

The Special Statutory Compensation List contains one part of the "compensation jurisdiction" of the District Court and is governed by Pt 3 Div 8A of the *District Court Act* 1973 ("the DCA"). Costs for matters in the List are governed by Pt 3 Div 8A of the DCA and UCPR r 1.27, Sch 11, Pt 4 (cl 39–45) and Pt 5 (cl 46–59). The other part of the residual jurisdiction is contained in the Coal Miner's Workers Compensation List: see [5-0800] and ff.

Proceedings assigned to this List are under:

(a) *Police Regulation (Superannuation) Act* 1906, s 21

(b) *Police Act 1990*, s 216A

(c) *Sporting Injuries Insurance Act* 1978, s 29

(d) *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987, ss 16 and 30

(e) *Workers Compensation (Dust Diseases) Act* 1942, s 8I.

**The Operation of the List**

The List is kept by the Registrar for Sydney: UCPR, Sch 11 cl 41(1). If any proceedings are commenced at a place other than Sydney they are to be sent by the Registrar at that place to Sydney for entry into the List: cl 41(3).

Proceedings are commenced by statement of claim and should be pleaded in the normal way: cl 40. Proceedings are listed for call over before a judge appointed by the Chief Judge to control proceedings in the List, within 3 months of the filing of the statement of claim: cl 42.

Some matters are ready to have a hearing date set when first called over. Many are not. The managing judge will adjourn any matters that are not ready for hearing to another call over when it is anticipated that the matter might be ready to have a hearing date allocated. When a matter is ready for hearing, the managing judge will fix a hearing date and seek to make an accurate assessment of the length of the hearing, allowing time for addresses and an ex tempore judgment. There are no reserve matters for this List.

## [5-1010] Powers when exercising compensation jurisdiction

The powers of the court when exercising the compensation jurisdiction are governed by s 142J of the the DCA. The provisions are a medley of provisions extracted from the *Compensation Court Act* 1984.

These provisions, it can be argued, give to a judge exercising compensation jurisdiction such expertise as to pay and labour conditions as the Compensation Court had attributed to it: *Mechanical Advantage Group Pty Ltd v George* [2003] NSWCA 121, per Young CJ in Eq at [60]–[63].

In *JLT Scaffolding International Pty Ltd (In Liq) v Silva* (unrep, 30/3/1994, NSWCA), Kirby P (as he then was) said at 12:

> The appeal comes to this Court from a specialised Tribunal which is dealing with compensation cases and conflicting lay and medical evidence everyday. The flavour of the expertise of the Compensation Court can be found in the judgment under appeal. Medical conditions, unfamiliar to a lay body are stated in the judgment without definition simply because those practising in the Compensation Court are, or are taken to be, familiar with the medical terms used and the ordinary and oft repeated conflicts

> of medical opinions expressed. It can be inferred from the establishment of a specialised Compensation Court (one might say especially given the abolition of such bodies elsewhere in Australia) that the Parliament of this State has entrusted the decision making in (relevantly) questions of medical causation and the aetiology of incapacity to a specialist tribunal comprised of specialist members whose expertise is refined by the repeated performance of their tasks.

This was quoted in *Strinic v Singh* (2009) 74 NSWLR 419 at [58], where it was doubted whether judges of the District Court sitting in the Civil Jurisdiction, unlike the Compensation Court, could ever be said to have "expertise" despite "familiarity" with medical terminology and conditions: at [59]. Therefore medical issues need to be approached cautiously whenever they are in dispute.

In relation to expert evidence, note the rule UCPR Sch 11 cl 44. This is designed to try to prevent a party from, for example, calling three psychiatrists or four thoracic physicians. There is a similar statutory provision relating to industrial deafness: s 142L DCA.

Appeals to the Court of Appeal are limited to error of law or to a question as to the admission or rejection of evidence: s 142N(1) DCA. Leave to appeal is required for a number of appeals: s 142N(4).

## [5-1020] Costs

Costs in the compensation jurisdiction are governed by the DCA s 142K and s 112 of the *Workplace Injury Management and Workers Compensation Act* 1998. The scale of costs is governed by Sch 2 and reg 25(2) of the *Legal Profession Uniform Law Application Regulation* 2015 and is subject to the *Workplace Injury Management and Workers Compensation Act* 1998.

There is a large body of case law concerning s 112(3) and (4): see Mills Workers Compensation Practice (NSW). It is important to note that because of these provisions a "costs reduction" order (that the plaintiff's costs be reduced by costs thrown away by the defendant) cannot be made: *Container Terminals Australia Ltd v Xeras* (1991) 23 NSWLR 214.

## [5-1030] Police Regulation (Superannuation) Act 1906

### (a) The Statutory Scheme

This Act applies to all members of the Police Force who joined prior to 1 April 1988. The District Court does not have jurisdiction for injuries occurring prior to 21 November 1979: *Staples v COP* (1990) 6 NSWCCR 33; *Dive v COP* (1997) 15 NSWCCR 366.

A member who has 20 years service and who is medically discharged, or aged 60 years or more who retires, is entitled to a pension, based upon their years of service: ss 7(1), 8. A gratuity is payable for a member who is medically discharged with less than 20 years service: s 14.

The decision as to whether a member is medically discharged is made by the Police Superannuation Advisory Committee (PSAC) by delegation from the SAS Trustee Corporation (STC), who must certify the member "to be incapable, from infirmity of body or mind, of personally exercising the functions of a police officer referred to in s 14(1) of the *Police Act 1990*": s 10B(1).

If the certified infirmity is found to be caused by the member's being hurt on duty (HOD) a pension is payable pursuant to s 10(1A)(a). The decision is made by the Commissioner of Police (COP) through a delegate pursuant to s 31 of the *Police Act* 1990. An annual superannuation allowance granted under s 10 is payable from the date of lodgment of the application or an earlier date as the STC may determine if satisfied there are exceptional circumstances that merit STC doing so: s 9A(4). The "exceptional circumstances" test was introduced by 2006 amendments but are not restricted to explaining a delay in lodging the application. In *SAS Trustee Corporation v Colquhoun* [2022] NSWCA 184, the Court of Appeal ,having regard to the legislative history of s 9A(4), found no narrowing of the range of circumstances that the STC could consider in determining whether

an application should be backdated from those that could be considered before 2006 amendments except by the requirement that the STC be satisfied that the circumstances meriting the backdating of the allowance be exceptional: at [36].

If the member who is HOD is not totally incapacitated for work outside the Police Force, he or she is entitled to a further amount of pension "commensurate, in the opinion of STC, with the member's incapacity for work outside the Police Force": s 10(1A)(b). If the member is totally incapacitated for work outside the Police Force, a "special risk benefit" is payable where "the member was required to be exposed to risks to which members of the general workforce would normally not be required to be exposed in the course of their employment": s 10(1A)(c).

The Act also provides death benefits where the COP finds death has been caused by having been HOD: s 12C.

The Act also provides "gratuities" to be paid to members and former members who the COP finds are HOD, equivalent to compensation payable to workers under ss 60, 66, 67, 74 and 75 of the *Worker's Compensation Act* 1987 (WCA): s 12D.

Once the COP decides whether the member's condition was HOD or not, the STC decides all questions relating to quantum.

Often members obtain certificates of PSAC specifying multiple infirmities. If any infirmity is accepted as being HOD, the HOD pension is payable. Nevertheless, members will seek to establish that the other infirmities be classified as HOD, as the greater the number of infirmities that are HOD, the greater will be the "top up" payable under s 10(1A)(b) and the greater the chance of being found totally incapacitated for work outside the Police Force.

**(b) Applications to the District Court**

An application (which is really a hearing de novo) lies to the District Court from any decision of the STC (including a delegated decision by PSAC) arising under the Act or from any decision of the COP on a question of HOD. The right to make an application about a decision of PSAC was confirmed by *SAS Trustee Corp v Rossetti* [2018] NSWCA 68 which overruled what was thought to be the way of challenging PSAC's determinations or failure to determine prior to that time.

There is no power to extend the 6 month period fixed by s 21(1): *Jennings v COP* (1996) 13 NSWCCR 640. To avoid this, members sometimes ask that an earlier decision be "reviewed" and then appeal against the refusal to review — such an application is incompetent: *Richardson v SASTC* (1999) 18 NSWCCR 423.

Costs are considered above at [5-1020].

**(c) Hurt on Duty (HOD)**

The term is defined in s 1(2) of the Act to mean "in relation to a member of the police force, means injured in such circumstances as would, if the member were a worker within the meaning of the *Workers Compensation Act* 1987, entitle the member to compensation under that Act."

This provision imports all the entitling and disentitling provisions of the *Workers Compensation Act* 1987 (WCA): *Adams v COP* (1995) 11 NSWCCR 715; *Innes v COP* (1995) 13 NSWCCR 27 at 29F; *Smith v COP (No. 2)* (2000) 20 NSWCCR 27 at [18].

This is not an appropriate place for a disquisition on workers compensation law but it is important to bear in mind the date of injury. The basic scheme of the WCA is that there must be a personal injury (which is defined in s 4 to include a disease contracted in the course of the employment and to which the employment was a contributing factor and also the aggravation, acceleration, exacerbation or deterioration of a disease where the employment was a contributing factor to the same):

(i) arising out of employment (causal relationship) or

(ii) in the course of the employment (temporal relationship).

For injuries after 12 January 1997, the employment must be "a substantial contributing factor": s 9A WCA. Consideration is also required of the decision in *Badawi v Nexon Asia Pacific Pty Ltd trading as Commander Australia Pty Limited* (2009) 75 NSWLR 503.

For psychological injuries (to which many police succumb) occurring after 1 January 1996, consideration must be given to s 11A. This section was amended at the time s 9A was enacted. For the period 1 January 1996 to 11 January 1997, s 11A required that the employment be a substantial contributing factor to a psychological injury.

The following authorities need to be considered:

- "psychological injury": *See v COP* [2017] NSWDC 6; *Stewart v NSW Police Service* (1998) 17 NSWCCR 202; *Hunt v Dept. of Education and Training* (2003) 24 NSWCCR 642
- "wholly or predominantly": *Jackson v Work Directions Australia* (1998) 17 NSWCCR 70
- "reasonable action": *COP v Minahan* [2003] NSWCA 239; *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138
- "transfer": *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; *White v COP* (2006) 3 DDCR 446
- "performance appraisal": *See v COP* [2017] NSWDC 6 at [143]–[154]; *Bottle v Wieland Consumables Pty Ltd* [1999] NSWCC 32; *Dunn v Department of Education and Training* (2000) 19 NSWCCR 475; *Brady v COP* (2003) 25 NSWCCR 58; *Soutar v COP* (2006) 3 DCLR (NSW) 351
- "discipline": *Kushwaha v Queanbeyan CC* [2002] NSWCC 25: *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Soutar v COP (2006)* 3 DCLR (NSW) 351
- "retrenchment": *Pirie v Franklins Ltd* (2001) 22 NSWCCR 346; *Temelkov v Kemblawarra Portuguese Sports and Social Club* [2008] NSWWCCPD 96; and
- as to the interaction between s 9A and s 11A see *Department of Education and Training v Sinclair* [2005] NSWCA 465 at [55]–[58].

***Other areas peculiar to HOD claims***

- police off duty — putting themselves back on duty: *Lavin v COP* (2007) 4 DDCR 657
- reacting to the death of other police: *King v COP* (2004) 2 DDCR 416 at [8]–[11]; *Rogers v COP* (2005) 2 DDCR 515
- being named in the Wood Royal Commission: *Brady v COP* (2003) 25 NSWCCR 58. There are a number of unreported decisions of the Compensation Court on this issue. The essential issue is what caused the member to be called/ cross-examined/ named etc in the Royal Commission. If it were an allegation of illegal conduct or misconduct, such conduct will need to be proved in this Court and then the decision made as to whether the member had taken himself outside the course of his employment and, if not, whether there was merely misconduct. If the latter, s 14 of the WCA needs to be considered
- allegations of crime or misconduct: *Schinnel v COP* (1995) 11 NSWCCR 278 (lying to Internal Affairs); *Liversidge v COP* (2003) 25 NSWCCR 333 (an arrest found unlawful by the High Court, the member pleaded guilty to a departmental charge and was sued civilly); *Remoundos v COP* (2006) 3 DDCR 616 (after going on sick leave after a trivial administrative disagreement member engaged in drug trafficking); *Holovinsky v COP (No. 2)* (2006) 4 DDCR 122 (obtaining criminal intelligence of drug trafficking the wrong way)
- suicide: *Smith v COP (No. 2)* (2000) 20 NSWCCR 27; *Guff v COP* (2007) 5 DDCR 132
- Police Sporting Team injury: *Clark v COP* (2002) 1 DDCR 193, and
- misperception: *Townsend v COP* (1992) 25 NSWCCR 9 (a misperception of actual events, due to irrational thinking of a member leading to a psychiatric illness does not make that illness HOD).

**(d) PSAC Certificate is binding**

This court is bound to accept that the member has the infirmities certified by PSAC and that the member is incapable of discharging the duties of his office: *Saad v COP* (1995) 12 NSWCCR 70 at 75F; *Innes v COP* (1995) 13 NSWCCR 27; *Dive v COP* (1997) 15 NSWCCR 366.

Implications as to causation often arise from the nature of the certified infirmity:

- Adjustment Disorder: *Gannon v COP* (2004) 1 DDCR 380
- Major Depression: *King v COP* (2004) 2 DDCR 416; *Moon v COP* (2008) 6 DDCR 32
- PTSD: *Murray v COP* [2004] NSWCA 365.

**(e) "Top Up" claims where Member not totally disabled: s 10(1A)(b)**

The methodology to be adopted here is authoritatively determined in *Lembcke v SASTC* (2003) 56 NSWLR 736 per Santow JA, Meagher and Ipp JJA concurring. The easiest way to approach the issue is this to:

1. Ascertain what the member would be earning, but for his infirmity or infirmities, in the open labour market outside the Police Force.
2. Ascertain what he is now earning (disregarding the pension itself) or is capable of earning in the open labour market.
3. Make the second a proportion of the first e.g.

   Uninjured able to earn $1000 pw

   Now able to earn $600 pw

   Ability now 60%

   and ascertain the percentage loss i.e. loss of 40% of ability to earn outside the Police Force.
4. Apply that same (loss) percentage to 12.25 i.e. 4.9.
5. If STC has determined 4.9% or more, you confirm its decision. If it has determined less than 4.9% you set aside its decision and replace it with the one you have made.

In determining the quantum of the "top up", any condition which is contributing to the disablement which has not been certified either by the COP or the court as being HOD is not to be taken into account, *Miles v SAS Trustee Corp* [2016] NSWDC 56, *SAS Trustee Corp v Miles* (2018) 265 CLR 137 overruling [2018] NSWCA 86.

**(f) "Top Up" claims where Member totally incapacitated: "Special Risk Benefit" s 10(1A)(c)**

The following authorities need to be considered:

- *Walsh v SASTC* (2004) 1 DDCR 438 where the earlier unreported case law is collected, and
- *Grech v COP* (2004) 1 DDCR 242, which was a case under s 216 *Police Act* 1990, which was held to be, in essence, the same test. This case discusses the words "was required to be exposed to risks."

**(g) Commencement of pension and of variations**

Section 9A(4) commenced on 30 June 2006. There are now cases pending arguing that the STC ought to have found "exceptional circumstances".

Section 10(1D) governs the time for the commencement of "top up" pensions.

There are sometimes arguments as to the date from which STC should commence to pay the "top up". Its policy is to backdate the payment to the time when the "top up" claim was made, not to the date of the first payment of the pension.

**(h) Provision for past and future**

Section 10(1BA) commenced on 30 June 2006. In *SAS Trustee Corp v Patterson* [2010] NSWCA 167, in construing "an application for payment of the allowance or additional amount" the Court of Appeal held the use of the word "or" was not conclusive. It could be taken as providing for the future and for persons who thereafter become otherwise entitled to apply for an allowance. Nothing in the terms of the Amending Act nor s 10(1BA) revealed an intention to affect accrued rights. Further, nothing in the *Interpretation Act*, s 30(1)(c), called for a contrary position: at [25].

A related issue arises under s 10B(2). The question in s 10B(2)(a) will be whether the member notified the COP that he or she was HOD before his or her resignation. Section 10B(2)(c) requires that the STC (having regard to medical advice on the condition and fitness for employment of the member) has certified that the former member was incapable, from that infirmity of body or mind, of personally exercising the functions of a police officer at the time of the member's resignation or retirement. An unjust dismissal does not fall within these terms: *Bigg v SAS Trustee Corp* [2016] NSWCA 236 at [35].

**(i) Section 12D quantum claims**

These usually concern claims for lump sum compensation that would have been payable under WCA ss 66–67 if the member were a "worker". It is important to bear in mind the date or dates of the relevant injuries.

- If the injury occurred before 30 June 1987, the entitlement is governed by s 16 of the *Workers Compensation Act* 1926.
- If the injury occurred between 30 June 1987 and 31 December 2001, the entitlement is governed by the former ss 66 and 67 of WCA 1987: the "Table of Maims".
- If the injury occurred on or after 1 January 2002, the current provisions of ss 66 and 67 need to be applied. The procedural provisions of the WCA require that the s 66 entitlement be determined by an Approved Medical Specialist. However, the procedural requirements of the WCA do not apply to the principal Act. Truss DCJ sets out how to calculate WPI for a psychiatric injury in *Gibson v SASTC* (2007) 4 DDCR 699.

## [5-1040] Police Act 1990

The relevant provisions of this Act apply to members of the Police Force who joined on or after 1 April 1988.

**(a) Special risk benefit for officers hurt before 30 January 2006**

Sections 216 and 216A, which were repealed on 30 January 2006, still apply for injuries which occurred before 30 January 2006: Sch 4, Pt 22, cl 68–69. The correct version of the legislation to access is 1 December 2005.

As to s 216(3) see the case law cited above at [5-1030] (f) relating to the "special risk benefit" under s 10(1A)(c) of the *Police Regulation (Superannuation) Act* 1906.

As to section 216(6), see the commentary regarding [5-1030] (c) HOD under the *Police Regulation (Superannuation) Act* 1906.

**(b) Special risk benefit for officers hurt on duty on or after 30 January 2006**

From 30 January 2006, death and disability cover for police officers (additional to workers compensation benefits) is provided by industrial awards: Sch 4, Pt 22 of the *Police Act* 1990. Presumably any litigation arising from such claims goes to the IRC.

**(c) Special risk benefit for students of policing hurt during police education: s 216AA**

The District Court retains jurisdiction over appeals from decisions made pursuant to s 216A for students of policing: s 216AA.

The writer is unaware of any applications under this provision. The similarity of the test in s 216AA(4) to the test under the repealed s 216 and under s 10(1A)(c) of the *Police Regulation (Superannuation) Act* 1906 should be noted.

## [5-1050] Sporting Injuries Insurance Act 1978

Applications under this Act are extremely rare. A "sporting organisation" must be declared in accordance with s 5. The sporting organisation must have "an authorised activity" as defined in s 4(1A). The sporting organisation pays premium to the Sporting Injuries Fund which is administered by the Sporting Injuries Committee. A claimant must be a "registered participant" (defined in s 4(1)) of the sporting organisation. The benefits payable in respect of injury or death are modest and are contained in Sch 1. Injuries may be assessed by a medical referee or panel: s 24.

Benefits under the sporting injuries fund scheme are restricted by s 25 *Sporting Injuries Insurance Act* 1978 in respect of injury and s 26 in respect of death. Certain funeral expenses are payable pursuant to s 27 *Sporting Injuries Insurance Act* 1978.

The decision to pay a benefit rests with the Sporting Injuries Committee. An appeal from a decision of the Sporting Injuries Committee lies to the District Court: s 29.

There is no reported case law.

## [5-1060] Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987

This Act extends the benefits of the WCA to a number of groups of people and provides benefits for the loss of or damage to the personal property of those people. Part 4 of the Act excludes various provisions of the WCA and of the *Workplace Injury Management and Workers Compensation Act* 1988 to this Act.

Part 2 of the Act applies to "bush fire fighters" defined in s 5 to extend to all volunteer fire fighters and Rural Fire Service ("official fire fighters"). Relevant events giving rise to compensable injuries are defined in ss 7, 8, 9 and 17. The cover provided for "official fire fighters" is much greater than merely fighting bush fires. It extends to most things that a member of a bush fire brigade does. The *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation* 2017 extends the cover to fundraising: cl 9. The Act is administered by and claims are heard by the Self Insurance Corporation: s 16. Appeal lies to the District Court: s 16(4).

Part 3 of the Act applies to:

(a) members of the State Emergency Service

(b) members of the NSW Volunteer Rescue Association

(c) members of Surf Life Saving NSW

(d) any person prescribed by the regulations to be an emergency service worker or rescue association worker or surf life saver, and

(e) any person whom the WorkCover Authority deems to be an emergency service worker, a rescue association worker or surf life saver.

The cover provided by s 24 is for personal injury arising out of or in the course of carrying out an "authorised activity" defined in s 23 of the Act and cll 5 and 8 of the Regulations, including a disease which is contracted, aggravated, accelerated, exacerbated or which deteriorates in carrying out the activity. They are quite extensive. For example cl 7(b) relates to members of Surf Life Saving NSW. Included are "surf life saving operations, training, preparatory activities genuinely related to those operations and fundraising".

The claims are decided by the Workcover Authority (s 30) and any dissatisfied claimant can ask for a determination of the claim by the District Court: s 30(6). Claims under this Act are few and usually involve questions of quantum of death benefits, weekly payments or lump sum compensation.

## [5-1070] Workers' Compensation (Dust Diseases) Act 1942

Workers who contract a "dust disease" are not entitled to compensation under the WCA but are entitled to compensation under this Act. A "dust disease" is one of the fourteen conditions specified in Sch 1 of the Act. The Act constitutes the Workers' Compensation (Dust Diseases) Authority ("DDA") (s 5) and establishes a Medical Assessment Panel (s 7) comprising three legally qualified medical practitioners appointed by the relevant Minister.

The primary entitling provision is s 8. The Medical Assessment Panel is required to certify whether a person is totally or partially disabled for work by a dust disease or that a death was due to a dust disease. It must also certify whether the disablement or death was "reasonably attributable" to the person's exposure to the inhalation of dust in an occupation to the nature of which the disease is due. The DDA is required find whether the person concerned was a worker during the whole of the period he or she was engaged in that occupation but, if he or she were a worker for only part of the time he or she was engaged in that occupation, the medical authority is required to find that the death or disablement was "reasonably attributable" to the person's exposure to dust in the occupation concerned when the person was a worker.

The rates of compensation are those prescribed by the WCA. The scheme of death benefits, however, is different: s 8(2B). The DDA acts, essentially, as both the employer and insurer of the worker.

Section 8I governs appeals. The "appeal" is a hearing de novo on its merits: *DDB v Veksans* (1993) 32 NSWLR 221; *Irhazi v DDB* (2002) 23 NSWCCR 426.

Appeals are usually from decisions of the medical assessment panel. The medical evidence is largely confined to that of thoracic surgeons and thoracic physicians, a relatively small pool of experts. The Act acknowledges this. The Medical Assessment Panel must be constituted by at least 2 of its 3 members and a decision of any 2 members is the decision of the Panel: s 7(2).

Subsection 7(4) provides:

> If a medical practitioner has given evidence or agreed to give evidence as a medical practitioner in connection with any legal proceedings taken by or on behalf of a worker or by any employer of the worker, the medical practitioner must not act as a member of the Medical Assessment Panel in connection with any case involving those proceedings.

In *Pizzini v DDB* (1991) 7 NSWCCR 278 it was held that a decision of the medical authority was void where one of its members had performed a bronchoscopy of the worker before being a member of the medical authority which issued the certificate under appeal.

Members of the Medical Assessment Panel often give evidence on appeals against a decision of the medical authority. The same issues are often relitigated: see *O'Brien v DDB* (2000) 22 NSWCCR 193 where Campbell CCCJ refers to earlier decisions at [12]. The types of issues which might arise are also demonstrated in *Cavanough v DDB* (1998) 16 NSWCCR 626.

The Act does not apply to Federal employees: *O'Brien v DDB* (2000) 22 NSWCCR 193.

### Legislation

- *District Court Act* 1973 Pt 3 Div 8A
- *Police Regulation (Superannuation) Act* 1906 ss 1, 7, 8, 9A, 10, 10B, 11A, 12C, 12D, 14, 21

- *Police Act* 1990 ss 216, 216A, 216AA
- *Sporting Injuries Insurance Act* 1978 ss 4, 5, 24, 29, Sch 1
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987, ss 16, 24, 30
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation* 2017 cl 9
- *Workers Compensation (Dust Diseases) Act* 1942, ss 7, 8, 8I

## Rules

- UCPR r 1.27, Sch 11 Pts 4–5

## Further references

Butterworths, Mills Workers Compensation Practice (NSW)

The full version of G W Neilson "The Special Statutory Compensation List", paper presented at the Judicial Commission of NSW District Court Annual Conference, 24 June 2009, Sydney, is available on JIRS.

**[The next page is 5301]**

# Trans-Tasman proceedings

## [5-3500] Introduction

The *Trans-Tasman Proceedings Act* 2010 (Cth) ("the Act") makes provision for matters such as service of Australian initiating documents in New Zealand, the granting of interim relief by Australian courts in support of civil proceedings in New Zealand courts, the issue and service of New Zealand and Australian subpoenas, remote appearances in Australian and New Zealand courts and tribunals and the recognition and enforcement of New Zealand judgments in Australia. Part 32 of the UCPR, titled "Trans-Tasman Proceedings Act 2010 (Commonwealth)" also applies to these proceedings to make provision for the practice and procedure to be followed in NSW courts with respect to matters arising under the Act.

The following treatment is not exhaustive but refers to the principal matters provided for in the new Act and Rules.

## [5-3510] Service in New Zealand of initiating documents issued by Australian courts and tribunals

Part 2 provides for the service of initiating documents for proceedings to which the Part applies: s 9.

The Part applies to a civil proceeding commenced in an Australian court and a civil proceeding commenced in an Australian tribunal. However, in the case of a tribunal certain qualifications are set out in ss 8(1)(b) and (3). Additionally certain proceedings are excluded pursuant to s 8(2).

Section 9 enables service in NZ of an initiating document issued by an Australian court or tribunal. The document must be served in New Zealand in the same way that the document is required or permitted, under the procedural rules of the Australian court or tribunal, to be served in the place of issue: s 9(2).

The note to s 9(2)(b) provides that it is not necessary for the Australian court to be satisfied that there is a connection between the proceeding and Australia. Section 10 provides that service under s 9 has the same effect and gives rise to the same proceedings as if the initiating document had been served in the place of issue. Sections 9 and 10 are not to be read down so as to apply only to service of process involving the exercise of federal jurisdiction, and are not otherwise invalid: *Zurich Insurance PLC v Koper* [2022] NSWCA 128 at [55].

The Act provides for certain information to be given to the defendant (s 11) and the consequences of failure to do so: s 12. The failure does not invalidate the proceedings.

A time for the filing of an appearance is provided by s 13. Section 15 provides for a security for costs order and a stay until any security ordered is given.

## [5-3520] Australian courts declining jurisdiction on the grounds that a New Zealand court is a more appropriate forum

Part 3 provides that a defendant in civil proceedings may apply to the court for an order staying the proceedings on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue: s 17.

The application must be made within 30 working days of service or such shorter or longer period that the court considers appropriate: s 17(2).

Pursuant to s 18, the Australian court may determine the application without a hearing unless the plaintiff, defendant or certain other persons (ss 18(2), (4)) make a timely request for a hearing: s 18(3). Provision is made for a remote appearance about the application for an order to stay the proceedings: s 18(4).

The Australian court may grant a stay if it is satisfied the New Zealand court has jurisdiction to determine the matters in issue between the parties to the proceedings and it is the more appropriate court to determine these matters: s 19(1).

Section 19(2) sets out matters which the Australian court must take into account in determining these questions.

Section 20(3) defines an exclusive choice of court agreement.

On application under s 17 the Australian court must stay the proceedings if satisfied that an exclusive choice of court agreement designates a New Zealand court as the court to determine the matters in issue: s 20(1)(a). The court must not stay the proceeding, if satisfied that an exclusive choice of court agreement designates an Australian court as the court to determine those matters: s 20(1)(b). However, s 20(1)(a) does not apply in the circumstances enumerated in s 20(2). Section 20(1)(b) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that it is null and void under Australian law (including the rules of private international law): s 20(2A).

An Australian court cannot stay a civil proceeding on forum grounds connected with New Zealand otherwise than in accordance with Pt 3: s 21(1).

## [5-3530] Restraint of proceedings

An Australian court must not restrain a person from commencing a civil proceeding in a New Zealand court on the grounds that the New Zealand court is not the appropriate forum for the proceedings: s 22(1).

An Australian court must not restrain a party to a civil proceeding before a New Zealand court from taking a step in the proceedings on the grounds that the New Zealand court is not the appropriate forum for the proceedings: s 22(2).

## [5-3540] Suspension of limitation periods

Subject to certain conditions where a stay has been granted by a New Zealand court on the grounds that an Australian court is the more appropriate court, later proceedings in an Australian court will, for the purpose of limitation periods or defence, be treated as commencing at the time the New Zealand proceedings commenced: s 23.

## [5-3550] Australian courts granting interim relief in support of civil proceedings in New Zealand courts

A party or intended party to civil proceedings commenced or to be commenced in a New Zealand court may apply to the Federal Court, the Family Court of Australia, the Supreme Court of a State or Territory or other prescribed Australian court for interim relief (other than a warrant for the arrest of property) in support of the New Zealand proceedings: s 25.

The Australian court may give interim relief if it considers it appropriate, and, if a similar proceeding had been commenced in the Australian court, it would have given interim relief in that proceeding: s 26.

## [5-3560] Subpoenas

Part 5 provides a detailed regime for the issue, service, application to set aside and enforcement of subpoenas issued by Australian (Div 2) and New Zealand (Div 3) courts. For proceedings in an Australian court, a subpoena cannot be served in New Zealand without the leave of the court: s 31(1).

Division 3 of the UCPR provides for related procedures.

In dismissing an application for leave to issue a subpoena and serve it under s 31 of the *Trans-Tasman Proceedings Act 2010* (Cth), the Federal Court in *Rauland Australia Pty Ltd v Law* [2020] FCA 516 at [27] found that :

> ... the test for leave to serve a subpoena in New Zealand is more exacting than the test for leave to issue a subpoena … the documents must be sufficiently significant to justify the expense and inconvenience likely to be caused by service of the subpoena..... Moreover, if there is a less expensive and less inconvenient way of obtaining the documents, then leave might be refused on that basis.

This was endorsed in *In the matter of Australasian Hail Network Pty Ltd (No 2)* [2020] NSWSC 517 at [69]–[75], where the NSWSC rejected an application for leave to serve a subpoena on the basis that the same evidence the defendants sought could be more cheaply and easily obtained from the plaintiffs via discovery.

## [5-3570] Remote appearances

Part 6 provides a detailed regime for remote appearances from New Zealand in an Australian court or tribunal (Div 2) and for remote appearances from Australia in a New Zealand court or tribunal (Div 3).

## [5-3580] Recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals

A registrable New Zealand judgment cannot be enforced in Australia if it is not registered in an Australian court under s 68: s 65(1).

This prohibition extends to provisions, forming part of a judgment which deals with different matters, some of which would, if contained in a separate judgment, make that separate judgment a registrable New Zealand judgment: ss 65(2), 71.

## [5-3590] Meaning of registrable New Zealand judgment

A registrable New Zealand judgment is defined in s 66.

## [5-3600] Application to register New Zealand judgments

An entitled person may apply to register a New Zealand judgment, with certain exceptions, in a superior Australian court or an inferior Australian court that has power to give the relief that is in the judgment: s 67(1). In the case of a civil pecuniary penalty, the inferior court must be one that has power to impose such a penalty of the same value: s 67(2).

## [5-3610] Registration of New Zealand judgments

An Australian court must, on application under s 67, register a registrable New Zealand judgment in that court in accordance with Pt 7: s 68(1). It remains registered unless set aside under s 72: s 68(2).

## [5-3620] Setting aside registration

An Australian court, on appropriate application, must set aside the registration if it is satisfied that enforcement would be contrary to public policy in Australia, or the judgment was registered in contravention of the Act, or if the judgment was given in a proceeding of which the subject matter was immovable property or was given in a proceeding, in which the subject matter was movable property and that property was, at the time of the proceeding in the original court or tribunal not situated in New Zealand: s 72(1).

The application must be made within 30 working days after the day notice of registration was given under s 73 or a court-granted longer period: s 72(2).

The Australian court must not set aside the registration otherwise than in accordance with s 72.

## [5-3630] Notice of registration

Upon registration, notice of registration must be given to every liable person within 15 working days or court-granted longer period: s 73.

## [5-3640] Effect of registration and notice of registration

A registered New Zealand judgment has the same force and effect and may give rise to the same proceedings for enforcement as if the judgment had been given by the Australian court in which it is registered: s 74(1). However, if notice of registration has not been given pursuant to s 73, then s 74(1) does not apply during the period that is 45 working days after registration: s 74(2).

## [5-3650] Restrictions on enforcing registered New Zealand judgments

A registered New Zealand judgment is capable of being enforced in Australia only if, and to the extent that, at the time it is being or is to be enforced, the judgment is capable of being enforced in the original court or tribunal or in another New Zealand court or tribunal: s 75.

## [5-3660] Other matters

Section 76 provides for an Australian court to make conditional orders amounting to a stay of execution pending an appeal. However that provision does not affect any other powers of the Australian court to grant a stay on any grounds on which the court could stay the enforcement of a judgment of an Australian court or tribunal

Section 77 makes provision for the costs and expenses of the enforcement of a registered New Zealand judgment and s 78 deals with interest thereon.

## [5-3670] Private international law does not affect enforcement of registered New Zealand judgments

Enforcement in Australia of a registered New Zealand judgment is not affected by the operation of any rule of private international law (other than any rule in Pt 7) in operation in Australia: s 79(1).

An Australian court may not refuse to enforce, or delay, limit or prohibit the enforcement of, a registered New Zealand judgment on any of the following grounds:

- enforcing the judgment would involve the direct or indirect enforcement in Australia of a New Zealand public law
- New Zealand tax is payable under the judgment
- the judgment imposes a civil pecuniary penalty or a regulatory regime criminal fine.

## [5-3680] UCPR Part 32

UCPR Pt 32, amongst other things, provides for:

- the commencement of civil proceedings under the Act (r 32.3)
- interlocutory proceedings (r 32.4)

- procedural matters relating to subpoenas (Div 3)
- procedural matters relating to the enforcement of judgments (Div 4)
- application for order for use of audio link or audiovisual link: r 32.13.

## Legislation

- *Trans-Tasman Proceedings Act* 2010 (Cth), ss 8, 9, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 25, 26, 65, 66, 67, 68, 72, 73, 74, 75, 76, 77, 78, 79, Pts 2, 3, 5, 6
- *Evidence and Procedure (New Zealand) Act* 1994 (Cth)

## Rules

- UCPR Pt 32, rr 32.3, 32.4, 32.13 Div 3, Div 4

**[The next page is 5601]**

# 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 circumstances where what is alleged is acting in excess of power, it is necessary for the claimant to establish (amongst other things) that the public officers in question were acting beyond power, and that they actually knew or were recklessly indifferent to the fact that they were doing so: *Toth v State of NSW* [2022] NSWCA 185 at [51].

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

**[The next page is 5901]**

# Applications for judicial review of administrative decisions, including decisions of tribunals

## [5-8500] Introduction

The Supreme Court exercises statutory and supervisory jurisdiction by way of judicial review with respect to public bodies and officials and various tribunals either by way of appeal or by application. UCPR Pt 59 applies to judicial review proceedings in this court. Proceedings of this nature are allocated to the Administrative Law List of the Common Law Division (see Practice Note SC CL 3 — Common Law Division — Administrative and Industrial Law List).

The two main bases for the court's jurisdiction to review administrative decisions are:

1. statutory appeals (where the jurisdiction of the court depends on an error of law, or a question of law), other than appeals from the Local or District Courts; and
2. proceedings under s 69 of the *Supreme Court Act* 1970 (NSW): specifically challenges based on an error of law on the face of the record or jurisdictional error.

## [5-8505] Jurisdiction

The court's jurisdiction in these cases is not based on the merits of the decision, but rather on its legality: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; [1990] HCA 21 at 35–37 per Brennan J.

In the case of statutory appeals, a plaintiff must identify an error of law or a question of law in the decision sought to be challenged. It is also important to identify the source of the court's jurisdiction. By contrast, proceedings under s 69 of the *Supreme Court Act* require either an error of law on the face of the record or a jurisdictional error to be identified.

The limitations on a statutory appeal depend on the wording of the statute which confers the right of appeal to this court. For example, a statutory appeal from the NSW Civil and Administrative Appeals Tribunal requires the plaintiff to identify a "question of law": see s 83(1) of the *Civil and Administrative Tribunal Act* 2013 (NSW).

Section 69 of the *Supreme Court Act* is an important source of this court's jurisdiction to review decisions of tribunals and other decision-makers in NSW. It creates a statutory jurisdiction which replaces the court's former jurisdiction to grant relief by way of prerogative writ.

Section 69(3), in its terms, confines the court's jurisdiction to errors of law that appear on the face of the record. However, the High Court has held that it is not open to Parliament to take away the court's jurisdiction to grant relief in respect of jurisdictional error. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond State legislative power: *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [100]. Accordingly the Supreme Court's jurisdiction with respect to jurisdictional errors is not confined to those errors of law which are on the face of the record.

Section 69(3) was amended in 2018 (by the *Justice Legislation Amendment Act* 2018, Sch 1 cl 21) to address a concern raised in *Morgan v District Court of NSW* [2017] NSWCA 105 relating to the limitation on the power of the Court of Appeal to make orders finally disposing of a matter (rather than remitting the matter to the lower court concerned).

As to the bodies or persons amenable to certiorari in judicial review proceedings, Rothman J concluded that if a person is acting as a "court or tribunal" within the terms of s 69(3), and therefore within the terms of s 69(4), they are amenable to the writ of certiorari: *Malek Fahd Islamic School Ltd v Minister for Education and Early Learning* [2022] NSWSC 1176 at [155]–[156].

The distinction between those errors of law that amount to jurisdictional errors and those that do not is not easy to draw or to articulate: see the discussion in *Kirk v Industrial Court of NSW*, above, at [66]–[73]. Various authoritative statements of the distinction have been made but do not remove the difficulty of classification. Under s 69 of the *Supreme Court Act*, this court has jurisdiction only to grant relief in respect of errors of law that are either on the record or which constitute jurisdictional errors.

For this reason it is necessary for a plaintiff to form a view as to whether he or she relies on a particular error as amounting to a jurisdictional error or merely as an error of law on the face of the record. If it is latter, there will rarely be any justification for tendering anything beyond the record, which includes the reasons, if any, of the tribunal or other decision-maker: s 69(4) of the *Supreme Court Act*.

Although the following is not exhaustive, it provides an indication of the types of errors that can amount to errors of law:

- failing to take into account a mandatory relevant consideration
- taking into account an irrelevant consideration
- failure to give reasons, or adequate reasons
- applying the incorrect statutory test or otherwise failing to comply with the terms of the applicable legislation
- failing to give the unsuccessful party an opportunity to be heard (otherwise known as a denial of procedural fairness, or of natural justice)
- legal unreasonableness, and
- lack of evidence to support a finding (also known as the "no evidence ground").

The jurisprudence in this area is considerable. It is not possible to summarise it here. However, practitioners and litigants are referred to M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn, Thomson Reuters, 2017, which provides a comprehensive review of the relevant principles and case law. The leading cases in administrative law include the following:

- *Craig v State of South Australia* (1995) 184 CLR 163; [1995] HCA 58 (what the "record" includes; jurisdictional error)
- *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; [1986] HCA 40 (identification of mandatory relevant considerations and generally)
- *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81 (principles of natural justice)
- *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; [2010] HCA 1 (jurisdiction of State Supreme Courts with respect to jurisdictional error, notwithstanding wording of privative clauses; distinction between jurisdictional error and errors of law which are not jurisdictional errors)
- *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 (the concept of legal unreasonableness)
- *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 (basis for impuging a decision through judicial review; relevance of irrationality)
- *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39 (procedural fairness)
- *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43; *Mifsud v Campbell* (1991) 21 NSWLR 725; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (adequacy of reasons)

- *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 (scope of statutory obligation to give reasons)
- *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088; [2003] HCA 26 (failure to exercise jurisdiction),
- *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; [2002] HCA 51 and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 (apprehension of bias).
- See also, *Li v AG for NSW* (2019) 99 NSWLR 630, where in dismissing an application for judicial review pursuant to s 69, it was doubted the aphorism that justice must be "seen to be done" was ever intended to be a test of the validity of judicial, let alone administrative, decision-making and does not constitute a separate ground of review or a freestanding test for validity of that decision-making: at [56]–[58], [63], [66]–[67]; [77]–[78].

The statutes under which decisions are commonly the subject of statutory appeals or applications for judicial review include the following, of which the following recent decisions of the NSW Court of Appeal are referred to by way of example:

1. *Motor Accidents Compensation Act* 1999 (NSW)
    - *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 (failure to exercise statutory function)
    - *Jubb v Insurance Australia* [2016] NSWCA 153 (constructive failure to exercise jurisdiction)
    - *Ali v AAI Ltd* [2016] NSWCA 110 (scope of statutory duty to give reasons; whether there was a failure to consider relevant evidence)
    - *Rodger v De Gelder* (2015) 71 MVR 514; [2015] NSWCA 211 (failure to take into account relevant considerations),
    - *Alliance Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443; [2012] NSWCA 244 (failure to take into account relevant considerations; whether a failure to refer to particular evidence can constitute failure to take into account a relevant consideration).
2. *Motor Accidents (Lifetime Care and Support Act)* 2006 (NSW)
    - *Insurance Aust Ltd t/a NRMA Insurance v Milton* [2016] NSWCA 156 (scope of statutory obligation to provide reasons; whether constructive failure to exercise functions).

## [5-8510] Practical aspects of commencing and conducting proceedings for judicial review

**Time limit for commencing proceedings**

Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by UCPR Pt 50. Such appeals must be instituted within 28 days: UCPR r 50.3. In such cases a statement of the grounds relied on must be served with the summons: UCPR r 50.4.

**Parties**

Unless there is a statutory provision to the contrary, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons. Where such tribunal or public body or official files a submitting appearance such tribunal, public body or official need not be represented at any directions hearing or substantive hearing and is automatically excused from further attendance: UCPR rr 6.10 and 6.11. If another party wishes to seek an order for costs against a submitting defendant, it must prior to such directions hearing, or within such further time as the court may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought: UCPR r 6.11.

**Evidence**

***Statutory appeals concerning errors, or questions of law***

In the case of statutory appeals concerning errors of law the parties are referred to UCPR r 50.14. Where there is no allegation of denial of procedural fairness, in the ordinary course the only evidence necessary is a copy of the reasons below, a copy of the transcript in the proceedings in the court below and a copy of any exhibit or affidavit or other documents from the proceedings below "that the plaintiff wishes to be considered at the hearing of the appeal" (UCPR r 50.14(1)(c)) bearing in mind the limited nature of the appeal.

***Appeals limited to errors of law on the face of the record***

In proceedings where the grounds of review are limited to errors of law on the face of the record (such as proceedings under s 69 of the *Supreme Court Act*), the evidentiary material should be limited to material that constitutes the "record": *Craig v State of South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 180–183. Usually the record does not include the evidence that was adduced before the decision-maker or the transcript of the hearing, but does include the reasons, if any, of the "court or tribunal for its ultimate determination": s 69(4) of the *Supreme Court Act*.

***Appeals based on jurisdictional error***

If a plaintiff contends that a decision or action is affected by jurisdictional error then that error should be identified as such in the summons. If reliance is sought to be placed on material beyond that which constitutes the record, the body of the affidavit to which such material is annexed or exhibited must identify the jurisdictional error alleged and the connection between the additional material and the alleged error.

***"No evidence" ground***

Where the plaintiff relies on a "no evidence" ground, it is not necessary, in the absence of a direction to that effect, for the plaintiff to tender all the evidence before the decision maker in order to prove the absence of evidence to support a finding. Instead, in the summons, the plaintiff should identify with particularity the finding of the tribunal or decision-maker which the plaintiff contends was not supported by any evidence.

## Legislation

- *Civil and Administrative Tribunal Act* 2013 s 83(1)
- *Motor Accidents Compensation Act* 1999
- *Motor Accidents (Lifetime Care and Support Act)* 2006 (NSW)
- *Supreme Court Act* 1970 s 69
- UCPR rr 6.10, 6.11, Pt 50, rr 50.3, 50.4, 50.14, Pt 59

## Further references

- M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn, Thomson Reuters, 2017

**[The next page is 6001]**

# Damages

*Acknowledgement*: *The following material has been updated by his Honour Judge Andrew Scotting, District Court of NSW.*

## [7-0000] General principles

Many of general principles referred to in this chapter have been drawn from H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021. This is an excellent general text that deals in detail with the assessment of damages in personal injury cases and provides examples of the practical application of these principles. Other texts used for reference purposes in the preparation of this chapter were D Villa, *Annotated Civil Liability Act* 2002, 3rd edn, Thomson Reuters, Sydney, 2018; and J A McSpedden and R Pincus, *Personal Injury Litigation in NSW*, LexisNexis, Sydney, 1995.

The application of the principles discussed below is subject to any relevant statutory provisions. One such provision is the *Motor Accident Injuries Act* 2017 which applies to motor accidents that occur after 1 December 2017: see [7-0085].

The first basic principle requires that a distinction be recognised between the term *damage* and *damages*. Damage is an essential element of a claim in most tortious actions. It is only if a plaintiff is able to establish that he or she has suffered damage that a cause of action becomes available. The position is different with intentional torts, see [7-0130].

Damages are the sums assessed in monetary terms that are paid to a successful plaintiff. Damages may be awarded as compensatory damages for damage sustained, or as aggravated or exemplary damages, although in *State of NSW v Corby* (2009) 76 NSWLR 439 aggravated damages were described as a form of compensatory damages.

The fundamental principle is that of restitutio in integrum, meaning that damages should be assessed so that they represent no more and no less than a plaintiff's actual loss: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, Lord Blackburn at 39. See also *Haines v Bendall* (1991) 172 CLR 60 at 63; *Arsalan v Rixon* [2021] HCA 40 at [25].

In personal injury matters, it has been recognised that in most cases it is not possible to measure accurately that part of the award that deals with non-economic loss so as to restore a plaintiff to the health enjoyed pre-injury. The principle has been qualified by the term "so far as money can do so": *Robinson v Harman* [1848] All ER Rep 383.

The law recognises that an award will not necessarily be perfect. In *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13–14, Dixon J said:

> No doubt it is right to remember that the purpose of damages for personal injuries is not to give a perfect compensation in money for physical suffering. Bodily injury and pain and suffering are not the subject of commercial dealing and cannot be calculated like some other forms of damage in terms of money.

The amount awarded is, however, required to be fair to both parties, although fairness to the defendant does not require that the award be less than full or adequate.

There are some qualifications that may have the result that the plaintiff recovers less than his or her actual loss. They arise out of the principles that govern remoteness of damage, the requirement to mitigate and the modifications to common law made by the *Workers Compensation Act* 1987, *Motor Accidents Compensation Act* 1999, *Civil Liability Act* 2002 and *Motor Accident Injuries Act* 2017. In addition, claims arising out of the death of a relative are limited to the recovery of pecuniary loss.

Conversely, principles relating to aggravated or exemplary damages allow the recovery of greater than actual loss in appropriate circumstances.

In *Todorovic v Waller* (1981) 150 CLR 402 at 412 Gibbs CJ and Wilson J identified the following four basic principles that they said were so well established that it was unnecessary to cite authority to support them.

1. Damages are compensatory in character.
2. Damages for one cause of action must be recovered once and forever and in a lump sum, there being no power to order a defendant to make periodic payments.
3. The plaintiff is free to do what he or she wishes with the sum awarded; the court is not concerned to see how it is applied.
4. The onus is on the plaintiff to prove the injury or loss for which damages are sought.

The plaintiff bears the onus of proving that the defendant's conduct caused the losses claimed. At common law, the defendant bears the onus of proving:

- failure to mitigate on the plaintiff's behalf
- contributory negligence.

The onus is on the plaintiff throughout to quantify damages. This does not necessarily require proof of the loss in actual monetary terms. Evidence in the form of comparable wages is commonly provided to establish loss of wages. Medical expenses and care costs for the past are rarely disputed and those expected in the future are normally capable of reasonable estimation.

Once a loss is proved, the court is required to do its best to put a value on that loss even if the evidence is less than satisfactory. In the absence of evidence, a plaintiff cannot complain that inadequate damages have been awarded: *Dessent v Commonwealth* (1977) 51 ALJR 482. See *Ashford v Ashford* (1970) 44 ALJR 195, where the court dealt with the assessment of income loss in the absence of evidence of likely earnings from planned pre- and post-accident careers. See also *Layton v Walsh* (1978) 19 ALR 594 (FC) where the court drew inferences concerning the cost of medical treatment.

It is standard practice to itemise amounts awarded to a plaintiff under various heads of damage and to give reasons for arriving at each of the stated figures. Care needs to be taken to avoid the possibility that the amounts assessed under the various heads of damage might be duplicated. For instance, a court must balance, in assessing general damages, the effect on a plaintiff of any incapacity to undertake domestic responsibilities for his or her family against making allowance for the provision of voluntary or commercial carers.

The recognised heads of damage are:

1. **General damages:** this is the term applied to non-pecuniary damages or non-economic loss suffered as a result of pain, disability, loss of enjoyment and amenities of life, disfigurement or loss of expectation of life.
2. **Pecuniary loss:** this term covers out-of-pocket expenses involved in medical and other treatment expenses; aids and appliances, domestic and personal care.
3. **Income loss:** covering actual income loss to the date of trial and loss of income-earning capacity thereafter.
4. **Aggravated damages:** awarded to a plaintiff who suffers increased distress as a result of the manner in which a defendant behaves when committing the wrong or thereafter.
5. **Exemplary damages:** awarded to mark the court's disapproval of the conduct of the defendant and to deter its repetition by the defendant or others.
6. **Nominal or contemptuous damages:** this head of damage is of little relevance to claims in tort involving personal injury where actual damage is a necessary part of the cause of action. It commonly arises in cases of trespass to the person where the options available to the court range between nominal damages and a more substantial award depending on the circumstances.

Exceptions to these basic principles are found both in the common law and in legislation.

It should be noted that the law of damages is governed by the law of the place of the tort, and different provisions may apply in different States or territories or for different damage: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [100]. For example, a person exposed to substance in different States who subsequently develops a substance-related disease may be entitled to different damages awards for the same damage. In *Kennedy v CIMIC Group Pty Ltd and CPB Contractors Pty Ltd* [2020] NSWDDT 7, the plaintiff, who suffered from mesothelioma, was exposed to asbsestos in NSW by the first defendant and in Western Australia by the second defendant. Ultimately, the plaintiff was entitled to a different award of damages against each defendant.

When it came to assessing damages, the Dust Diseases Tribunal (DDT) was required to apply the statutory provisions relevant to each defendant including:

- s 10A *Civil Liability Act* 2002 (WA) that allowed the comparison of other awards when assessing general damages (which is not permitted by the common law applicable in NSW);
- s 15A *Civil Liability Act* 2002 (NSW) that restricts the quantum of damages that can be awarded for gratuitous attendant care services (which did not apply in WA, such damages being assessed by reference to the commercial cost of the services provided), and
- s 15B *Civil Liability Act* 2002 (NSW) that allows damages to be awarded for a loss of capacity to provide domestic services (which does not exist at common law, applicable in WA *CSR Ltd v Eddy* (2005) 226 CLR 1 at [71]).

As noted in [2-6330] the generally accepted practice is that the court determine all issues in question. This extends to the assessment of damages notwithstanding that the case on liability fails. The purpose of the practice is to avoid the costs of a further hearing in the event that the decision on liability is overturned. In *Gulic v Boral Transport Ltd* [2016] NSWCA 269, the court expressed concern that the trial judge had not adopted this practice and confirmed that a judge should decide all issues to avoid the need for a new trial. On the question of exceptions to the general rule Macfarlan J said at [8]:

> There may of course be good reasons for not dealing contingently with issues that the judge does not consider decisive. One reason might be that the judge considers that because the outcome is so clear or there is so little at stake that there is no reasonable prospect of an appeal. Alternatively, the judge might consider that the expenditure of judicial time and effort required to determine other issues is not justified when balanced against the likely costs of a retrial and the likelihood of a retrial being necessary. Another reason might be that determination of an issue whose resolution is considered not to be decisive might require assumptions as to a party's credit diametrically opposed to the judge's findings. It might be difficult to give effect to this assumption.

## [7-0010] The once-and-forever principle

**Interim payments**

Section 82 of the *Civil Procedure Act* 2005 (CPA) makes provision for the award of interim damages when:

- the defendant admits liability or the plaintiff has judgment against the defendant for damages to be assessed, or
- the plaintiff has obtained judgment, or the court is satisfied, if the action proceeded to trial, that the plaintiff would secure judgment against the defendant for substantial damages: s 82(3).

Orders of this nature may only be made against insured defendants, public authorities or persons of sufficient means: s 82(4) CPA. These provisions do not apply to claims that are dealt with under the Motor Accidents legislation.

In *Frellson v Crosswood Pty Ltd* (1992) 15 MVR 343, Sully J held:

- the civil onus of balance of probabilities applies in establishing the plaintiff will recover substantial damages at trial
- caution must be exercised, and it is necessary to take into account the difficulty a defendant might encounter if required to recover from an unsuccessful plaintiff
- if there is more than one defendant, the court can order payment of interim damages against one or more defendants if satisfied the plaintiff will succeed against those defendants.

Section 83 of the *Motor Accidents Compensation Act* imposes on a third party insurer the obligation to pay for reasonable, necessary and properly verified medical, rehabilitation, respite care and attendant care expenses where liability is admitted or determined, wholly or in part, to meet the care needs generated by injuries resulting from the motor accident.

As to the *Motor Accident Injuries Act* 2017, see Pt 3.

**Court structured settlements**

Section 143 of the *Motor Accidents Compensation Act* permits the parties to apply to the court for approval of a structured settlement agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

Similarly, s 151Q of the *Workers Compensation Act* permits the court, at the request of a plaintiff and having considered the views of the defendant, to make orders for payment of damages by means of a structured settlement rather than a lump sum award.

**Lifetime care and support**

The *Motor Accidents (Lifetime Care and Support) Act* 2006 provides for support for victim of motor accidents who are catastrophically and permanently injured. It imposes on the Lifetime Care and Support Authority the obligation of paying for the expenses incurred in meeting the plaintiff's treatment and care needs.

## [7-0020] Actual loss

Once the defendant's liability to the plaintiff is proved, the assessment of the plaintiff's loss and damage must take into account issues that may increase or reduce the amounts awarded under all heads of damages. Considerations to be addressed include: the prospective consequences of the injury; conduct of the plaintiff in failing to mitigate or in aggravating his or her condition; contributory negligence; unrelated conditions that affect the plaintiff before or after injury; causation and aggravated or exemplary damages.

**Prospective consequences**

Proof of damage and assessment of damages requires calculation of the consequence of events from the date of injury to the date of trial and of the chance that events will or will not occur. In*Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, Deane, Gaudron and McHugh JJ held at [7]:

> A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99% – or very low – 0.1%. But unless the chance is so low as to be regarded as speculative – say less than 1% – or so high as to be practically certain – say over 99% – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat

as certain the prediction which has a 51% probability of occurring, but to ignore altogether a prediction which has a 49% probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded.

**Example**

**Loss of opportunity**: As noted in the *Malec* decision, damage and loss suffered to the date of the hearing are reasonably simple to prove and assess. There are, however, occasions when it becomes necessary to assess the effects of injury on, for instance, the opportunity to undertake a particular career path or succeed in a particular business. *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 54 dealt with the recovery of the value of a lost opportunity in circumstances where it was a known fact that the opportunity was lost but there was no certainty that availability of the opportunity would have resulted in a successful outcome. Deane J at [8] said it might be necessary to modify the conventional approach, when assessing damages for past income loss, of deciding an issue on the balance of probabilities and then proceeding on the basis of a certainty where none in fact existed. The *Amann Aviation* case involved a breach of contract claim but it was made clear that the same principles applied to claims in tort.

**Extras and discounts**

Damages may also be reduced for a number of reasons. The common law principle is that a defendant, who asserts that a reduction in damages is warranted, must provide evidence to support the claim. This principle has been modified in some circumstances by legislation.

**Mitigation**

The courts have accepted the following principles, as set out in H McGregor, *McGregor on Damages*, 16th edn, Sweet & Maxwell Ltd, UK, 1997 at [283]–[288], as an accurate statement of the law concerning mitigation.

1. The law disallows recovery of damages in respect of any loss that could have been avoided but which the plaintiff has failed to avoid through unreasonable action or inaction.
2. The plaintiff may recover loss or expense incurred in a reasonable attempt to mitigate.
3. The plaintiff may not recover loss in fact avoided, even though damages for that loss would have been recoverable because the efforts that went to mitigation went beyond what was required of the plaintiff under the first principle.

In NSW in motor accident and workplace accident cases, the first rule is embodied in statute: s 4.15 *Motor Accident Injuries Act* 2017 and s 151L *Workers Compensation Act* 1987. In workplace accident cases, the onus is on the plaintiff (s 151L(3)), in motor accident cases the onus is on the person alleging that there has been a failure to mitigate (s 4.15(4)).

At common law, the failure of a plaintiff to take steps to mitigate a claimed loss may be raised as a defence to the claim and the onus of proof rests with the defendant.

If the defendant succeeds, damages are reduced to take account of the failure to mitigate. The extent of the reduction is assessed by calculating the value of the plaintiff's loss on the basis of the condition that he or she would be in, had reasonable steps to mitigate been taken.

Section 4.15(3) *Motor Accidents Injuries Act* 2017 requires consideration of the steps the injured person could have taken to mitigate damages by: undergoing medical treatment, undertaking rehabilitation, pursuing alternative employment opportunities and giving the earliest practicable notice of claim to enable the assessment and implementation of the other matters.

Section 151L *Workers Compensation Act* imposes a burden on the claimant to establish that all reasonable steps to mitigate have been taken, including as to treatment, employment and rehabilitation by the injured worker, except where it is established that the injured worker was not told by his or her employer or the insurer that it was necessary to take steps to mitigate before it could reasonably be expected that any of those steps would be taken: *ACN 096 712 337 Pty Ltd v Javor* [2013] NSWCA 352, per Meagher JA.

At common law, what is reasonable for the plaintiff to do is dependent on the consequences of the injury: *Grierson v Roberts* [2001] NSWCA 420 at [19]. It does not require a plaintiff to engage in rituals or exercises in futility, including embarking on complex litigation, pleading the statute of limitations to avoid liability for hospital expenses (*Lyszkowicz v Colin Earnshaw Homes Pty Ltd* [2002] WASCA 205 at [64]), continuing to work when their injuries make it reasonable for them to retire (*Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 23 per McHugh J), or failing to accept a voluntary redundancy payment (*Morgan v Conaust Pty Ltd* [2000] QSC 340). The extent of the plaintiff's injuries may make it reasonable for them not to try to find work during the lead-up to contested litigation: *Arnott v Choy* [2010] NSWCA 259 at [161].

A claimant's failure to undergo medical and/or rehabilitative treatment can amount to a failure to mitigate loss. Examples include, failing to take prescribed medications (*State of NSW v Fahy* [2006] NSWCA 64), in particular where the adverse impacts of the medication are expected to be temporary and reversible. There have been a few cases where the failure to undergo surgery has been decided to constitute a failure to mitigate, but the general rule is that it is not unreasonable to refuse to undergo seriously invasive and/or risky treatment such as spinal surgery: *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345. The benefits and costs of the action must be weighed against the risk of death, aggravation of the condition and the inconvenience or discomfort involved: *Radakovic v R G Cram & Sons Pty Ltd* [1975] 2 NSWLR 751 at 768 per Mahoney JA (the disfigurement of amputation must be outweighed by substantial advantages) and *Mantle v Parramatta Smash Repairs Pty Ltd* (unrep, 16/2/79, NSWCA) (plaintiff's subjective view against amputation was relevant in deciding the refusal was not unreasonable). Conflicting medical opinion about the efficacy of medical treatment will usually make it reasonable to refuse treatment: *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500. The plaintiff's subjective views based on their understanding of the treatment, risks and benefits are relevant, notwithstanding that the test is objective. A baseless refusal will usually be unreasonable: *Fazlic v Milingimbi Community Inc*. Religious beliefs are relevant: *Walker-Flynn v Princeton Motors Pty Ltd* [1960] SR(NSW) 488, cf *Boyd v SGIO (Qld)* [1978] Qd R 195 (note the doubts expressed by the authors of Luntz at [1.12.5]).

A plaintiff is entitled to recover the reasonable costs of mitigation, even if the attempts are unsuccessful and the consequential loss is greater than if there had been no attempt to mitigate: *Tuncel v Reknown Plate Co Pty Ltd* [1979] VR 501.

**Loss of amenity of the use of a chattel**

Where a plaintiff's chattel is damaged as a result of the defendant's negligence, the plaintiff will generally be entitled to damages for the costs of repair and for consequential loss: *Talacko v Talacko* [2021] HCA 15 at [45]. An assessment of consequential loss always requires the identification of the manner in which the loss of use of a chattel has adversely affected the plaintiff: *Arsalan v Rixon* [2021] HCA 40 at [18]. In *Arsalan*, the High Court recognised the loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel, as a recoverable head of damage for a tort that involves negligent damage to a chattel: at [17], [25]. It was not unreasonable for the respondents to take steps to mitigate their loss, including loss of amenity consequent on negligent damage to their vehicles by the hire, at a reasonable rate, of an equivalent car for a reasonable period of repair.

**Aggravation**

The defendant also bears the evidentiary onus of establishing that the plaintiff's conduct positively exacerbated his or her condition. In this respect, it is necessary to consider the following.

1. Whether there has in fact been a failure to mitigate. In *Munce v Vinidext Tubemakers Pty Ltd* [1974] 2 NSWLR 235 the court left open the question of whether refusal of a blood transfusion amounted to a failure to mitigate.

2. Whether the plaintiff's conduct that positively exacerbates the condition is itself the result of injuries caused by the defendant's tortious conduct.

**Pre- and post-injury conditions**

Damages may be denied or reduced where the symptoms of which a plaintiff complains are the result of a pre-existing condition. In *Watts v Rake* (1960) 108 CLR 158, prior to the accident, the plaintiff suffered from a commonly occurring degenerative spinal condition that might have produced the symptoms suffered after the accident. The High Court settled the issue of onus of proof, deciding that it was for the plaintiff to prove on a prima facie basis the difference between his or her pre- and post-accident condition; once the change in condition was satisfactorily established, the evidentiary onus was then on the defendant "to exclude the operation of the accident as a contributory cause": Dixon CJ at [160].

*Purkess v Crittenden* (1965) 114 CLR 164 confirmed *Watts v Rake*, above, and its reference to the evidential onus necessary to rebut the prima facie case made by the plaintiff. Barwick CJ, Kitto and Taylor JJ, at 168, said it was insufficient for the defendant merely to suggest that the plaintiff suffered from a progressive pre-existing condition or that there was a relationship between any condition and the plaintiff's present incapacity and that:

> On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (ie substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence.

Where the defendant alleges that the plaintiff would have suffered disability because of a pre-existing condition, even if the compensable injury had not occurred, the evidentiary burden rests on the defendant to establish what the effect of the pre-existing condition would have been: *Watts v Rake* and *Purkess v Crittenden*, above.

The nature of the pre-existing condition, its probable effects, the relationship it has to the ultimate state and any disability, and the time when these effects would have been seen without the tort, must be established with some reasonable measure of precision but not to a standard of near perfection: *Expokin Pty Ltd v Graham* [2000] NSWCA 267 at [50] (Santow AJA) and *Mount Arthur Coal Pty Ltd v Duffin* [2021] NSWCA 49 at [64] per Payne JA. If the disabilities of the plaintiff can be disentangled and one or more traced to a cause in which the tort played no part, it is the defendant who must do the disentangling: *Watts v Rake* at 160 per Dixon J. In this context, the principles stated in *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 may need to be taken into account so that consideration may need to be given as to whether the defendant has established that there was a substantial chance that the plaintiff would have been affected by a pre-existing condition: *Seltsam Pty Ltd v Ghaleb* (2005) NSWCA 208 per Ipp JA (Mason P agreeing).

In *State of NSW v Skinner* [2022] NSWCA 9 the Court of Appeal approved the apportionment of damages by the trial judge to take into account her post-traumatic stress disorder arising from the plaintiff's employment as a police officer and her non-tortious psychiatric conditions.

In *Sampco Pty Ltd v Wurth* [2015] NSWCA 117 the Court of Appeal emphasised that the requirement in s 5D(1)(a) *Civil Liability Act* 2002, that factual causation be established, applies both to the issue of liability and injury.

The apportionment of damages where the plaintiff suffered injury in successive motor vehicle accidents was considered in *Falco v Aiyaz* [2015] NSWCA 202. Emmett JA at [13] set out the principles of *State Government Insurance Commission v Oakley* (1990) 10 MVR 570:

> where the negligence of a defendant causes injury and the plaintiff subsequently suffers further injury, the principles for determining the causal connection between the negligence of the defendant and the subsequent injury are as follows:
>
> - where the further injury results from a subsequent accident that would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by the negligence of the defendant;
> - where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the negligence of the defendant;
> - where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health and the damage sustained includes no element of aggravation of the earlier injury, the subsequent accident and further injury should not be treated as caused by the negligence of the defendant.

**Material contribution**

Where it is not possible to apportion damages to take account of other causes of damage, the plaintiff is required to establish that the defendant's negligence materially contributed to the loss or damage. The evidentiary onus is then on the defendant and, if the defendant is unable to establish an alternative cause, he or she may be held fully liable.

A commonly occurring scenario arises in cases of injuries suffered as a result of more than one accident or exposure to disease-causing dusts. Again, the plaintiff is required to prove that the defendant's conduct contributed materially to the injury. If this is done and it is not possible to apportion responsibility between one or more potential causes of damage, the plaintiff will recover in full. The onus is on the defendant to establish and quantify the extent of damage caused by another tortfeasor: *Bonnington Castings Ltd v Wardlaw* (1956) AC 613 (House of Lords); *Middleton v Melbourne Tramway & Omnibus Co Ltd* (1913) 16 CLR 572; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 and *Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt* [2022] NSWCA 151.

Where it is possible to divide the harm, the court must do its best to apportion the loss between tortious and non-tortious causes: *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR(NSW) 120, per Sugerman AP at 125–126 and *State of New South Wales v Skinner* [2022] NSWCA 9.

**Life expectancy**

The defendant bears the evidential onus of establishing that the plaintiff's life expectancy is likely to be shorter than that estimated in standard life-expectancy tables: *Thurston v Todd* [1966] 1 NSWR 321; *Proctor v Shum* [1962] SR (NSW) 511. In *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 81 ALJR 919, Gummow, Callinan and Crennan JJ at [4], and Kirby and Hayne JJ at [68]–[70], held "the Court of Appeal was right to conclude that, despite the then prevailing practice in the courts of New South Wales, the primary judge should have used the prospective rather than the historical tables".

The standard life expectancy was reduced by 10% in the case of a plaintiff who, although only 21 years old at the time of assessment, continued to be a heavy smoker and the nature of his injuries and their effect on his psychological condition suggested that he would not give up the habit: *Egan v Mangarelli* [2013] NSWCA 413.

Where the plaintiff's life expectancy is reduced as a result of injury, loss of income during those years is to be assessed by deducting the probable living expenses that would be incurred in

maintaining the plaintiff if she or he had survived: *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389. This principle was adopted by Sheller JA in *James Hardie & Co Pty Ltd v Roberts* [1999] NSWCA 314 where he confirmed that compensation was directed at loss of income-earning capacity not wages. Damages of this nature were therefore not a windfall but compensation for the destruction of the asset.

## [7-0030] Contributory negligence

At common law a defence of contributory negligence, if successful, defeated a claim, regardless of the extent of any negligence on the part of the defendant. This situation was remedied in NSW by the *Law Reform (Miscellaneous Provisions) Act* 1965 where provision was made to apportion liability between the parties and to reduce the plaintiff's damages in accordance with this apportionment.

Contributory negligence must be specifically pleaded as a defence to a claim and, since it is raised by way of defence, the onus is on the defendant to prove that the plaintiff failed to use reasonable care, that had care been taken the plaintiff's damage would have been diminished, and the extent of that diminution.

The principles that apply to the determination of whether the plaintiff was negligent are the same as those that determine the question of the defendant's negligence. This involves the application of the general principles set out in s 5B *Civil Liability Act*. Further s 5R specifically provides that the standard to be applied in determining the issue of contributory negligence is that of a reasonable person in the position of the plaintiff on the basis of what he or she knew or ought to have known at the time. In other words, an objective test is applied without regard to the subjective situation of the plaintiff.

The *Motor Accidents Act* ss 74, 76, *Motor Accidents Compensation Act* ss 138, 140 and *Motor Accident Injuries Act* 2017 ss 4.17 and 4.18 compel a finding of negligence by a plaintiff where drugs or alcohol were involved or the plaintiff failed, contrary to the requirements of the law, to use a seatbelt or use other protective equipment. Some of these provisions do not apply to minors. The provisions concerning drugs and alcohol apply not only to an injured passenger's condition at the time of an accident; they encompass the situation where the plaintiff, as a passenger in a vehicle at the time of the accident, knew or ought to have known that the driver's capacity to drive was affected by alcohol.

As to the *Motor Accident Injuries Act* 2017, see [7-0085] under the subheading **Contributory negligence**.

The *Civil Liability Act* goes further in relation to drugs or alcohol. Pt 6 deals with intoxication, defined in s 48 as:

> a reference to a person being under the influence of alcohol or a drug (whether or not taken for a medicinal purpose and whether or not lawfully taken).

These provisions apply to civil liability for personal injury or damage to property, except where excluded by s 3B. Section 49 replaces s 74 *Motor Accidents Act* and s 138 *Motor Accidents Compensation Act* to the extent of any inconsistency.

Section 50 applies where the capacity of a plaintiff to exercise reasonable care and skill is impaired by intoxication. No damages are to be awarded where damage is unlikely to have occurred if the injured party had not been intoxicated. Otherwise, unless intoxication was not self-induced, the provision mandates a finding of a minimum 25% for contributory negligence on the part of the plaintiff. This provision applies to under-age drinkers. *Russell v Edwards* [2006] NSWCA 19 held that inexperience concerning the intoxicating effects of alcohol did not lead to the conclusion that intoxication was not self-induced. Ipp JA stating that "self-induced" equated to "voluntary": [21].

**Apportionment**

Once a finding is made that the plaintiff was guilty of contributory negligence, it is necessary to determine the proportions in which each of the parties is to be held liable for the damage suffered by the plaintiff.

The leading authorities on this issue are *Pennington v Norris* (1956) 96 CLR 10 and *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529. In *Podrebersek*, above, at [10] it was said:

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris*, above, at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* (1953) AC 663, at p 682; *Smith v McIntyre* (1958) Tas SR 36, at pp 42–49 and *Broadhurst v Millman* (1976) VR 208, at p 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

In *Wynbergen v Hoyts Corporation* (1997) 149 ALR 25, the High Court decided that it was not possible, where a finding of contributory negligence is made, to conclude that damages recoverable by the injured party should be reduced to nothing because the effect of such a conclusion would be to hold the claimant wholly responsible. Section 5S *Civil Liability Act* now provides for a finding of contributory negligence of 100% with the result that no damages are to be awarded. The claim that a finding of 100% contributory negligence should be made is often coupled with a pleading that the defendant owed no duty of care and is most frequently encountered in motor accident cases where joint illegal purpose or intoxication of both passenger and driver are involved. To date the courts have shown great reluctance to reduce damages by 100% or, except where illegality is concerned, to find no duty of care.

In *Gala v Preston* (1991) 172 CLR 243 at 254, the High Court noted that there might be special and exceptional circumstances where participants could not have had any reasonable basis for expecting that a driver of a vehicle would drive it according to ordinary standards of competence and care. In *Joslyn v Berryman* (2003) 214 CLR 552, McHugh J at [29] accepted that the plea of no breach of duty or a plea of no duty in an extreme case remained open in the case of a passenger who accepted a lift with a driver known to the passenger to be seriously intoxicated.

Similarly in *Imbree v McNeilly* (2008) 236 CLR 510, Gummow, Hayne and Kiefel JJ said at [82]:

> The conclusion that the defendant owed a plaintiff *no* duty of care is open in a case like *Joyce* if, as Latham CJ said, "[in] the case of the drunken driver, *all* standards of care are ignored [because the] drunken driver cannot even be expected to act sensibly". And as indicated earlier in these reasons, it is that same idea which would underpin a conclusion that the plaintiff voluntarily assumed the risk of being driven by a drunken driver.

In *Miller v Miller* (2011) 242 CLR 446, the High Court confirmed that no duty of care to a co-offender is owed by a person committing a crime unless one party withdraws from the joint illegal enterprise and is no longer complicit in the crime. The duty of care is owed from the point of withdrawal. In deciding the issues in that case, the High Court considered in detail prior authority on issues of duty of care in circumstances of illegal conduct: *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Smith v Jenkins* (1970) 119 CLR 397; *Jackson v Harrison* (1978) 138 CLR 438; *Gala v Preston* (1991) 172 CLR 243; *Cook v Cook* (1986) 162 CLR 376; *Imbree v McNeilly* (2008) 236 CLR 510; *Insurance Commissioner v Joyce* (1948) 77 CLR 39.

The issues in *Zanner v Zanner* (2010) 79 NSWLR 702 concerned the extent to which the defendant, at 11 years of age, should be held liable to the plaintiff, his mother, who allowed him to drive his father's car. The defendant raised three issues in defence: the duty of care owed by the defendant

when he was too inexperienced and incompetent to be expected to control the vehicle; causation, in circumstances where the plaintiff brought about the risk that eventuated; and whether, that if liability were established, contributory negligence should be assessed at 100%.

Tobias AJA rejected all of these defences. He did, however, reassess the plaintiff's contributory negligence, increasing it from 50% to 80%, a result he considered to be warranted by two aspects of the plaintiff's conduct. The first was allowing the defendant to drive the vehicle; the second was to stand in front of it while directing the defendant.

The NSW Court of Appeal has considered the issue of how the apportionment of liability is to be undertaken having regard to the provisions of the *Civil Liability Act*.

In *Joslyn v Berryman* (2003) 214 CLR 552, the High Court was concerned with the provisions of s 74 *Motor Accidents Act* (subsequently re-enacted as s 138 *Motor Accidents Compensation Act* and now dealt with in s 49 *Civil Liability Act*). Although these provisions differed from those of the *Law Reform (Miscellaneous Provisions) Act* in that they provided for damages in respect of a motor accident to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case, Kirby J at [127] said that they supplemented common law and enacted law. He noted that the *Law Reform (Miscellaneous Provisions) Act* did not address the extent to which the plaintiff's neglect caused the accident and that the responsibility for which it provided:

> is that which is "just and equitable having regard to the claimant's share in the responsibility *for the damage*". Such "damage", as the opening words of s 10(1) make clear, is the damage which the person has suffered as a "result partly of his own fault and partly of the fault of any other person or persons". [Emphasis in original.]

Doubt on whether these principles continue to apply has arisen from the decisions of the Court of Appeal in *Gordon v Truong* [2014] NSWCA 97 and *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235. Both cases involved collisions between vehicles and pedestrians and both involved findings of breach of duty and contributory negligence. Basten JA proposed that s 5R *Civil Liability Act*, in its application of the general principles of negligence described in s 5B of the Act, altered the approach to be taken to apportioning liability. He took the view that the apportionment is now to be made having regard to the causative contributions of the lack of care of each party and not by reference to the extent to which each act of neglect contributed to the damage suffered by the plaintiff. See also his discussion of the inter-relationship between ss 5R and 49 *Civil Liability Act* and their application to motor vehicle accidents in *Nominal Defendant v Green* [2013] NSWCA 219.

Further clarification of the approach to be taken to apportionment was provided in the reasons of Meagher JA, with whom Gleeson JA and Sackville AJA agreed, in *Verryt v Schoupp* [2015] NSWCA 128. The appeal dealt, amongst other things with the trial judge's finding that, although there was negligence on the part of a 12-year-old skateboarder who "skitched" a ride uphill by holding onto the back of the appellant's motor vehicle, the appellant was overwhelmingly responsible and that there should therefore be no reduction in damages for contributory negligence.

Meagher JA noted the difference between the requirement of s 9(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 that responsibility be apportioned according to what is just and equitable having regard to the claimant's share in the responsibility for the damage and that of s 138(3) of the *Motor Accidents Compensation Act* that damages recoverable be reduced by such percentage as the court thinks just and equitable in the circumstances of the case. This did not involve reference to s 5D to determine a causal connection between the contributory negligence and the injury. It involved, first, as required by s 5R(1) of the *Civil Liability Act*, the application of the principles of s 5B in determining whether the person who suffered harm has been contributorily negligent.

It was in the apportionment of responsibility that the issue of the extent to which each party was responsible for the accident and the injuries sustained became relevant. In this case, the Court of Appeal accepted that there was no evidence to support the contention that the respondent's failure

to wear a protective helmet caused his brain injury, an element where the onus of proof rested with the appellant. There was, however, evidence that the 12-year-old respondent appreciated that the skitching exercise was dangerous and Meagher JA considered that his lack of care for his own safety was adequately reflected by reducing his damages by 10%.

This approach has been adopted in a number of decisions, including *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72 and *Nominal Defendant v Cooper* [2017] NSWCA 280. In the latter case, McColl JA noted that the parties did not suggest that there was any significance in the differences between s 9(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 and s 138(1) of the *Motor Accidents Compensation Act* 1999. Her Honour said, using the principles derived from *Podrebersek* and *Pennington*, that both provisions required the court to arrive at an apportionment of the parties' respective shares in the responsibility for the damage by comparing the degree to which they had each departed from the standard of care of the reasonable person and the relative importance of their acts in causing the damage.

Appellate courts consistently note that the facts of earlier cases are rarely of assistance when determining an appropriate apportionment. They also maintain a degree of reluctance to interfere in the first instance determination: *Mobbs v Kain* [2009] NSWCA 301; *Harmer v Hare* [2011] NSWCA 229.

Section 5T *Civil Liability Act* requires the court to take account of the contributory negligence of the deceased in claims under the *Compensation to Relatives Act* 1897. Section 30 *Civil Liability Act* extends this requirement to the contributory negligence of a victim killed, injured or endangered by an act or omission of the defendant when assessing claims for nervous shock.

**Blameless accidents**

The application of the principles of contributory negligence to blameless accidents was considered by the Court of Appeal in *Axiak v Ingram* (2012) 82 NSWLR 36. A blameless accident is defined in s 7A *Motor Accidents Compensation Act* as follows:

> "blameless motor accident" means a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.

Section 7F of the Act provides for the reduction of damages by reason of contributory negligence on the part of a deceased or injured person.

In *Axiak*, the Court of Appeal held that the words "and not caused by the fault of any other person" referred to tortious conduct of persons other than the plaintiff. In those circumstances the principles of *Podrebersek* had no application where, because of the provisions of the Act, the driver was not at fault so that comparisons of culpability and contributions to the damage suffered were inappropriate. Tobias JA said that contributory negligence was therefore to be assessed by reference to the extent to which the plaintiff departed from the standard of care imposed in taking care for his or her own safety. He rejected, as contrary to the intention of the legislature, the proposition that a plaintiff, guilty of contributory negligence in a blameless accident must always be the sole cause of his or her injuries and therefore guilty of negligence to the degree of 100%.

This decision was not challenged in *Davis v Swift* [2014] NSWCA 458 but the Court of Appeal was unanimous in the view that it required reconsideration. The court was divided on the question of whether, it being accepted that the plaintiff's conduct was the sole cause of the accident, contributory negligence should be assessed at 100%. Meagher and Leeming JJA, held that, since the defendant was, by s 7B(1), deemed to have been at fault, the assessment of culpability for the accident should be 20% to the defendant and 80% to the plaintiff. Adamson J agreed with the trial judge that the plaintiff's contributory negligence should be assessed at 100%. She suggested that the contributory negligence addressed by s 7F related to conduct, such as failure to wear a seatbelt, that aggravated damage but was not causative of the accident.

The approach taken in *Axiak* was adopted in *Nominal Defendant v Dowedeit* [2016] NSWCA 332.

## Heads of Damage

### [7-0040] Non-economic loss

This head of damage is also referred to as general damages or non-pecuniary loss. It covers the elements of pain, suffering, disability and loss of amenity of life, past and future. As already noted, in respect of the future, an element of hypothesis is involved.

There are few remaining areas in personal injury claims where damages remain at large. The *Motor Accidents Compensation Act* and the *Civil Liability Act* impose thresholds to the recovery of non-economic loss and an upper limit on the amounts that may be awarded. Common law damages for non-economic loss are no longer recoverable under the *Workers Compensation Act.*

The maximum sums recoverable for non-economic loss are adjusted annually by reference to fluctuations in the average weekly earnings of full-time adults as measured by the Australian Statistician: s 146 *Motor Accidents Compensation Act*; s 16 *Civil Liability Act*. The adjustment takes effect on 1 October in each year. The maximum sum to be awarded is that which is prescribed at the date of the order awarding damages.

Section 3 *Civil Liability Act* contains the following definition:

> "non-economic loss" means any one or more of the following:
>
> (a) pain and suffering
>
> (b) loss of amenities of life
>
> (c) loss of expectation of life
>
> (d) disfigurement.

The same definition is found in s 3 *Motor Accidents Compensation Act*.

**Assessing non-economic loss**

The *Motor Accidents Compensation Act* applies to injuries suffered in accidents occurring after midnight on 26 September 1995. Sections 131–135 deal with non-economic loss. To qualify for an award the plaintiff's level of whole-person impairment must be assessed at greater than 10%. If the parties disagree on this question, a medical assessor, whose determination is binding on the parties and the courts, is appointed by the Motor Accidents Authority. Unlike the *Motor Accidents Act* and the *Civil Liability Act*, s 134 does not require that the court assess damages as a proportion of the maximum sum fixed for an award of non-economic loss. Damages are assessed with the application of common law principles up to the maximum provided for in s 134. This was explained by Heydon JA in *Hodgson v Crane* (2002) 55 NSWLR 199 when he said it was not possible to construe the concept of proportionality out of the language of ss 131–134. When the threshold of 10% permanent impairment was passed, the court was required to assess non-economic loss without statutory restraint except for the maximum that may be awarded: at [39].

The *Motor Accidents Act* first introduced the concept of significant impairment to an injured person's ability to lead a normal life as the basis for assessment of non-economic loss and the assessment of the percentage of that impairment against a most extreme case.

As to the *Motor Accident Injuries Act* 2017, see [7-0085] under the subheading **Non-economic loss**.

The *Civil Liability Act* contains provisions similar to those of the *Motor Accidents Act*. The threshold for recovery of non-economic loss is an injury assessed by the court to be at least 15%

of a most extreme case: s 16(1). Where the severity of the plaintiff's injuries is assessed to be less than 33% of a most extreme case, the amount to be awarded is to be calculated by reference to the deductibles set out in s 16(3). If the assessment exceeds 33%, the plaintiff is entitled to receive in full the proportion of the maximum sum applicable.

A note appended to s 16 *Civil Liability Act* describes the following method of assessing damages in accordance with the table of deductibles:

> The following are the steps required in the assessment of non-economic loss in accordance with this section:
>
> Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.
>
> Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under s 17.
>
> Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table.
>
> Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.

The issue of what constitutes a most extreme case has been considered in a number of decisions arising out of provisions of the *Motor Accidents Act* that are identical to those now in the *Civil Liability Act*: *Matthews v Dean* (1990) 11 MVR 455; *Dell v Dalton* (1991) 23 NSWLR 528; *Kurrie v Azouri* (1998) 28 MVR 406. In each case, the courts involved confirmed that the use of the indefinite article "a" allowed for questions of fact and degree to be taken into account in determining whether the severity of injury was such that the maximum sum was to be awarded.

In *Dell v Dalton*, above, Handley JA said at 533:

> In my opinion the definition of non-economic loss and the bench mark in s 79(3) do not enact a statutory table of maims which reduces all human beings to some common denominator and require the impact of particular injuries on a given individual to be ignored.

Another issue that has been dealt with on several occasions is the manner in which damages as a proportion of the maximum are to be assessed. Cautions have been expressed against having regard to the consequences in monetary terms of deciding on a particular percentage, where assessments below 33% may have significant consequences. In *Clifton v Lewis* [2012] NSWCA 229 Basten JA said at [57]:

> It is true that a small variation in the assessment may have significant consequences for the amount of damages to be awarded. In the present case, according to the table provided in s 16 of the *Civil Liability Act*, a 25% assessment as a proportion of a most extreme case will permit an award of 6.5% of the maximum amount fixed by statute; a 33% assessment will result in 33% of the maximum amount. In rough terms, an increase of one-third in the assessment results in an increase of 500% in the award. However, the fact that a small change in the assessment can have a large consequence in monetary terms does not mean that the nature of the assessment changes or can be assumed to be a more precise exercise than it is. The relationship between the assessment and the consequence is fixed by Parliament. To assess the proportion of a most extreme case by reference to the consequence in monetary terms would be to adopt a legally erroneous course.

Consistent with the *Dell* approach, a trial judge, assessing the proportion of a most extreme case, is not required to arrive at an unrealistic level of precision provided the percentage falls within a reasonable range of assessment: *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, Basten JA.

The age of a plaintiff may have an effect on the assessment of non-economic loss under the *Civil Liability Act*. In *Reece v Reece* (1994) 19 MVR 103, the Court of Appeal remarked upon the need, when assessing, on a proportionate basis, the severity of injury, to consider the age of a plaintiff and the likely length of the period over which the pain and suffering of progressive disability would be suffered. The court held that the consequence of particular injuries were likely to be more severe in the case of a younger person than that of an elderly plaintiff who had a much shorter period of life expectancy.

The requirement to consider the age of the plaintiff was confirmed in *Marshall v Clarke* (unrep, 5/7/94, NSWCA) and *Christalli v Cassar* [1994] NSWCA 48 at [3]. In *Varga v Galea* [2011] NSWCA 76, McColl J noted at [72] that age was only one of numerous matters to be taken into account in assessing non-economic loss by reference to the definition of that term in s 3 *Civil Liability Act*.

The principles adopted in *Reece v Reece* and *Varga*, above, did not apply to claims under the *Motor Accidents Compensation Act* or the *Motor Accident Injuries Act* 2017 where damages are not assessed by reference to a proportion of a most extreme case: *RACQ Insurance Ltd v Motor Accidents Authority (NSW) (No 2)* (2014) 67 MVR 551 per Campbell J.

The court is required to assess the totality of the plaintiff's injuries rather than assessing each injury on an individual basis: *Holbrook v Beresford* (2003) 38 MVR 285. However, where the plaintiff suffered injury in multiple accidents, the assessment is to be made by reference to the injuries suffered in each individual accident: *Muller v Sanders* (1995) 21 MVR 309.

The plaintiff in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219 claimed for damages both under the *Civil Liability Act* and the Australian Consumer Law. The issue to be determined was whether her claim for non-economic loss should be calculated according to the more generous provisions of s 16 of the *Civil Liability Act* or in accordance with s 87M of the *Competition and Consumer Act* 2010. Macfarlan JA, with whom Simpson JA and Campbell AJA agreed, rejected the argument that the Commonwealth legislation prevailed. He said the *Competition and Consumer Act* did not purport to, nor did it, have the effect of excluding recovery of non-economic loss under the *Civil Liability Act* notwithstanding that causes of action were available to the plaintiff under both Acts.

The Court of Appeal dealt with the principles to be applied in the assessment of damages for false imprisonment in *State of NSW v Smith* [2017] NSWCA 194. The court referred to texts and authorities that emphasised that "[e]ven apparently minor deprivations of liberty are viewed seriously by the common law" (see *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 128 FCR 54; [2003] FCAFC 70 at [88]). Damages in such a case, therefore, are intended to take account of, in addition to the deprivation of liberty, the shock of the arrest and injury to feelings, dignity and reputation.

## [7-0050] Pecuniary losses

This head of damage includes income loss, superannuation losses and out-of-pocket expenses such as voluntary and commercially provided care expenses.

**Income loss**

The authorities make it clear that damages for lost income, past and present, are awarded for impairment to income-earning capacity when the impairment is productive of income loss: *Graham v Baker* (1961) 106 CLR 340; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. There are therefore three questions to be answered in assessing income.

1. What was the plaintiff's income-earning capacity at the time of injury?
2. To what extent was it impaired by the injury?
3. To what extent was the impairment productive of income loss?

A very useful summary of the applicable principles, with reference to authority, was provided by McColl JA and Hall J in *Kallouf v Middis* [2008] NSWCA 61 at [44]–[61].

1. Damages for past and future loss of income are allowed because diminution of earning capacity is or may be productive of financial loss: *Graham v Baker*, above. An alternative way of expressing the principle is that the plaintiff is compensated for the effect of an accident on the plaintiff's ability to earn income: *Medlin v State Government Insurance Commission*, above, McHugh J at [16].
2. Although the exercise involves assessment of lost earning capacity and not loss of earnings, evidence of wage rates, known for the past and likely in the future, provides a basis for assessment.
3. Both the lost capacity and the economic consequences of that loss must be identified before it will be possible to assess the sum that will restore the plaintiff to his or her position but for injury.
4. What was earned in the past may be a useful guide to what might be earned in the future but it does not always provide certain guidance.
5. Assessment of future income loss necessarily involves the consideration of future possibilities or hypothetical events. The exercise is imprecise and carried out within broad parameters.
6. Evaluation of the extent to which a plaintiff may in future lose time from work and of the proper compensation to be allowed depends on the evidence.
7. An error of principle would be involved in concluding, in the absence of evidence, as a matter of certainty that a plaintiff will suffer future income loss.
8. The onus is on the plaintiff to provide evidence in support of the claimed diminution in earning capacity. Past income is relevant to this consideration but is not always determinative.
9. The onus is on the defendant who contends that the plaintiff has a residual earning capacity to provide evidence of the extent of that capacity and of the availability of employment.
10. In both cases the evidence must establish more than a mere suggestion of loss or capacity.
11. Where it is clear that income-earning capacity has been reduced but its extent is difficult to assess, the absence of precise evidence will not necessarily result in non-recovery of damages. The task is to consider a range of what may be possibilities only that a particular outcome might be achieved to arrive at an award that is fair and reasonable.

Tax treatment of a plaintiff's income may be relevant to the assessment of his or her income-earning capacity. There are cases where tax returns do not reflect the full amount of that capacity. For example, the case of a husband and wife partnership, where income is divided equally although one partner performs the work necessary to generate the income while the other undertakes the administrative tasks associated with the operation of the business.

*Husher v Husher* (1999) 197 CLR 138 was an example of such a case. The plurality of the High Court noted:

- all of the income of the partnership was the result of exploitation of the plaintiff's earning capacity
- the partnership continued at will; it was a matter for the plaintiff if he chose to continue it
- the plaintiff therefore had under his control and at his disposal the whole of the fruits of his skill and labour.

These principles were applied by the Court of Appeal in *Conley v Minehan* [1999] NSWCA 432.

In *Morvatjou v Moradkhani* [2013] NSWCA 157, it was said that it was glaringly improbable that the plaintiff earned only the income disclosed in his tax returns at a time when he was supporting

himself, his wife and two children. McColl JA referred to reasons of von Doussa J in *Giorginis v Kastrati* [1988] 49 SASR 371 in which he said that, while such a discrepancy reflected on a plaintiff's credit so that his or her evidence generally needed to be scrutinised with special care, it did not necessarily disqualify him or her from recovering damages based on evidence of actual earnings. McColl JA did not endorse the proposition that a plaintiff must admit failure to disclose income to tax authorities but she continued the Court of Appeal's emphasis on the need to assess diminution of income-earning capacity, acknowledging that evidence of actual income was the most useful guide when undertaking this exercise.

*Malec v Hutton* and *Medlin v State Government Insurance Commission*, above, were High Court decisions, the result of which was that, where a plaintiff demonstrates some loss of earning capacity extending beyond the date of trial, although difficult to assess, the courts are bound to award something unless, on the material before the court, it can be seen confidently that the damage suffered by the plaintiff will not in fact be productive of income loss.

The task of assessment of future loss, particularly where there is little or no evidence of loss to the date of hearing, was clarified in *State of NSW v Moss* (2002) 54 NSWLR 536 where the plaintiff's injuries clearly pointed to an effect on his capacity to earn and there was therefore evidence of impaired earning capacity. Heydon JA said it was wrong to conclude that damages to compensate for this loss should be minimal. He referred at [69] to authorities that he said contained two uncontroversial themes.

1. In general it was desirable for precise evidence to be called of pre-injury income and likely post-injury income.
2. Absence of that evidence will not necessarily result in an award of no or nominal damages for impaired earning capacity.

His Honour's summary at [89] was:

> In short, where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages. Statements to the contrary such as those made in *Allen v Loadsman* [1975] 2 NSWLR 787 at 792 are not correct: *Baird v Roberts* [1977] 2 NSWLR 389 at 397–8 per Mahoney JA; *J K Keally v Jones* [1979] 1 NSWLR 723 at 732–735 per Moffitt P; *Yammine v Kalwy* [1979] 2 NSWLR 151 at 154–5 and 156–7 per Reynolds JA and Mahoney JA; *Thiess Properties Pty Ltd v Page* (1980) 31 ALR 430; see also *Radakovic v R G Cram & Sons Pty Ltd* [1975] 2 NSWLR 751 at 761 where Samuels JA criticised the "meagre facts" provided but did not say it was not open to the jury to find a substantial sum for diminished earning capacity by the "application of their own knowledge and experience". The task of the trier of fact is to form a discretionary judgment by reference to not wholly determinate criteria within fairly wide parameters. Though the trier of fact in arriving at the discretionary judgment must achieve satisfaction that a fair award is being made, since what is involved is not the finding of historical facts on a balance of probabilities, but the assessment of the value of a chance, it is appropriate to take into account a range of possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility.

In *Cupac v Cannone* [2015] NSWCA 114 the Court of Appeal noted the extremely difficult task of assessment of income loss facing the trial judge when dealing with wildly differing medical opinion and the failure to call any medical expert for cross examination. The court rejected the contention that the award for past income loss should be increased to take account of inflation from the date of the plaintiff's injury. This was because the trial judge was required to estimate loss when precise calculation was not possible and the figure arrived at took into account a range of factors, including the changing value of money.

In *Jopling v Isaac* [2006] NSWCA 299 the Court of Appeal confirmed that, notwithstanding the requirement of s 13(1) *Civil Liability Act* that the plaintiff's most likely future circumstances, but for

injury, be taken into account, the principles of *State of NSW v Moss*, above, continued to apply when the evidence was deficient and that the option of awarding a cushion or buffer as compensation for future economic loss remained available. This was confirmed in *Black v Young* [2015] NSWCA 71, where the court also confirmed the need to address specifically the provisions of *Motor Accidents Compensation Act* 1999 s 126 to the circumstances of each particular case.

In *Thorn v Monteleone* [2021] NSWCA 319 the Court of Appeal upheld the award of a buffer or cushion for economic loss to compensate the plaintiff for the future prospect of becoming a farm manager or operating his own farm. The buffer of $150,000 was awarded on top of an assessment that the plaintiff had an ongoing loss of $900 per week because he unfit to perform his pre-injury duties.

A similar problem arose in *Younie v Martini* (unrep, 21/3/95, NSWCA) when the plaintiff suffered no income loss to the date of trial. The court held, however, that an assessment that the plaintiff suffered significant impairment to the extent of 18% should have resulted in a finding of impaired income capacity. In this case, given the nature of the plaintiff's duties as a nursing assistant, having found that the injury continued to the date of trial, some award ought to have been made for future economic loss.

Nevertheless, as pointed out by Young AJA at [111] in *Perisher Blue Pty Ltd v Harris* [2013] NSWCA 38, there can be no compensation for loss of income-earning capacity unless it is also established that diminished capacity is productive or is likely to be productive of actual loss.

In *Sharman v Evans* (1977) 138 CLR 563 the High Court dealt with the question of the adjustment to be made to the award for income loss where the plaintiff's injuries were such that she was not expected to live to retirement age. The court held that she was entitled to recover income loss during the lost years subject to the deduction of an amount to account for the expenses that she would have incurred in self maintenance. No deduction was required for the expense of maintaining dependants.

*Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 set aside any suggestion that a working mother's income should be reduced to account for expenses of providing childcare or domestic help or for the prospect that she "would at some stage (choose) or (be) forced to accept a less demanding job" because she "would be unable or unwilling to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband": Dawson, Toohey, Gaudron, Gummow JJ at [9]. They pointed out that it was necessary to call evidence that suggested a plaintiff was less able than any other career-oriented person, whether male or female, to combine successfully a demanding career and family responsibilities. Childcare and domestic-care responsibilities, they said, did not always involve expenditure. This was a matter of choice for the family and the expense involved was of a private or domestic nature.

*White v Benjamin* [2015] NSWCA 75 also rejected the proposition that a wife's future income loss should be discounted because her husband's secure employment in a flourishing business might persuade her to abandon her own career ambitions.

Specific evidence is required if a plaintiff proposes to work beyond retirement age: *Roads and Traffic Authority v Cremona* [2001] NSWCA 338. In that case the court accepted a general practitioner's evidence that he would continue to work to the age of 70 years but the assessment of his income loss beyond retirement age was reduced to take account of the likelihood that, as he advanced in age, he would earn less.

A certificate of assessment of whole person impairment issued under *Motor Accidents Compensation Act* 1999 s 61 is not conclusive in respect of economic loss: *Pham v Shui* [2006] NSWCA 373, *Brown v Lewis* (2006) NSWLR 587; [2006] NSWCA 87, *Motor Accidents Authority of NSW v Mills* (2010) 78 NSWLR 125; [2010] NSWCA 82, *El-Mohamad v Celenk* [2017] NSWCA 242. While the content of the certificate may have some relevance, extreme caution was required in relying on the content of the certificate in assessing damages for economic loss: *Brown v Lewis*, above, Mason P at [23].

***Loss of income from operation of a business***

Difficulties arise in valuing a plaintiff's loss when they are self-employed or operate a business through a partnership, trust or company. The starting point is the joint judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ in *Husher v Husher* (1999) 197 CLR 138 at [16], which states that the basic principles for the assessment of damages are well known and should not be obscured by particular factual contexts. These principles require the "identification of what earning capacity has been impaired or lost and what financial loss has been occasioned by that impairment or loss": at [17].

Poor accounting practices, lack of tax returns for previous years, variations in revenue and expenditure from year to year, inability to estimate capacity for expansion and economic downturns (including events such as pandemics) are examples of occurrences that cause particular problems. The problem may be aggravated where a plaintiff intends to start a business but has not done so at the time of injury.

Sometimes a plaintiff's absence through injury may not adversely impact the profits of an established business, and it is difficult to estimate the financial loss incurred by the plaintiff's absence. Conversely, the incurrence of a loss does not necessarily mean that it is recoverable by the plaintiff, or anyone else. Similarly, the wage drawn from a business by a self-employed person may not be a true reflection of earning capacity. A court is required to do its best on the material available to measure the loss that is due to the injury: *Ryan v AF Concrete Pumping Pty Ltd* [2013] NSWSC 113 at [211] and *New South Wales v Moss* (2000) 54 NSWLR 536 at [72] (Heydon JA).

The requirement to mitigate the loss will ordinarily mean that the damages cannot exceed the cost of employing someone to do what the injured plaintiff is unable to do. However, in an appropriate case the entrepreneurial efforts of a business proprietor may need to be rewarded by a percentage uplift on the wages of the replacement employee or employees. Alternatively, a loss of profit is recoverable if it reflects the pecuniary value of the plaintiff's physical and intellectual labour, such as self-employed professionals who are dependent on rendering fees for services.

**Vicissitudes**

It is an acknowledged principle that life is not always certain and that unpredictable events can affect future income. These events or vicissitudes are dealt with by of the application of a discount to the sum assessed as compensation for future income losses.

In *State of NSW v Moss*, above, Mason P at [33], referring to *Wynn v NSW Insurance Ministerial Corporation*, above, at 497, said that the negative consequences or vicissitudes that are normally taken into account are sickness, accident, unemployment and industrial disputes.

In *Norris v Blake (No 2)* (1997) 41 NSWLR 49 Clarke JA confirmed that it was in order to add a sum against the positive contingency of success or income-earning capacity beyond pension age.

In NSW, 15% is the conventional allowance made for vicissitudes. In *FAI Allianz Insurance Ltd v Lang* [2004] NSWCA 413 at [18] Bryson JA described the conventional allowance as "an expedient and approximate resolution of many imponderables, and the difficulty of producing a justification for any greater or lower figure in a particular case tells strongly against departing from the conventional figure". In *State of NSW v Moss* at [100] Heydon JA described it as the starting point and the finishing point in most cases.

The conventional discount of 15% may be varied to take account of particular circumstances. For instance, where the plaintiff is of advanced age with a relatively short period over which the assessment of future income loss is to be made, the percentage applied for vicissitudes may be reduced. It is more common, however, that the percentage is increased, particularly where there is evidence of a pre-existing condition, unrelated to the injury that is the subject of the claim, that is likely to affect the plaintiff's capacity to continue to earn income: *Berkley Challenge Pty Ltd v Howarth* [2013] NSWCA 370.

In *Taupau v HVAC Constructions (Qld) Pty Ltd* [2012] NSWCA 293, Beazley JA at [190]–[192] said that the plaintiff's past record of imprisonment should not have altered the principles on which his past and future income loss was assessed in any way differently from the principles applied to law abiding members of the community. However, it would have been appropriate to take the plaintiff's propensity to crime and imprisonment into account by way of the discount for vicissitudes.

Care should be exercised to avoid double counting. In *Smith v Alone* [2017] NSWCA 287, the plaintiff's pre-accident income had been limited by his pre-existing alcohol dependency. The trial judge took account of this factor in assessing the sum to be awarded for income loss and further decreased the award by 35% for vicissitudes. Macfarlan JA, with whom Meagher and White JJA agreed, said at [58]:

> Both parties accepted that the usual discount to damages for future economic loss that is made for contingencies or "vicissitudes" is 15%. As the plurality said in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497; [1995] HCA 53, this discount is to "take account of matters which might otherwise adversely affect earning capacity" and "death apart, 'sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of the loss of income'" (ibid, citing Harold Luntz, *Assessment of Damages for Personal Injury and Death*, (3rd ed 1990, Butterworths) at 285).

In re-assessing the deduction at 25%, Macfarlan JA at [63] said:

> After all, the average person can hardly be regarded as a paragon of virtue when it comes to heavy drinking.

Care should exercised before departing from the conventional figure to identify and express reasons as to why the plaintiff's future income is likely to be affected by contingencies to any different or greater degree than normal, notwithstanding that a trial judge's conclusion is likely to be evaluative and impressionistic: *Fuller v Avichem Pty Ltd t/as Adkins Building and Hardware* [2019] NSWCA 305 at [69]–[70] (Macfarlan JA) and [105] (Payne JA, White JA agreeing).

**Statutory provisions**

The *Workers Compensation Act* places stringent limits on the recovery of common law damages from an employer, except where the claim is the result of a motor accident. Section 151G disallows any award of common law damages except that which arises out of past and future losses from impairment to income-earning capacity. In order to qualify for any right to claim, the plaintiff must have been assessed with a degree of permanent impairment of at least 15%: s 151H.

Any amount by which the plaintiff's net weekly earnings exceed or are likely to exceed the amount of gross weekly compensation payments payable under s 34 of the Act is to be disregarded: s 151I. Damages are payable only to pension age as defined by the *Social Security Act* 1991: s 151IA.

No damages for pure mental harm, or nervous shock, may be claimed where the injury was not a work injury: s 151AD. This provision disallows any claim for nervous shock by, for instance, a relative of an injured worker.

Damages are not to be reduced on account of contributory negligence to the extent that the amount awarded is less than the court's estimate of the value of the plaintiff's entitlements by way of commutation of weekly payments of compensation: s 151N.

The defence of voluntary assumption of risk is not available to a claim under the Act but damages are to be adjusted to take account of the plaintiff's negligence: s 151O.

The *Civil Liability Act* limits an award of damages for past or future income loss by providing that the court must disregard any amount by which the plaintiff's gross weekly earnings exceed average weekly total earnings of all employees in NSW in the most recent quarter prior to the date of the award as published by the Australian Statistician: s 12.

In respect of future income loss, s 13 requires a plaintiff to establish assumptions about earning capacity that accord with his or her most likely future circumstances but for the injury. The calculation based on those assumptions must be discounted against the possibility that those circumstances might not eventuate. The court is required to state the assumptions on which the award is based and the percentage by which it has been adjusted. The same provision appears in s 126 *Motor Accidents Compensation Act*.

In *Coles Supermarkets Australia Pty Ltd v Fardous* [2015] NSWCA 82 Macfarlan JA said that the requirements of s 13 of the *Civil Liability Act* were in accordance with the principles established in *Purkess v Crittenden* (1965) 114 CLR 164 and *Morvatjou v Moradkhani* [2013] NSWCA 157, namely that a plaintiff at all times bears the onus of proof of the extent of injury and of consequential loss of income-earning capacity. They accorded also with the two-stage process of assessment described in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 that required a plaintiff to establish his or her theoretical earning capacity but for injury and the extent to which that earning capacity would, but for injury, have been productive of income.

Notwithstanding these requirements, common law principles relating to the assessment of income loss, vicissitudes or contingencies continue to apply: *Taupau v HVAC Constructions (Qld) Pty Ltd*, above, where Beazley JA said ss 12 and 13 made no change to the common law principles, established in *Graham v Baker* and *Medlin v SGIO*, that damages for economic loss, past and future, are awarded for impairment to economic capacity resulting from the injury, provided the impairment is productive of income loss.

The *Motor Accidents Compensation Act* provides in s 125 for a limit on the weekly amount that may be awarded for income losses. The amount of the cap is indexed annually with effect from 1 October in each year. Section 130 requires the court to deduct from payments on account of income loss expenses paid to the plaintiff under the *Victims Compensation Act 1996* (repealed, now *Victims Rights and Support Act* 2013) or by the insurer or Nominal Defendant.

As to the *Motor Accident Injuries Act* 2017, see [7-0085] under the subheading **Economic loss**.

The problems presented to a court in meeting the requirements of s 13 *Civil Liability Act* have been the subject of judicial comment in many decisions. In *MacArthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145, Hodgson J noted that s 13 appeared to make no provision for the contingency that a plaintiff's income might increase significantly. He said it was doubtful that the court could make allowance as in *Norris v Blake (No 2)*, above, for the prospect of superstardom.

Hodgson J also expressed doubt about the power to award a lump sum or buffer when assessing income loss under s 13. This concern was put to rest in *Dunbar v Brown* [2004] NSWCA 103 where the court held that a buffer could be allowed to account for absences from work from time to time to allow for periods of respite or treatment. This principle has been applied in a number of subsequent decisions, including *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302 where McColl JA said at [30]:

> there is a point (which may be differently assessed by different courts) beyond which the selection of a figure for economic loss is so fraught with uncertainty that the preferred course is to award a lump sum as a "buffer", without engaging in an artificial exercise of commencing with a precise figure, and reducing it by a precise percentage.

Each statute provides for the net present value of any lump sums paid on account of future income loss to be discounted at a prescribed rate, currently 5%: *Workers Compensation Act*, s 151J; *Civil Liability Act*, s 14; *Motor Accidents Compensation Act*, s 127.

**Superannuation**

The maximum recoverable for the loss of employer contributed superannuation is that required by law to be paid by the employer: *Civil Liability Act*, s 15C.

In general terms, where a claimant is injured during their working life, what is awarded in relation to superannuation benefits is the net present value of the court's best estimate of the fund that the claimant would have had at the date of retirement but for the injury; namely, a fund which would have generated the "lost" superannuation benefits. The capital asset that is being valued (because it is lost) is the present value of the future rights: *Amaca Pty Ltd v Latz* (2018) 92 ALJR 579 at [97] applying *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354 at [54], [59], [66]–[67]. The loss suffered is the diminution in value of the asset: *Amaca Pty Ltd v Latz* at [97].

In *Amaca Pty Ltd v Latz*, the respondent, who had retired, was in receipt of a superannuation pension and the Commonwealth age pension when diagnosed with terminal malignant mesothelioma. The Full Court of the Supreme Court of South Australia held the value of both pensions were compensable losses, but reduced the award to take into account a reversionary pension payable to his partner after death under the *Superannuation Act* 1988 (SA), s 38(1)(a). The High Court by majority held that the Full Court was correct to include in the damages award an allowance for the superannuation pension that he would have received for the remainder of his pre-illness life expectancy, less the reversionary pension. The majority held that that his superannuation benefits are a "capital asset", which has a present value, and which can be quantified: at [101]. As a result of the respondent's injury caused by the appellant, he would suffer an economic loss in respect of his superannuation pension, which is a capital asset and intrinsically connected to earning capacity. That loss was both certain and measurable by reference to the terms of the *Superannuation Act* — the net present value of the superannuation pension for the remainder of his pre-illness life expectancy, a further 16 years, and he should be entitled to recover that loss: at [109]. The age pension however is neither a part of remuneration, nor a capital asset. It is not a result of, or intrinsically connected to, a person's capacity to earn and no sum should be allowed on account of the age pension in the calculation of damages for the respondent's personal injuries: at [115].

In *Najdovski v Cinojlovic* (2008) 72 NSWLR 728 the court, by majority, confirmed the adopted practice of awarding 9% if the calculation is based on a gross earning figure or 11% if calculated on earning, net of tax.

**The Fox v Wood component**

This element of income loss arises in situations where a plaintiff has received weekly payments for loss of income under the workers compensation legislation upon which tax has been paid. The plaintiff when recovering common law damages is required to repay to the workers compensation insurer the gross amount of weekly payments received. The tax paid on those weekly payment was held to be recoverable in *Fox v Wood* (1981) 148 CLR 438 at 441.

## [7-0060] Out-of-pocket expenses

**Medical care and aids**

Out-of-pocket expenses incurred by a plaintiff are recoverable to the extent that they are:

- reasonably incurred, and
- expended in the treatment of injuries arising out of the accident that is the basis for the claim.

In many cases where liability is not in issue, the insurer will pay for or reimburse out-of-pocket expenses that meet these requirements. Section 83 *Motor Accidents Compensation Act* obliges an insurer, when liability is admitted in whole or in part, to meet the plaintiff's reasonable expenses of medical care, rehabilitation and certain respite and attendant care services. Payment of these expenses is commonly raised as a defence to a claim.

In general, claims for out-of-pocket expenses centre on needs for treatment, past and future, rehabilitation and aids to assist a plaintiff in overcoming disability arising from injury. As with

income loss, in determining the amount to be awarded, it is often necessary to take account of future requirements for treatment, particularly in the case of orthopaedic injuries that may involve ongoing degeneration and the need for surgery for fusion or replacement of joints.

The assessment for future needs involves consideration of the following:

- has the requirement been established as a probability?
- when is the expense likely to be incurred?
- the extent to which treatment will affect income-earning capacity, so that loss of income may have to be taken into account
- in a plaintiff of relative youth, the extent to which surgery may need to be repeated.

Aids to assist in overcoming disability include items such as artificial limbs, crutches, wheelchairs and special footwear as well as the costs of providing or modifying accommodation to meet the plaintiff's needs. In addition, allowance may be made for the cost of providing special beds, tools or equipment designed to assist an impaired plaintiff in the functions of everyday living.

Section 3 *Motor Accidents Compensation Act* includes in the definition of "injury" damage to artificial members, eyes or teeth, crutches and other aids or spectacle glasses. Thus, the cost of repair or replacement of these items is compensable. Other items held to be compensable include clothing damaged in the course of the accident or treatment.

As to the *Motor Accident Injuries Act* 2017, see [7-0085].

The fact that the treatment fails or is ineffective does not preclude recovery (*Lamb v Winston (No 1)* [1962] QWN 18) but the cost of experimental treatment that offers no cure will not be recoverable. *Neal v CSR Ltd* (1990) ATR ¶81-052 held that the cost of a treatment that remained at trial stage was disallowed.

The issue of whether an expense could be regarded as reasonable was discussed in *Egan v Mangarelli* [2013] NSWCA 413. The plaintiff claimed the considerable cost of a C-leg prosthesis, a specialised computerised device. He explained that he did not, prior to trial, use his conventional prosthesis regularly or for extended periods because it caused him pain. The cost of the C-leg prosthesis was held to be reasonable because, properly fitted, it would reduce the plaintiff's pain, lead to greater use and improve his mobility.

*McKenzie v Wood* [2015] NSWCA 142 dealt with the issue of whether the plaintiff should recover the cost of a hip replacement. The evidence established that prior to his accident, the plaintiff suffered from symptoms of osteoarthritis and it was inevitable that he would at some stage require hip replacement that could have been undertaken in a public hospital at no expense to him. The Court of Appeal accepted that the replacement that would have been required as a result of the pre-accident progressive condition was unlikely to involve the urgent intervention necessitated by the injury suffered in the accident. Accordingly the plaintiff was entitled to recover the cost.

The capital costs of modifications to accommodation to meet the needs of a disabled plaintiff are recognised as recoverable out-of-pocket expenses and no allowance is to be made for the increase in the capital value of a property modified for that purpose: *Marsland v Andjelic* (1993) 31 NSWLR 162. In most cases, the cost of the basic accommodation itself is not recoverable. In *Weideck v Williams* [1991] NSWCA 346, the court said this was not a strict rule and that, in accordance with the principles of *Todorvic v Waller* (1981) 150 CLR 402, each case was to be decided on its facts. In *Weideck*, the injured plaintiff could no longer live in the caravan he occupied prior to his injury. He was allowed the full capital costs of modifications required to deal with his disability. In addition, he was allowed the costs of land and a basic house, heavily discounted to set off the rent he otherwise would have continued to pay and the income that ordinarily would have been diverted to the provision of a capital asset, such as a house.

The majority in the High Court in *Cattanach v Melchior* (2003) 215 CLR 1 awarded damages for the cost of raising and maintaining a child born as the result of medical negligence. In response to *Cattanach v Melchior*, s 71 *Civil Liability Act*, was enacted to prevent claims for economic loss for the cost of rearing or maintaining a child or the loss of earnings forgone while rearing the child, except where the child suffers from a disability, where the additional costs of rearing and maintaining a child who suffers from a disability are recoverable. Section 71 does not prevent the recovery of damages for pregnancy and birth of a child, where the pregnancy is the result of negligence, such as a failed sterilisation procedure: *Dhupar v Lee* [2022] NSWCA 15 at [172]. Further, s 71 does not prevent the recovery of damages for physical or psychiatric injury sustained during or as a consequence of the birth: *Dhupar* at [175]–[176].

**Attendant care**

There are two varieties of attendant care: those that are provided by friends or family on a gratuitous basis and those that are commercially provided and paid for. As with all heads of damage, a plaintiff may recover compensation for the loss of capacity for self and domestic care only if the need for the care arises out of injuries suffered as a result of the defendant's negligence and provided that the amount claimed is reasonable.

The issue that has been most productive of judicial and legislative scrutiny is that arising out of claims for services provided on a gratuitous basis.

The High Court in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 dealt with the issue of whether a plaintiff could be said to have suffered a compensable loss when her attendant care needs of a domestic and nursing nature were met by an unpaid third party and to whom she owed no obligation of payment. The argument was that the loss was in truth suffered by the person who provided the services. Gibbs CJ at [12], discarding prior authority, said that damages for gratuitously provided services were payable if three conditions were met.

1. It was reasonably necessary to provide the services.
2. It would be reasonably necessary to do so at a cost.
3. The character of the benefit that the plaintiff received by the gratuitous provision of services was such that it ought to be brought to the account of the wrongdoer.

Mason J at [30] set out the principle upon which compensation was payable to the plaintiff rather than the volunteer as follows:

> The respondent's relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services and this loss is to be quantified by reference to the value or cost of providing those services. The fact that a relative or stranger to the proceedings is or may be prepared to provide the services gratuitously is not a circumstance which accrues to the advantage of the appellant. If a relative or stranger moved by charity or goodwill towards the respondent does him a favour as a disabled person then it is only right that the respondent should reap the benefit rather than the wrongdoer whose negligence has occasioned the need for the nursing service to be provided.

The issue in *Van Gervan v Fenton* (1992) 175 CLR 327 was the basis upon which this element of compensation was to be valued. In a majority decision, the High Court rejected the argument that the plaintiff's loss of capacity was to be valued by reference to the income lost by the person providing gratuitous services. Mason CJ, Toohey and McHugh JJ said at [16] that the true basis of a claim was the need of the plaintiff for gratuitous services and the plaintiff did not have to establish that the need was or might be productive of income loss. The value of the plaintiff's loss, they said, was the ordinary market cost of providing the services.

*Kars v Kars* (1996) 187 CLR 354, where the defendant was the plaintiff's husband and provided attendant care services, involved the argument that the defendant thereby met his obligations as a tortfeasor and no further compensation could be recovered. In rejecting the argument, the High

Court confirmed that *Griffiths v Kerkemeyer* principles are directed at the loss of capacity suffered by a plaintiff and that, although the resulting need for care is quantified by reference to what the care provider does, the focus remains on the plaintiff's needs.

Justices Toohey, McHugh, Gummow and Kirby said:

> The plaintiff might, or might not, reimburse the provider. According to the repeated authority of this Court, contractual or other legal liability apart, whether the plaintiff actually reimburses the provider is entirely a matter between the injured plaintiff and the provider.
>
> …
>
> The starting point to explain our conclusion is a clear recollection of the principle that the Court is not concerned, as such, to quantify a plaintiff's loss or even to explore the moral or legal obligations to a care provider. It is, as has been repeatedly stated, to provide the injured plaintiff with damages as compensation for his or her need, as established by the evidence. The fact that a defendant fulfils the function of providing services does not, as such, decrease in the slightest the plaintiff's need.

In *CSR v Eddy* (2005) 226 CLR 1, the High Court noted at [26] that the *Griffiths v Kerkemeyer* principles were anomalous and controversial. The anomaly arose from the departure from the general rule that damages, other than damages for loss not measurable in money, were not recoverable unless the injury involved resulted in actual financial loss. The controversy arose because the result could be disproportionately large awards when compared to sums payable under traditional heads of damage.

These principles were confirmed in *Hornsby Shire Council v Viscardi* [2015] NSWCA 417 and *Smith v Alone* [2017] NSWCA 287. In *Smith* Macfarlan JA at [75]–[77] referred to authority that supported the proposition that consideration must be given to a plaintiff's family circumstances in deciding whether the provider of gratuitous care will continue to do so in the future. He also accepted that in appropriate circumstances a deduction for vicissitudes might be appropriate when assessing a claim for attendant care costs.

**Legislative provisions**

The legislation that attempts to address the concerns expressed by the High Court appears in ss 15, 15A and 15B *Civil Liability Act* at and in ss 141B, 141C and 142 *Motor Accidents Compensation Act*. There are some substantial differences between these provisions. The *Civil Liability Act* sets out in s 15(1) definitions of attendant care services and gratuitous attendant care services and, in s 15(2) specifies the conditions to be satisfied to qualify for compensation, namely: a reasonable need for the services, a need created solely because of the injury to which the damages relate, and services that would not be provided but for the injury.

Both statutes impose a threshold on the recovery of damages that requires that not less than six hours per week be provided for a period of at least six consecutive months: s 15(3) *Civil Liability Act*; s 141B(3) *Motor Accidents Compensation Act*. In each case the maximum amount recoverable is set, where services are provided for more than 40 hours per week at the weekly sum that is the Australian Statistician's estimate of the average weekly total earnings of all employees in NSW, and where the weekly requirement is less than 40 hours, at the hourly rate that is one-fortieth of this figure: s 15(4) *Civil Liability Act*, s 141B(4) *Motor Accidents Compensation Act*.

As to the *Motor Accident Injuries Act* 2017, see [7-0085].

In *Hill v Forrester* (2010) 79 NSWLR 470, the Court of Appeal confirmed that both requirements of s 15(3), as amended following the decision in *Harrison v Melham* (2008) 72 NSWLR 380, must be met in order to qualify for compensation. The issue in *Hill v Forrester* was whether the right to compensation applied to services provided before the threshold of six hours per week of care over a period of six consecutive months was met. Sackville AJA held that only one six-month qualifying period was involved and it was not a continuing requirement. The result was that compensation was payable for services provided both before and after the threshold requirements were met.

The *Civil Liability Act* contains no equivalent provision to s 141C *Motor Accidents Compensation Act* where specific provision is made for the cost of reasonable and necessary respite care for a seriously injured plaintiff who is in need of constant care. It is probable however that these services would be covered within the definitions of attendant care services in s 15(1).

As to services that would have been provided in any event, the High Court in *Van Gervan v Fenton*, above, recognised that in the ordinary course of a marriage there is an element of give and take in the provision of mutually beneficial services. Deane and Dawson JJ at [4] said:

> The qualification is that such services will be taken out of the area of the ordinary give-and-take of marriage to the extent that the injuries to the wife or husband preclude her or him from providing any countervailing services. To that extent, the continuing gratuitous services provided by the spouse assume a different character and should be treated as additional services which have been or will be provided by that spouse to look after the accident-caused needs of the injured plaintiff.

Ipp JA in *Teuma v CP & PK Judd Pty Ltd* [2007] NSWCA 166 at [64] noted that this part of the minority judgment supported the majority in *Van Gervan* to the effect that no reduction should be made to attendant care damages to take account of the mutual obligations of family life.

*White v Benjamin* [2015] NSWCA 75 involved issues of the extent to which the time required to meet the need for attendant services could be determined separately from the needs of a household as a whole. The principle accepted by both Beazley ACJ and Basten JA was that where the elements of the claim were severable as between a plaintiff and those who also benefit from those services, no aspects of those services may be commingled for the purpose of determining whether the thresholds of six hours per week for a continuous period of six months have been met. Where those elements are not severable, the element of mutuality referred to in *Van Gervan v Fenton*, *CSR v Eddy*, above, *Hodges v Frost* (1984) 53 ALR 373 and *Coles Supermarkets Australia Pty Ltd v Haleluka* [2012] NSWCA 343, applied so that the commingled needs of a plaintiff remained the plaintiff's needs even if they were of mutual benefit.

Basten JA pointed out that s 15 of the *Civil Liability Act* did not apply to claims made under the *Motor Accidents Compensation Act* where they were dealt with in s 141B which did not mirror exactly the provisions of s 15. However, s 15B of the *Civil Liability Act* applied to motor accident claims so that it was necessary to distinguish between damages awarded for the plaintiff's personal loss and those awarded for the loss of capacity to provide services to dependents and to apply the six hour/six month thresholds separately to each claim.

Nor is it permissible to aggregate the needs created by successive breaches of duty, for example, where those needs are generated by successive accidents, in order to meet the threshold requirements of the legislation: *Muller v Sanders* (1995) 21 MVR 309; *Falco v Aiyaz* [2015] NSWCA 202.

The question of whether the need for services was generated solely by the relevant injury was dealt with in *Woolworths Ltd v Lawlor* [2004] NSWCA 209 where it was argued that the plaintiff had a pre-existing asymptomatic degenerative condition that might at some later stage produce symptoms and generate the need for services. Thus, it was argued, the need for services did not arise solely out of the aggravation of the condition for which the defendant was responsible. Beazley JA, although she said the section was not without difficulty, preferred a construction that was based on the definition of injury. This included impairment of a person's physical or mental condition so that gratuitous services provided solely as a result of such an injury, although an aggravation, were compensable. The same approach to this requirement was taken in *Basha v Vocational Capacity Centre Pty Ltd* [2009] NSWCA 409; *Angel v Hawkesbury City Council* [2008] NSWCA 130 and *Westfield Shoppingtown Liverpool v Jevtich* [2008] NSWCA 139.

*Daly v Thiering* (2013) 249 CLR 381 dealt with the issue of whether the plaintiff, a participant in the scheme established by the *Motor Accidents (Lifetime Care and Support) Act* 2006, was entitled to compensation for the gratuitous services provided by his mother. The plaintiff's mother agreed with the Lifetime Care and Support Authority to provide domestic services for the plaintiff without

pay. Although recovery of damages for gratuitously provided services is regarded as compensation for the plaintiff's loss of capacity, the High Court held that the claim was for economic loss and was precluded by s 130A *Motor Accidents Compensation Act* (now repealed) for so long as the services were provided for under the scheme. It was irrelevant that the services provided by the plaintiff's mother without expense might result in a windfall to the Authority.

**Commercially provided services**

Where care is not provided on a gratuitous basis, the reasonable cost of reasonably required commercially provided services is recoverable both for the past and future: *Matcham v Lyons* [2004] NSWCA 384. The issue of what was reasonable was dealt with in *Dang v Chea* [2013] NSWCA 80, where Garling J dealt with competing arguments concerning the services to be provided to the plaintiff who required 24-hour care. There was a considerable difference between the cost of 24-hour care in a rented apartment, as claimed by the plaintiff, and the cost of nursing-home care that the defendant argued would meet her reasonable requirements. Garling J rejected the plaintiff's contention after consideration of authority, including:

1. The test established by Barwick CJ in *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 that the aim of an award of damages was not to meet the ideal requirements for an injured plaintiff but rather his or her reasonable requirements.
2. The following extract from the reasons of Windeyer J in *Chulcough v Holley* (1968) 41 ALJR 336 at 338:

> A plaintiff is only entitled to be recouped for such reasonable expenses as will reasonably be incurred as a result of the accident. What these are must depend upon all the circumstances of the case — including the particular plaintiff's way of life, prospects in life, family circumstances and so forth. It does not follow that every expenditure which might be advantageous for a plaintiff as an alleviation of his or her situation or which could give him or her happiness or satisfaction must be provided for by the tortfeasor.

3. The following extract from the reasons of Gibbs and Stephen JJ at 573 in *Sharman v Evans* (1977) 138 CLR 563:

> The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative health benefits to the plaintiff, becomes manifest.

Accepting that the need for care was demonstrated because, although the plaintiff continued to perform domestic tasks, he did so with difficulty, the court in *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370 also accepted that his needs should be assessed on the basis that commercial services would be required after the plaintiff's family would no longer be available to care for him gratuitously. Tobias AJA rejected the argument, as without legal basis, that the court must be satisfied that the amount awarded would actually be spent. It was contrary to the authority of *Todorovic v Waller* (1981) CLR 402 at 412 that the court has no concern as to the manner in which a plaintiff uses the amount awarded.

In *Perisher Blue Pty Ltd v Nair-Smith* (2015) 320 ALR 235 the Court of Appeal accepted that the plaintiff was entitled to recover damages for the cost of commercially provided services at the established market rate rather than at the lower rate she paid for domestic assistance at the time of trial. The court continued its practice of preferring the commercial rate on the basis that it was not known how much longer the current service provider would continue to work at the lower rate.

In *Manly Fast Ferry Pty Ltd v Wehbe* [2021] NSWCA 67 at [110] the Court of Appeal accepted that the award of future damages at the commercial rate was appropriate where the plaintiff gave

evidence that by using a commercial provider he would take pressure off his brothers and where it could be inferred that if there were funds available that his brothers would cease to provide their services gratuitously.

**Loss of capacity to care for others**

In *Sullivan v Gordon* (1999) 47 NSWLR 319, the Court of Appeal held that the injured plaintiff was entitled to compensation for the lost capacity to care for a child on the same basis as that established in *Griffiths v Kerkemeyer*. This approach was set aside by the High Court in *CSR v Eddy* (2005) 226 CLR 1. The court reinstated the principles of *Burnicle v Cutelli* (1982) 2 NSWLR 26 that damages for loss of capacity to care for family members was compensable but as a component of general damages and not on *Griffiths v Kerkemeyer* principles.

Damages for the loss of capacity to provide domestic services are now dealt with in s 15B *Civil Liability Act*, a provision that applies also to claims brought under the *Motor Accidents Compensation Act*, unless the care needs have been met through the *Motor Accidents (Lifetime Care and Support) Act* or payments made by the insurer under s 83 *Motor Accidents Compensation Act*: s 15B(8), (9).

The section provides definitions of assisted care and dependants and in s 15B(2) lists four preconditions to the award of damages:

> (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of "dependants" in subsection (1) — the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and
>
> (b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and
>
> (c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:
>
> (i) for at least 6 hours per week, and
>
> (ii) for a period of at least 6 consecutive months, and
>
> (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

These requirements received scrutiny in *State of NSW v Perez* (2013) 84 NSWLR 570. Recognising the ambiguities of s 15B(2)(b), Basten JA said that the activities of a plaintiff prior to the date at which the liability arose set the upper limit of what can be claimed, provided the other requirements of the section are met. On the question of what was reasonable in all the circumstances (s 15B(2)(d)), he said the qualification did not apply to the word "need" in isolation. It qualified and required that a need for six hours of care per week for six consecutive months be reasonable. It was therefore necessary to consider the particular needs of the dependants involved.

Macfarlan JA at [39] said it was irrelevant that other family members took over the role of providing care because that care would always have to be provided by some alternative means. The right to damages addressed the needs of the dependants that would, but for injury, have been satisfied by the claimant and the question of whether those needs were reasonable in the circumstances.

The thresholds of six hours per week for six consecutive months apply and damages are quantified by reference to the limits imposed by s 15(5). The balance of s 15B is directed at avoiding duplication in the award of compensation so that:

1. If damages are awarded under the section, the assessment of non-economic loss must not include an element to compensate for loss of capacity to provide services to others: s 15B(5).
2. Damages are not recoverable:
   - by the plaintiff, if the dependant has previously received compensation for the loss of capacity for self-care: s 15B(6), or

- by a dependant for loss of capacity for self-care, if a plaintiff has previously recovered compensation for loss of capacity to provide those services: s 15B(7)
- to the extent that gratuitous attendant care services, for which the plaintiff is compensated under s 15, also extend to the care of dependants: s 15B(10).

3. A plaintiff who participates in the Motor Accidents (Lifetime Care and Support) Scheme cannot recover under s 15B if services provided under the scheme include those provided to dependants: s 15B(8).
4. In respect of a claim under the *Motor Accidents Compensation Act*, the plaintiff may not recover if payments in respect of services to dependants are made under s 83 of that Act: s 15B(9).
5. Other matters to be taken into account in the assessment of compensation are: the extent of the plaintiff's pre-injury capacity to provide services to dependants; the extent to which services provided pre-injury also benefited non-dependants; and vicissitudes: s 15B(11).

In *Amaca Pty Ltd v Novek* [2009] NSWCA 50, the plaintiff lived with her daughter and partner and cared for their two children while they worked. The defendant challenged the claim that the children were the plaintiff's dependants, arguing that the parents had partially delegated to her some of the moral and legal obligations for their care. Campbell JA, after reference to extensive authority dealing with the many aspects of dependency, said that the nature and extent of the care provided by the claimant to the children were such that a finding of dependence was open. On the same basis, he rejected the claim that the services were in fact provided to the parents and not to the children. Rejecting the claim that it was not reasonable nor within the intention of the legislation to compensate parents for the expense of providing childcare, Campbell JA said it was not clear that Parliament did not have this intention.

*Liverpool City Council v Laskar* (2010) 77 NSWLR 666 dealt with the situation where, prior to his injury, the plaintiff and his wife provided services in the nature of therapy for his profoundly disabled daughter. The defendant argued that these services were not services of a domestic nature so that they were not compensable. The defendant contrasted the definitions "attendant care services" contained in s 15 *Civil Liability Act* with the term "domestic services" appearing in the heading to s 15B. Whealy J rejected this argument. He said ss 15 and 15B addressed different objectives. Section 15B was directed, not at the care needs of an injured party, but the loss of capacity of a plaintiff to attend to the needs of dependants. Those needs, he said, should not be subjected to a restricted or narrow interpretation, they extended beyond cooking and cleaning to incorporate the very considerable personal care needs of young children and, as in this case, the needs of the plaintiff's daughter.

In contrast to ss 15, 15B does not cap the number of hours for which compensation may be provided. It caps only the hourly rate by which compensation is to be assessed. The plaintiff in *Amaca Pty Ltd v Phillips* [2014] NSWCA 249 provided 18 hours per day of care for his wife, who was suffering from dementia. Following his diagnosis with mesothelioma, he lost the capacity to provide this care, and his wife was admitted to a nursing home. The Court of Appeal upheld the award of compensation for 18 hours per day at the statutory hourly rate, rejecting the defendant's claim that the lesser cost of nursing home care should be adopted as the measure of damage and pointing out that compensation was awarded for the plaintiff's loss of capacity to provide services, not the value of those services to the recipient. Ward JA, delivering the judgment of the court, said the partial reinstatement of *Sullivan v Gordon* damages created a new statutory entitlement that did not require the plaintiff's loss of capacity to be measured by reference to the cost of providing alternative services, nor did it require account to be taken of how the plaintiff would spend the damages recovered in accordance with that entitlement.

The six hour/six month threshold must be separately assessed in respect of both the claim for the plaintiff's personal loss of capacity and to the claim of lost capacity to care for others: *White v Benjamin* [2015] NSWCA 75.

Section 15B(2) imposes two conditions on recovery of damages. First, that the claimant was in fact providing services to a dependent who had a need for the services at the time that the liability of the tortfeasor arose. And second, absent the injury, the claimant would have continued to provide such services in respect of the continuing need of the dependent: *Piatti v ACN 000 246 542 Pty Ltd* [2020] NSWCA 168 at [12] (Basten JA). The assessment of damages must take into account variables relevant to the dependent's need, for example the needs of a child will usually diminish over time where the needs of an elderly or infirm person may increase over time: *Piatti* at [15].

Damages awarded under s 15B survive the plaintiff's death where the plaintiff is entitled to prosecute a claim after death, for example pursuant to s 12B *Dust Diseases Tribunal Act* 1989 and are otherwise recoverable by dependents under the *Compensation to Relatives Act* 1987: *Piatti* at [28].

## [7-0070] Compensation to relatives

The *Compensation to Relatives Act* provides for actions to be brought on behalf of dependants of deceased victims of compensable injury to recover for loss of financial support and funeral expenses. Only one such action may be brought so that all potential beneficiaries should be nominated as plaintiffs. Insurance, superannuation, payments from provident funds or statutory benefits are not to be taken into account in assessing an award of compensation: s 3(3). The definition of dependants appears in s 4.

*De Sales v Ingrilli* (2002) 212 CLR 338 involved the very similar provisions of the *Fatal Accidents Act* 1959 (WA) and concerned the extent to which a widow's prospects of remarriage were to be taken into account in the assessment of compensation. Although unanimously recognising changing social circumstances that cast doubt on prior authority, the High Court was divided on the issue. The majority, Gaudron, Gummow, Hayne JJ and Kirby J decided that the prospect of remarriage should not be considered separately from the general, and similarly unpredictable, vicissitudes of life unless at the time of the trial there was evidence of an established new relationship. Kirby J referred to the uncertainty, distaste, cause of humiliation and judicial inconsistency likely to arise in determining the claimant's prospects of remarriage.

Gleeson CJ, McHugh and Callinan JJ said that the prospects of remarriage should be taken into account. Gleeson CJ accepted that this contingency should be dealt with when determining an appropriate adjustment for vicissitudes. He questioned the continued use of the term dependency to describe the right to compensation when, in modern society, it was common for both parties to a relationship to earn income and to have the capacity for financial self-support. He accepted, however, that each party to the relationship might have expectations of direct financial support. He also said that all elements involved in the calculation of compensation involved some speculation, including the benefits the deceased would be expected to bring to the family, the share that might be enjoyed by each dependent during the deceased's lifetime and the period of support reasonably expected by each claimant. Allowances for contingencies, he said, might take into account the deceased's health or evidence of a failing marriage.

McHugh J thought that failing to take into account the prospects of remarriage presented a danger of providing a windfall to the surviving spouse. He pointed to the anomaly involved in taking into account an established new relationship at the time of trial while making no allowance for repartnering when there was none.

In *Taylor v Owners – SP No 11564* (2014) 306 ALR 547, the High Court rejected the claim that the loss of financial support occasioned by the death of the principal income earner should be limited by the cap provided for in s 12(2) *Civil Liability Act*. They pointed out that s 125(2) *Motor Accidents Compensation Act* and the *Workers Compensation Act* referred to the deceased person's earnings and the deceased worker's earnings, terms that were not used in the *Civil Liability Act* and therefore could not be read into that Act.

The Court of Appeal, in *Norris v Routley* [2016] NSWCA 367, considered the question of an adjustment of the personal consumption figures set out in Table 9.1 "Percentage of dependency of

surviving parent and children" in H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, at [9.3.3] on the basis that the appellant's deceased husband lived frugally. Having reviewed the principles involved the court concluded that there was no legal rule that prescribed the way in which the proportion of the deceased's consumption of the household income was to be proved. This was a factor to be proved in the usual way and there was no special legal or evidentiary status attaching to the Luntz tables.

## [7-0080] Servitium

The cause of action actio per quod servitium amisit was abolished in claims arising out of motor accidents by s 142 *Motor Accidents Compensation Act*. The *Civil Liability Act* makes no reference to actions of this nature. The question of whether, nevertheless, the Act applied to claims of this nature was considered by Howie J in *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533. He held that the limits on recovery of lost income provided for in s 12 did not apply.

The High Court was asked, in *Barclay v Penberthy* (2012) 246 CLR 258, to consider whether the per quod claims had been absorbed into the law of negligence and no longer existed as separate causes of action. They answered in the negative, the plurality pointing out:

1. The action was available when:
   - the injury to an employee was wrongful, that is when injury was inflicted intentionally or through a breach of the duty of care to the employee, not to the employer, and
   - the result was that the employer was deprived of the services of the employee.
2. It was not an exception or variation to the law of negligence but remained a distinct cause of action.

See also *Chaina v Presbyterian Church (NSW) Property Trust (No 25)* [2014] NSWSC 518 Davies J at [623]–[632].

On the issue of the measure of damages available in per quod actions, the court in *Barclay v Penberthy*, above, at [57] adopted the following from H McGregor, *McGregor on Damages*, 13th edn, Sweet & Maxwell Ltd, UK, 1972 at [1167]:

> the market value of the services, which will generally be calculated by the price of the substitute less the wages the master is no longer required to pay the servant.

The court indicated that caution should be exercised in expanding the scope of recoverable damages in such actions and confirmed that they did not extend to loss of profits or recovery of sick pay, pension or medical expenses payable to the employee.

## [7-0085] Motor Accident Injuries Act 2017

The *Motor Accident Injuries Act* 2017 applies to motor accidents that occur after 1 December 2017 and provides for compensation by way of *statutory benefits* and *damages* defined in s 1.4(1) as:

> "statutory benefits" means statutory benefits payable under Pt 3.
>
> "damages" means damages (within the meaning of the *Civil Liability Act* 2002) in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle, but does not include statutory benefits.

Statutory benefits provide for compensation in the form of income loss; medical and other treatment expenses and attendant care services. The regime for the payment of statutory benefits for medical expenses and attendant care services applies to all claims. The statutory benefits payable for income loss extend to those claims that do not proceed to claims assessment or court.

Part 4 of the *Motor Accident Injuries Act* deals with awards of damages by a court and the assessment of damages by a claims assessor in respect of motor accidents. It provides for modified common law damages.

Court proceedings may only be commenced in the circumstances provided for in s 6.31; namely when the Principal Claims Assessor certifies that the claim is exempt from assessment. A certificate may be issued when:

1. it is exempted from assessment by regulation: s 7.34(1)(a)
2. a claims assessor with the approval of the Principal Claims Assessor determines that the claim is not suitable for assessment: s 7.34(1)(b)
3. in the case of a finding on liability by a claims assessor, any party does not accept the assessment: s 7.38(1) or,
4. where liability is not in issue, a claimant fails to accept the assessment of quantum within 21 days of the issue of the claims assessor's certificate: s 7.38(2).

The only *damages* that may be awarded are those that compensate for economic loss as permitted by Div 4.2 and for non-economic loss as permitted by Div 4.3.

Courts and claims assessors are no longer concerned with assessment of damages for minor injuries defined in s 1.6 as:

> (1) For the purposes of this Act, a "minor injury" is any one or more of the following:
>
> (a) a soft tissue injury,
>
> (b) a minor psychological or psychiatric injury.
>
> (2) A "soft tissue injury" is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.
>
> (3) A "minor psychological or psychiatric injury" is (subject to this section) a psychological or psychiatric injury that is not a recognised psychiatric illness.
>
> …

This definition is amplified in cl 4 of the *Motor Accident Injuries Regulation* 2017 as follows:

> Meaning of "minor injury" (section 1.6(4) of the Act)
>
> (1) An injury to a spinal nerve root that manifests in neurological signs (other than radiculopathy) is included as a soft tissue injury for the purposes of the Act.
>
> (2) Each of the following injuries is included as a minor psychological or psychiatric injury for the purposes of the Act:
>
> (a) acute stress disorder,
>
> (b) adjustment disorder.
>
> …
>
> (3) In this clause "acute stress disorder" and "adjustment disorder" have the same meanings as in the document entitled *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, published by the American Psychiatric Association in May 2013.

Nor are they concerned with expenses incurred for "treatment and care" or "attendant care services". In s 1.4(1) of the *Motor Accident Injuries Act*, "treatment and care" is defined as:

> (a) medical treatment (including pharmaceuticals),
>
> (b) dental treatment,

(c) rehabilitation,

(d) ambulance transportation,

(e) respite care,

(f) attendant care services,

(g) aids and appliances,

(h) prostheses,

(i) education and vocational training,

(j) home and transport modification,

(k) workplace and educational facility modifications,

(l) such other kinds of treatment, care, support or services as may be prescribed by the regulations for the purposes of this definition,

but does not include any treatment, care, support or services of a kind declared by the regulations to be excluded from this definition.

"Attendant care services" are defined in s 1.4(1) as:

> … services that aim to provide assistance to people with everyday tasks, and includes (for example) personal assistance, nursing, home maintenance and domestic services.

These expenses are dealt with through the statutory benefits regime. The Act expressly provides that no compensation is payable for gratuitous attendant care, leaving open the question of whether the loss of capacity to provide these services remains for assessment under the umbrella of non-economic loss: see discussion in *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 187 CLR 354.

**Economic loss**

There is little change to the parameters for the assessment of loss of capacity to earn income: see [7-0050]. Section 4.5 limits awards for economic loss as follows:

(1) The only damages that may be awarded for economic loss are (subject to this Division [Div 4.2]):

(a) damages for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, and

(b) damages for costs relating to accommodation or travel (not being the cost of treatment and care) of a kind prescribed by the regulations, and

(c) damages for the cost of the financial management of damages that are awarded, and

(d) damages by way of reimbursement for income tax paid or payable on statutory benefits or workers compensation benefits arising from the injury that are required to be repaid on an award of damages to which this Part [Pt 4] applies.

These limits do not apply to awards of damages in claims brought under the *Compensation to Relatives Act* 1897. Those claims are effectively unchanged by the *Motor Accident Injuries Act*.

Income loss is permitted only up to the maximum weekly statutory benefits amount, notwithstanding that this is a gross earnings amount: s 4.6(2). This amount is adjusted annually on 1 October: see Motor Accident Injuries (Indexation) Order 2017. Credit must be given for any weekly payments made under the statutory benefits provisions: see s 3.40 for the effect of recovery of damages on statutory benefits.

Superannuation contributions are recoverable at the minimum percentages required by law to be paid as employer superannuation contributions s 4.6(3).

Section 4.7 mirrors s 126 of the *Motor Accidents Compensation Act* 1999 in requiring that the claimant satisfy the court or claims assessor of assumptions on which future losses may be calculated (s 4.7(1)); that the court state the assumptions that form the basis for the award (s 4.7(2)); and, the relevant percentage by which economic loss damages have been adjusted (s 4.7(3)).

The discount rate continues to be 5%, unless adjusted by the regulations: see s 4.9(2)(b).

For an assessment of economic loss damages under the *Motor Accident Injuries Act* by the Court of Appeal, see *Hoblos v Alexakis (No 2)* [2022] NSWCA 11.

**Non-economic loss**

Assessment of non-economic loss remains essentially unchanged: see [7-0020].

The threshold of 10% as the degree of permanent impairment continues to apply: see s 1.7(1). The assessment is made by a medical assessor and remains binding on the court or claims assessor, except in the limited circumstances provided for s 7.23. They are the same as those set out in s 61 of the *Motor Accidents Compensation Act*.

A maximum amount continues to apply, adjusted annually on 1 October: s 4.13 of the *Motor Accident Injuries Act*.

The provisions relating to mitigation in s 4.15 are the same as those in s 136 of the *Motor Accidents Compensation Act*. Those relating to the payment of interest in s 4.16 of the *Motor Accident Injuries Act* are essentially the same as s 137 of the *Motor Accidents Compensation Act*.

**Contributory negligence**

Section 4.17 of the *Motor Accident Injuries Act* repeats the provisions of s 138 of the *Motor Accidents Compensation Act* when dealing with the circumstances in which a finding of contributory negligence must be made with the addition of a provision to include other conduct as prescribed by regulation: see [7-0030]. Section 4.17(3) leaves the assessment of the percentage reduction for contributory negligence to the discretion of the court of claims assessor, except where the regulations fix a percentage in respect of specified conduct. At this stage this aspect remains unregulated.

**Miscellaneous**

Provisions concerning voluntary assumption of risk (s 4.18) (see [7-0030]) and exemplary and punitive damages (s 4.20) (see [7-0110]) are unchanged.

*Blameless accidents* are now referred to as *no-fault motor accidents*. They are dealt with in the same way under Pt 5 of the *Motor Accident Injuries Act*: see [7-0030].

## [7-0090] Funds management

In *Gray v Richards* (2014) 88 ALJR 968 the High Court, dealing with a claim under the *Motor Accidents Compensation Act*, confirmed that, in ordinary circumstances, a plaintiff is not entitled to recover the cost of managing the fund comprised by a lump sum award of damages. This was because those costs are not the consequence of the plaintiff's injury. The court also confirmed the principles of *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 and *Willett v Futcher* (2005) 221 CLR 627, namely, that damages of this nature may be recovered where the plaintiff's intellectual capacity was impaired by injury to the point of putting the plaintiff in need of assistance in managing the fund.

The issues in *Gray v Richards*, above, were whether the right of recovery extended to the cost of managing the sum awarded for management of the fund (the fund management damages issue) and whether it extended to the cost of managing the predicted future income of the managed fund (the fund management on fund income issue).

In dealing with the fund management damages issue, the court referred to s 127(1)(d) of the Act entitling a plaintiff, without imposing a limit, to compensation for loss that was referable to a liability

to incur expense in the future. The court held that s 127(1)(d) invited assessment of the present value of all future outgoings based on evidence that established likely future expenditure. Expenses of fund management by whatever trust company was appointed were to be included in this assessment.

The court rejected the claim for the costs of fund management on fund income. They said s 127 did not alter the principles expressed in *Todorovic v Waller* (1981) CLR 402.

1. Having applied the discount rate to damages awarded to cover future loss no further allowance should be made. It was inconsistent with this comprehensive dismissal of any further allowance to suggest that the cost of managing the income generated by the fund to ensure that it maintains a net income at a given rate was a compensable loss.
2. The capital and income of the lump sum award for future economic loss would be exhausted at the end of the period over which that loss was expected to be incurred.
3. The cost of managing the income generated by the fund was not an integral part of the plaintiff's loss arising out of injury. It would be contrary to the principles of *Todorovic v Waller*, above, to assume that the fund would generate income that would be reinvested and swell the corpus under management, an assumption that could not be made when drawings from the fund might exceed its income.

## [7-0100] The Workers Compensation Act 1987, s 151Z

The provisions of s 151Z are somewhat complex. They relate to situations in which a party other than an injured worker's employer is wholly or partly responsible for the injury suffered by the worker.

It deals with the mechanism by which an employer (effectively the workers compensation insurer) is able to recover from a third party workers compensation paid to a worker, either out of damages awarded to the worker in common law proceedings brought against the third party, or by a separate action in the employer's own right. The employer's action arises under the indemnity provided for in s 151Z(1)(d).

It also deals in s 151Z(2) with situations where a worker brings a claim at common law against a third party in circumstances where the third party and the employer are joint tortfeasors. In such actions, the worker may or may not join the employer. The provision applies where the worker takes or is entitled to take proceedings against both the third person and the employer: ss 151Z(2)(a) and (b).

Campbell JA described the circumstances in which it became necessary to provide for adjustment as provided for in s 151Z(2) in *J Blackwood & Son v Skilled Engineering* [2008] NSWCA 142. The need arose because, upon the introduction of the scheme for modification of the common law rights of a worker against an employer, it was no longer possible to determine the respective liabilities of an employer and a third party by reference simply to the proportions in which they were held to be responsible for the damage suffered by the employee.

The provisions of the section have generated discussion concerning the circumstances in which a worker becomes entitled to bring proceedings; the process for determination of the employer's contribution; and the manner in which the third party's proportion of damages is to be calculated.

### Entitlement

The right of a worker to recover common law damages against an employer has been increasingly limited to the point where, commonly, no rights exist. Under the current scheme a worker must be assessed as having suffered a degree of impairment of at least 15%: s 151H. If that threshold is met, the worker's right to recover damages is limited to loss of income-earning capacity. If the threshold is not met, there is no right of recovery of any common law damages against the employer. This outcome has prompted the argument that there is no entitlement to take proceedings against the employer.

The Court of Appeal has consistently rejected this argument. The construction adopted in *Grljak v Trivan Pty Ltd (In liq)* (1994) 35 NSWLR 82 at 88 held that the term entitlement in s 151Z(2)(b) referred to the right to take proceedings and not to a right to recover damages. Once established that an employer owed a duty of care that was breached, causing loss to the plaintiff, the entitlement was established. The right to recover damages was irrelevant: *Izzard v Dunbier Marine Products (NSW) Pty Ltd* [2012] NSWCA 132.

**Calculation of the employer's contribution**

To determine the amount of an employer's contribution, it is necessary to calculate what the worker would recover against the employer under the modified common law provisions of the *Workers Compensation Act*. In *J Blackwood & Son v Skilled Engineering*, above, at [40] Campbell JA pointed out that ss 151Z(1)(d) and 151Z(2)(d) required that a contribution be calculated in accordance with the modified common law provisions of the Act and not that damages be assessed in accordance with those provisions.

A worker who takes action against the employer must undergo medical assessment to determine if the threshold of impairment of at least 15% is met and the process of calculation is relatively simple. A worker who does not join the employer cannot be compelled to undergo assessment. In those circumstances the calculation of the employer's contribution involves a hypothetical exercise analogous to that involved in dealing with professional negligence cases as outlined in *Johnson v Perez* (1988) 166 CLR 351: *Izzard v Dunbier Marine Products (NSW) Pty Ltd*, above, Macfarlan J at [117].

The court is required to undertake that exercise in accordance with the principles established by Pt 7 *Workplace Injury Management and Workers Compensation Act*. In so doing, it may rely on an assessment provided by a medical expert who has not been appointed under those provisions as an approved medical specialist, provided the assessment is made in accordance with WorkCover Guidelines as required by s 322(1) of the Act: *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370.

**The third party's contribution**

The provisions of s 151Z(2) are designed to avoid the recovery by a worker, whose rights to recover damages from an employer are restricted, of the shortfall from a non-employer third party.

Having determined that the third party and the employer are jointly liable to the worker in damages (for example, in the sum of $100,000) and the appropriate percentage of responsibility to each of them is allocated (for example, 70% third party, 30% employer), the section therefore requires that the following steps be taken.

1. Calculate the contribution the third party would recover from the employer but for the modified common law provisions of the Act (the common law sum), in the example — $30,000.
2. Calculate the amount the worker would recover from the employer under the modified common law provisions of the Act, say — $15,000.
3. Apply to this amount the percentage representing the employer's share of responsibility (the modified common law sum), — $5,000.
4. Reduce the amount that the worker can recover from the third party by deducting from the modified common law sum the common law sum, $30,000–$5,000 = reduction of $25,000.

## [7-0110] Punitive damages

No compensation in the nature of aggravated or exemplary damages is recoverable through claims made under the statutory schemes: *Workers Compensation Act,* s 151R; *Motor Accidents Compensation Act*, s 144; *Motor Accident Injuries Act* 2017 s 4.20; *Civil Liability Act*, ss 21, 26X. Damages under these heads remain available in the limited categories of personal injury claims that are not dealt with under these schemes.

It is very important to distinguish between aggravated and exemplary damages. In the past, courts have tended to award a single sum to account for both types of damage but it is now accepted that the better practice is to distinguish between amounts awarded under these heads and to provide reasons in each case.

In *Lamb v Cotogno* (1987) 164 CLR 1 the High Court drew the distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages.

A further explanation of the distinction is found in the judgment of Spigelman CJ in *State of NSW v Ibbett* (2005) 65 NSWLR 168 where he said at [83]:

> In this regard it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the Plaintiff and in the case of exemplary damages the focus is on the conduct of the Defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.

The award of damages under these heads is discretionary and caution is required to ensure that the circumstances in which they awarded are appropriate. In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, Leeming JA noted that this discretionary quality conferred considerable leeway in the assessment of both aggravated and exemplary damages, although the assessment must bear some proportion to the circumstances to which it relates.

The extent to which the plaintiff provoked the assault by one of the defendants was the subject of consideration in *Tilden v Gregg* [2015] NSWCA 164 in the context of whether it was appropriate to award aggravated or exemplary damages. Meagher JA quoted from Salmon LJ in *Lane v Holloway* [1968] 1 QB 379 at 391 as follows:

> There is no doubt that if a plaintiff is saying: "This man has behaved absolutely disgracefully and I want exemplary damages because of his disgraceful conduct," when the court is considering how disgraceful the conduct was or whether it was disgraceful at all, it is material to see what provoked it. This is relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much.

Meagher JA also noted that the defendant's assault on the plaintiff resulted in a criminal charge to which he entered a guilty plea. He referred to *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [46] in noting the principle that a civil court, when considering whether it was appropriate to award aggravated or exemplary damages, would ordinarily proceed on the basis that the criminal conviction and sentence of the assailant had adequately dealt with the elements of punishment and deterrence.

This principle was applied in *Cheng v Farjudi* (2016) 93 NSWLR 95; [2016] NSWCA 316 where Beazley P, with whom Ward JA and Harrison J agreed, having reviewed *Gray v Motor Accidents Commission*, above, and the many authorities in which these principles have been applied said at [87]:

> Accordingly, the position in Australia is that exemplary damages may not be awarded where substantial criminal punishment has been imposed. However, the High Court in *Gray* did not preclude an award of exemplary damages where something other than substantial punishment was imposed, and in accordance with the authorities in this Court exemplary damages may be awarded in some circumstances notwithstanding that a criminal sanction has been imposed.

Her Honour concluded that conviction for assault and the imposition of a bond was a substantial punishment such that exemplary damages were not warranted on this basis. Her Honour did,

however, accept at [105] the other basis for the award of exemplary damages, namely, that the manner in which the appellant defended the claim for damages was unusual in the sense used in *Gray v Motor Accidents Commission*.

**Aggravated damages**

Damages under this heading may be awarded to a plaintiff who suffers increased distress as a result of the manner in which a defendant behaves when committing the wrong or thereafter. The qualification for their award is that the conduct of the defendant is of the type that increased the plaintiff's suffering. In *Lamb v Cotogno*, above, at 8, aggravated damages were described as compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like.

The leading case in this area is *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 where Windeyer J at 152 described the necessary conduct as insulting or reprehensible or capable of causing the plaintiff to suffer indignity or outrage to his or her feelings.

A plaintiff's own conduct may be relevant to determining whether damages of this nature should be awarded or the amount to be awarded, for instance, where a plaintiff retaliates in the case of an assault or is of bad repute.

In *Kralj v McGrath* [1986] 1 All ER 54 Woolf J rejected a claim for aggravated damages in a case based on medical negligence but said that compensatory damages could be increased to take account of consequences that made it difficult to overcome the distress caused by the negligent medical treatment.

The availability of aggravated damages in negligence clams was debated in *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268 where Mason P listed the torts for which damages under this head might be claimed including defamation, intimidation, trespass to the person and malicious prosecution. He expressed serious doubt about when they might be claimed in negligence actions or about the need for such damages when elements such as injured feelings and distress could be dealt with in an award for general damages.

These concerns were dealt with in *State of NSW v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208, and in *MacDougal v Mitchell* [2015] NSWCA 389. In *MacDougal*, an appeal challenging the trial judge's decision against the award of both aggravated and exemplary damages, Tobias AJA, with whom Meagher JA, Bergin CJ in Eq agreed, cited at length passages from the reasons of Hodgson JA in *State of NSW v Riley*, above, where he addressed the issue of how, in a personal injury case, having assessed the appropriate level of damages, the compensatory nature of aggravated damages leaves room for the award of further compensation without incurring the risk of double counting.

Justice Hodgson's answer was reasoned at [131] as follows:

> In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt damages neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

He added further at [133] that there must be a justification for this approach, which he acknowledged was one of degree so that "the worse the defendant's conduct, the further from the centre of the range and towards the upper limit of the range the court may be justified in going".

**Exemplary damages**

Exemplary damages are awarded as a form of punishment: to deter repetition of reprehensible conduct by the defendant or by others, or to act as a mark of the court's disapproval of that conduct.

They may be awarded for a tort committed in circumstances involving a deliberate, intentional or reckless disregard for the plaintiff and his or her interests. The objects of the award may include condemnation, admonition, making an example of the defendant, appeasement of the plaintiff in order to temper an urge to exact revenge, or the expression of strong disapproval.

The term repeatedly relied upon as the basis for the award of exemplary damages, first expressed by Knox CJ in *Whitford v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77, is conscious wrongdoing in contumelious disregard of another's rights. The defendant's conduct must be such that punishment is warranted. It may include elements of malice, violence, cruelty, high-handedness or abuse of power. In *Uren v John Fairfax & Sons Pty Ltd*, above, Windeyer J said at [11] that an award of exemplary damages should be based on something more substantial than mere disapproval of the defendant's conduct.

In *Lamb v Cotogno* (1987) 164 CLR 1 the defendant left the plaintiff in agony at the side of a road after attacking him by driving his car at him. This was considered to be conduct that was cruel or demonstrating reckless disregard or indifference towards the plaintiff's welfare.

In *Adams v Kennedy* [2000] NSWCA 152 the court awarded one aggregate figure for exemplary damages where different causes of action arose out of a series of closely connected events. Priestley JA stated at [36]:

> That figure should indicate my view that the conduct of the defendants was reprehensible, mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.

The High Court in *State of NSW v Ibbett* (2006) 229 CLR 638 at [38]–[40] similarly noted in particular the function served by exemplary damages as a tool to discourage and condemn the arbitrary and outrageous use of executive power: *Rookes v Barnard* [1964] AC 1129, Lord Devlin at 1226.

As a general principle, the power to award exemplary damages should be exercised with restraint and only when compensatory damages are insufficient to punish, deter or mark the court's disapproval of the defendant's conduct. There is a question mark over whether the defendant's means should be taken into account in deciding whether to award exemplary damages.

The award of exemplary damages is rare in actions for negligent conduct. There must be conscious wrongdoing in contumelious disregard of another's rights: *Gray v Motor Accidents Commission* (1998) 196 CLR 1.

This decision was referred to in *Dean v Phung* (2012) NSWCA 223 but ultimately the outcome of the plaintiff's claim was not based on negligence. The dentist's misrepresentations as to the need for and nature of treatment were held to negate the plaintiff's consent so that claim of trespass to the person was made out and the *Civil Liability Act* exclusion of the right to exemplary damages did not apply. In deciding that a substantial award of exemplary damages was warranted, the court noted that the dentist's conduct was carefully planned and executed over a period of more than 12 months with the purpose of self-enrichment. Damages were assessed by reference to the sum paid for the dental services and interest.

Although required to be proportionate to the circumstances, in an appropriate case, exemplary damages may exceed compensatory damages: *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 Leeming JA at [43].

*State of NSW v Smith* [2017] NSWCA 194 involved a claim of false imprisonment. The court regarded the police officer's conduct, in being unaware of provisions of the relevant statute, as the product of ordinary human fallibility and not a conscious wrongdoing in contumelious disregard of the respondent's rights, with the result that an award of exemplary damages was not warranted.

## [7-0120] Offender damages

The *Civil Liability Act* makes special provision in Pt 2A to deal with claims by offenders in custody, including the application of the Act to claims that involve intentional torts. The legislation introduces a regime for assessment of claims that is similar to that provided for in relation to common law claims for workplace accidents.

In *State of NSW v Corby* (2009) 76 NSWLR 439, the Court of Appeal noted that Pt 2A of the Act, dealing with offender damages, had been extended by amendment to intentional torts and that nothing in the amending legislation indicated that claims for exemplary damages were to be excluded. The court was not prepared to accept that this was an oversight stating at [56]:

> The Parliament may well not have been prepared to exclude liability for exemplary damages, even in cases of relatively minor physical or mental impairment, where the conduct of its officers, for which it accepts vicarious liability, demonstrates egregious disregard of the civil rights of its citizens.

The court concluded, however, that aggravated damages were not available to an offender in custody. This was because s 26C defined damages as including any form of monetary compensation. Aggravated damages were designed to deal with matters such as humiliation and injury to feelings and provided compensation for mental suffering that fell short of a recognised psychiatric illness. In that sense, in contrast to exemplary damages they were compensatory.

## [7-0130] Intentional torts

An intentional tort is described as the intentional infliction of harm without just cause or excuse. The presence of an intention to cause harm is central to the imposition of liability. The tort frequently involves conduct that results in criminal as well as civil liability, although it extends to conduct that causes harm to reputation, trade or business activity.

The American Law Institute, *Restatement of the Law — Torts 2d*, § 870, American Law Institute Publishers, St Paul, Minn,1979 describes intentional torts in the following terms:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

The concept of an intention to cause harm, in the context of the law of negligence, has been the subject of a degree of judicial consideration and much academic consternation concerning the extent to which intentional conduct can be described or pleaded as negligent.

The exclusion of intentional torts from the strictures of the *Civil Liability Act* 2002 has also generated judicial scrutiny of this class of tort. Section 3B(1)(a) provides:

> 1. The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> (a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except:
>
> (i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and
>
> (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and
>
> (iii) Part 2A (Special provisions for offenders in custody).

The attraction of this provision is that, if the wrong of which a plaintiff complains can be brought within its scope, the constraints on damages contained within the Act can be avoided, with the

exception of those relating to the recovery for gratuitously provided care services. Damages in claims of intentional torts are at large, with the exception of those claimed for voluntarily provided care. They may therefore range from a nominal amount, where a plaintiff is unable to establish actual damage, to substantial damages on all heads for personal injury. Aggravated and exemplary damages are also available in appropriate cases. Application of the provisions of the section has not been straightforward, issues to date encompassing the following.

**Pleadings**

It is in this area that incongruity arises in the context of the law of negligence. In *New South Wales v Lepore* (2003) 212 CLR 511, a claim of vicarious liability against an employer, views diverged on the question of whether a claim of intentional infliction of harm could be pleaded in negligence. McHugh J at [162] took the view that the plaintiff was entitled to elect to plead negligence or trespass to the person. He said an action for the negligent infliction of harm was not barred because of the intentional act of the person causing the harm. Gummow and Hayne JJ took a different view. They said at [270], that while negligently inflicted injury to the person could sometimes be pleaded in trespass to the person, the intentional infliction of harm cannot be pleaded as negligence.

**Consent**

Barrett JA in *White v Johnston* (2015) 87 NSWLR 779 made it clear that the absence of consent was an essential element of the tort of assault and battery. He said it was meaningless at least in the civil sphere to speak of an assault that was consensual.

The difficulty created by the failure to plead separately the allegations of negligence and assault is most clearly demonstrated in claims of medical negligence where the question of consent to treatment arises.

In *White v Johnston*, above, Leeming JA pointed to the distinction between consent to medical treatment that is procured through negligence in explaining the risks of treatment and that which is fraudulently obtained. He referred to the reasons of Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in *Rogers v Whittaker* (1992) 175 CLR 479 where they said at [15]:

> Anglo-Australian law has rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass; the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed.

Leeming JA noted the following principles on the issue of consent to medical treatment:

1. Consent may be vitiated by fraud, misrepresentation, treatment that materially differs from that to which the consent was given or the improper purpose for the provision of the treatment.
2. The motive for the provision of medical treatment is relevant to the issue of whether consent was obtained through fraud or misrepresentation or for an improper purpose. In *Dean v Phung* [2012] NSWCA 223, the practitioner's purpose, being solely non-therapeutic, was sufficient to vitiate consent. The majority view in that case was that it was therefore unnecessary to consider further whether the practitioner acted fraudulently.
3. There may be circumstances where more than motive exists for misconduct. A person who enters land within the scope of his or her authority does not necessarily become a trespasser because he or she has some other purpose in mind.
4. Thus improper purpose, even if it falls short of fraud is relevant to the issue of whether medical treatment was outside the terms of any consent.
5. The withholding of information in bad faith is sufficient to vitiate consent.

It is not necessary that the plea of trespass to the person or assault contain a specific allegation of absence of consent. The plea itself is sufficient under the rules of common law pleading to amount to an allegation of non-consensual conduct: *White v Johnston*, Barrett JA.

**Intent**

The prerequisites to the operation of s 3B(1)(a) are:

- an intentional act; and
- an intentional act committed with intent to cause injury.

It is the second of these requirements that presents the greatest challenge to litigants. In *White v Johnston* Leeming JA at [132] noted that these requirements took matters further than the tort of assault and battery where it was unnecessary to establish that a defendant intended to cause harm. Even if a plaintiff was able to prove an intentional tort, he said, the action would be excluded from the *Civil Liability Act* only if it was also established that the defendant's conduct was carried out with intent to cause injury.

It is not necessary that the intended injury be physical. In *State of NSW v Ibbett* (2005) 65 NSWLR 168, a police officer pointed a gun at the plaintiff at the same time as threatening her. Spigelman CJ thought this was sufficient to establish that the officer acted with the intent to cause injury namely an apprehension of physical violence. Ipp JA agreed that it was intended to cause in the plaintiff's mind an apprehension of immediate personal violence.

It is not necessary that the intentional act be criminal in character. RS Hulme J in *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107 rejected the proposition that the s 3B exception was directed at criminal conduct and sexual misconduct. The spear tackle that resulted in the plaintiff's injury, although not a crime, was undertaken intentionally and with intent to cause injury.

In *Drinkwater v Howarth* [2006] NSWCA 222 Basten JA asked, hypothetically, whether an intentional act directed at someone other than a plaintiff might allow for the application of s 3B.

In *Hayer v Kam* [2014] NSWSC 126 Hoeben CJ at CL said it was unclear whether a defendant who is reckless as to the consequences of an intentional act has the requisite intention to cause injury. He noted, however, that in *Dean v Phung*, above, whilst the primary intention was that of monetary gain, the dentist was found to have the intention to cause harm sufficient to meet the requirements of the section because at the time of giving the relevant advice he knew that the treatment proposed was unnecessary.

**Causation**

*Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 involved a claim of injurious falsehood in the course of which the High Court considered whether the principles of reasonable foreseeability applied to intentional torts. Gleeson CJ, agreeing with Gummow J, said at [13] there was no reason for foreseeability to operate as an independent factor in limiting liability for damage if the relevant harm was intended or was the natural and probable consequence of the wrongdoer's conduct.

Gummow J, dealing with the role of intention in the context of intentional torts, said at [81]:

> That role is that, where the other elements of the tort are made out, a finding that the defendant intended the consequences which came to pass will be sufficient to support an award of damages against the defendant in respect of that consequence.

After reference to authority to the effect that the intention to injure a plaintiff disposes of any question of remoteness of damage, he said at [81]:

> It will not necessarily be sufficient that the wrongdoer intended damage different in kind from that which occurred … That is to say, it will depend upon the relation of that which the wrongdoer intended to the consequences which actually resulted. This relation will generally be assessed by asking whether the damage was the "direct and natural" result of the publication of falsehood.

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

**Injury**

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

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

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

**Onus**

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

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

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

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

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

**Vicarious liability**

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

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

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

## Legislation

- *Civil Liability Act* 2002, Pts 2A, 6, ss 3B, 5B, 5R, 5T, 7B(rep), 7F(rep), 12, 12(2), 13(1), 14, 15, 15(1), (2), (3), (5), 15A, 15B, (2)(b), (2)(d), (5), (6), (7), (8), (9), (10), (11), 15C, 16, (1), (3), 17, 21, 26X, 26C, 34, 48, 49, 50, 71(1)
- *Civil Procedure Act* 2005, s 82
- *Compensation to Relatives Act* 1897, s 3(3)
- *Fatal Accidents Act* 1959 (WA)
- *Law Reform (Miscellaneous Provisions) Act* 1965
- *Motor Accidents Act* 1974
- *Motor Accidents Act* 1988, ss 49, 74, 76, 79(3)
- *Motor Accidents Compensation Act* 1999, ss 3, 7A, 7B(1), 7F, 83, 125, (2), 126, 127, (1)(d), 130, 130A(rep), 134, 131–135, 136, 138, 140, 141B, 141C, 142, 143, 144, 146
- *Motor Accidents (Lifetime Care and Support) Act* 2006
- *Workers Compensation Act* 1987, ss 151H, 151I, 151IA, 151AD, 151J, 151L, 151N, 151O 151Q, 151R, 151Z, (1)(d), (2), (2)(a), (b), (d)
- *Workplace Injury Management and Workers Compensation Act* 1998, Pt 7, s 322(1)
- *Social Security Act* 1991
- *Victims Compensation Act* 1996 (rep, now *Victims Rights and Support Act* 2013)

## Further references

- The American Law Institute, *Restatement of the Law — Torts 2d*, § 870, American Law Institute Publishers, St Paul, Minn,1979
- H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021
- D Villa, *Annotated Civil Liability Act* 2002, 3rd edn, Thomson Reuters, Sydney, 2018
- J A McSpedden and R Pincus, *Personal Injury Litigation in NSW*, LexisNexis, Sydney, 1995
- J Dietrich, "Intentional conduct and the operation of the Civil Liability Acts: unanswered questions", (2020) 39(2) *University of Queensland Law Journal* 197
- H McGregor, *McGregor on Damages*, 16th edn, Sweet & Maxwell Ltd, UK, 1997

**[The next page is 7501]**