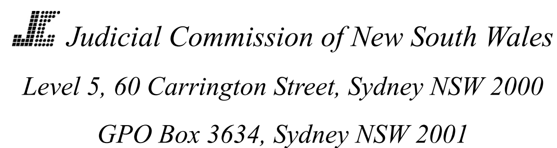
Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 51

March 2023

SUMMARY OF CONTENTS OVERLEAF


Judicial Commission of New South Wales

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SUMMARY OF CONTENTS

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Update 51, March 2023

[1-0000] Disqualification for bias

A small revision has been made to a reference to *Charisteas v Charisteas* [2021] HCA 29 at **[1-0020]**, and ALRC report, *Without fear or favour: judicial impartiality and the law on bias* and a paper on judicial legitimacy by the Honourable Justice Gageler AC have been added to **Further references**.

[2-0000] Case management

At **[2-0020] General principles** the case of *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2022] NSWCA 275 has been added.

[2-2600] Stay of pending proceedings

In **Further references** an article written by A Monichino QC and G Rossi, "Staying court proceedings in the face of ADR clauses" has been added.

[2-5900] Security for costs

Three cases have been added at **[2-5965] Ordering security in appeals**: *Swift v McLeary* [2013] NSWCA 173, *Cassaniti v Katavic* [2022] NSWCA 230 and *Yu Xiao v BCEG International (Australia) Pty Ltd* [2022] NSWCA 233.

[2-6300] Judgments and orders

A number of cases have been added at **[2-6440] Reasons for judgment**, including *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 (citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 and *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430) and *Rialto Sports Pty Ltd v Cancer Care Associates Pty Ltd* [2022] NSWCA 146.

[2-7600] Vexatious litigants

At **[2-7610] Inherent jurisdiction and powers of courts and tribunals** the cases of *Ghosh v Miller (No 2)* [2018] NSWCA 212; *Choi v Secretary, Department of Communications and Justice* [2022] NSWCA 170; *Hassan v Sydney Local Health District (No 5)* [2021] NSWCA 197 and *Samootin v Shea* [2013] NSWCA 312 have been added.

[4-0200] Relevance

At **[4-0210] Relevant evidence — s 56**, a reference to the *Criminal Trial Courts Bench Book* at **[5-100]** has been added. The **Further references** for the chapter have also been updated.

[4-0300] Hearsay

At **[4-0330] Exception: civil proceedings if maker not available — s 63**, the case of *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D* [2022] NSWCA 119 has been added to demonstrate factors that make a plaintiff "not available" within the meaning of s 63 of the *Evidence Act*, along with the operation and interpretation of Pt 2, cl 4(1)(f). *RC v R* [2022] NSWCCA 281 has been added for its observations on the requirements of "all reasonable steps" in the definition of "unavailability of persons" in Pt 2, cl 4(1)(g).

At **[4-0390] Exception: business records — s 69**, the case of *Di Liristi v Matautia Developments Pty Ltd* [2021] NSWCA 328 has been added as an example of records that were found to be "business records".

[5-5000] Possession List in the Supreme Court

Minor changes have been made at **[5-5000] Introduction**, **[5-5010] Commencement of proceedings** and **[5-5020] Defended proceedings**. The case *Stacks Managed Investments Ltd v Rambaldi and Cull as trustees of the Bankrupt Estate of Reinhardt* [2020] NSWSC 722 has been added at **[5-5040] Stay applications**.

A new section has been added at **[5-5035] Writs of restitution** in which the cases of *Perpetual Ltd v Kelso* [2008] NSWSC 906; *Wiltshire County Council v Frazer* [1986] 1 All ER 65; *Australia and New Zealand Banking Group Ltd v Rafferty* [2018] NSWSC 960; *Commonwealth Bank of Australia v Maksacheff* [2015] NSWSC 1860; *Capital Access Pty Ltd v Charnwood Constructions Pty Ltd* [2022] NSWSC 1185; *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161 and *GE Personal Finance Pty Ltd v Smith* [2006] NSWSC 889 have been added.

[5-7000] Intentional torts

At **[5-7115] Justification** (note that this section has been moved up from [5-7170]) the case of *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 has been added along with *Hook v Cunard Steamship Co* [1953] 1 WLR 682.

The case of *Spedding v New South Wales* [2022] NSWSC 1627 has been added at **[5-7150] Some examples, [5-7160] Malice** and **[5-7188] Misfeasance in public office**. This case involved a successful claim by the plaintiff who was arrested on discredited historical allegations of sexual abuse.

At **[5-7188] Misfeasance in public office** the cases of *Cornwall v Rowan* (2004) 90 SASR 269 and *De Reus v Gray* (2003) 9 VR 432 have also been added.

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

The workers compensation amounts in this chapter have been reviewed and updated.

At **[6-1040] Claims subject to the Motor Accidents Compensation Act 1999**, *Stein v Ryden* [2022] NSWCA 212 has been added for its summary of the relevant authorities on what constitutes a "full and satisfactory explanation" under s 109 of the Act.

Amendments have been made at **[6-1045] Claims subject to the Motor Accident Injuries Act 2017** to reflect changes brought by the *Motor Accident Injuries Amendment Act 2022* commencing 28 November 2022.

[8-0000] Costs

At **[8-0020] The general rule: costs follow the event** the cases of *Calvo v Ellimark Pty Ltd (No 2)* [2006] NSWCA 197 and *Kumaran v Employsure Pty Ltd (No 2)* [2022] NSWCA 247 have been added as examples of cost orders being moulded to reflect the degree of success on distinct issues.

At **[8-0040] Departing from the general rule: apportionment** the case of *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)* [2022] NSWCA 258 has been added under the headings "Mixed success on multiple issues" and "Giving effect to apportionment".

At **[8-0120] Legal practitioners** the cases of *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180 and *Muriniti v Kalil* [2022] NSWCA 109 (referring to *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300, *Redowood Pty Ltd v Goldstein Technology Pty Ltd* [2004] NSWSC 515 and *Saadat v Commonwealth of Australia (No 2)* [2019] SASC 75) have been added. These cases concern the making of a personal "wasted costs order" against a legal practitioner under s 99 of the CPA.

[9-0700] Enforcement of foreign judgments

The case of *Nyunt v First Property Holdings Pte Ltd* [2022] NSWCA 249 has been added at **[9-0750] Procedure** to expand upon the operation of ss 7(2) and (3) of the *Foreign Judgments Act*. *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 has also been added.

[10-0300] Contempt generally

At **[10-0480] Breach of orders and undertakings** the case of *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* (2019) 106 NSWLR 479 has been added.

Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

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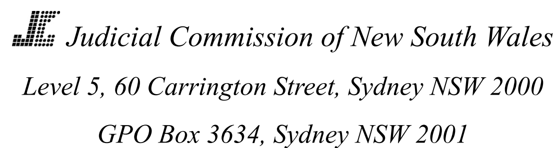
March 2023

FILING INSTRUCTIONS OVERLEAF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FILING INSTRUCTIONS

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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		
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Disqualification for bias

[1-0000] Introduction

Bias may involve actual or apprehended bias.

[1-0010] Actual bias

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

[1-0020] Apprehended bias

The test for determining whether a judge should disqualify himself or herself by reason of apprehended bias is objective: "whether a fair-minded lay observer *might* reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide [emphasis added]": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 and *Charisteas v Charisteas* [2021] HCA 29; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 255 CLR 135. The resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place: *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 at [41]–[43] (citing *Ebner* at [7]–[9], [33]).

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

See also *Chamoun v District Court of NSW* [2018] NSWCA 187 per Gleeson JA at [39] (citing *Tarrant v R* [2018] NSWCCA 21) for discussion as to the four discrete elements required for the "double might" test and *Polsen v Harrison* [2021] NSWCA 23 at [46] for a useful summary of the principles that are to be applied in an application for recusal for apprehended bias.

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

As to the former association of the judge with legal representatives and litigants, see *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43. As to an example of where a fair-minded observer would likely be concerned about a current close personal relationship between judge and a prosecutor connected with the proceedings, see *Gleeson v DPP (NSW)* [2021] NSWCA 63 at [29]. As to the relevance of non-disclosure to issues of apprehended bias, see *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (in liq)* [2011] NSWCA 176. As to a party being a member of the trial court, see *Rouvinetis v Knoll* [2013] NSWCA 24.

As to inappropriate contact or communication between the judge and a party's barrister during proceedings and while judgment was reserved which would cause a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the matter, see *Charisteas v Charisteas* at [12], [15], [21]–[22].

[1-0030] Procedure

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

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

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

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

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

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

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

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

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

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

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

Judges are required to discharge their professional duties unless disqualified by law. They should not accede too readily to applications for disqualification, otherwise litigants may succeed in effectively influencing the choice of judge in their own cause: see *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 352; *Attorney General of New South Wales v Lucy Klewer* [2003] NSWCA 295; *Ebner v Official Trustee*, above, at [19]–[23]; and *Raybos Australia Pty Limited v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272.

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

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

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

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

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

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

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

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

(f) The fact that the judge is related to a party, or to one of the party's legal representatives, at least where that legal representative is actually involved in the litigation, will normally be a ground

for disqualification. However, where association with somebody with an interest in the litigation is relied upon there must be shown to be a logical connection between the matter complained of and the feared deviation from impartial decision making: *Smits v Roach* (2006) 227 CLR 423.

(g) The fact that a prior complaint has been made to the Independent Commission Against Corruption, or to some other body such as the Judicial Commission or the Bar Association, in relation to the judge, has also arisen for consideration: *Briscoe-Hough v AVS Australian Venue Security Services Pty Ltd* [2005] NSWCA 51; see also *Attorney General of NSW v Klewer*, above.

(h) The fact that the judge knows a party or witness may be a ground for disqualification, depending upon the degree and the circumstances of the acquaintanceship and association. See *McIver v R* [2020] NSWCCA 343 at [74] where the NSWCCA stated that "it was particularly important that there be no circumstance which might give rise to the possibility of pre-judgment, conscious or unconscious, as a result of a prior association. The position would be the same if the case was a civil case…".

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

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

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

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

[1-0050] Circumstances arising during the hearing

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

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

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

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

> [21] There should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties to those proceedings. Particularly in relation to written communications, given the ubiquity and speed of emails, the precise terms of any proposed communication with a judge's chambers should be provided to the other parties for their consent.
>
> There are four exceptions to this:
>
> 1. trivial matters of practice, procedure or administration (eg the start time or location of a matter, or whether the judge is robing)
> 2. ex parte matters
> 3. where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (eg for the filing of material physically or electronically with a judge's associate), and
> 4. exceptional circumstances.
>
> [22] There are three other matters. First, any communication with a judge's chambers which falls into any of the categories set out in sub-paragraphs [21] (2), (3) and (4) above should expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent. Second, where consent has been obtained, that fact should also be referred to in the communication. Third, all written communications with a judge's chambers in relation to proceedings should always be copied to the other parties.

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

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

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

[1-0060] Immunity from suit

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

Further references

- B Cairns, "Bias and procedural fairness at trial" (2021) 9 *Journal of Civil Litigation and Practice* 182
- J Sackar, "Disqualification of judges for bias", at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf, accessed 16 May 2018.

- Australian Law Reform Commission, *Without fear or favour: judicial impartiality and the law on bias,* Report No 138, 2021
- S Gageler, "Judicial legitimacy", paper presented at the 2022 Australian Judicial Officers Association Colloquium, Hobart, 7 October 2022, at https://www.ajoa.asn.au/wp-content/uploads/2022/10/Judicial-Legitimacy-final.pdf, accessed 6 March 2023.

[The next page is 151]

Case management

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

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

[2-0010] Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2-0020] General principles

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

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

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

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

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

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

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

In *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2022] NSWCA 275 at [3]–[4], a failure to identify and focus on the real issues in the proceedings, as s 56 of the CPA requires, led to the tender of a large volume of manifestly irrelevant material, lengthy submissions addressing it and lengthy discussion in the judgment. At each stage this failure should have been identified and the process adjusted, with beneficial consequences for the costs to the parties and the demands on the limited resources of the court.

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

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

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

Legislation

- CPA ss 14, 16, 56–63, 64, 86

Rules

- UCPR rr 2.1, 2.3, 12.7

Practice Notes

Supreme Court

Common Law Division

General SC CL 1

Administrative Law List SC CL 3

Defamation List SC CL 4

Urgent matters in the Common Law Division SC CL 5

Possession List SC CL 6

Professional Negligence List SC CL 7

Equity Division

Case Management SC Eq 1

Admiralty List SC Eq 2

Commercial List and Technology and Construction List SC Eq 3

Corporations List SC Eq 4

District Court

Case management in the general list DC (Civil) No 1

Case management in country sittings DC (Civil) 1A

Online courts DC (Civil) 1B

Defamation DC (Civil) No 6

Court approval of settlement DC (Civil) 7

Local Court

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

[The next page is 601]

Stay of pending proceedings

[2-2600] The power

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

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

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

[2-2610] Forum non conveniens

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

[2-2620] The test for forum non conveniens

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

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

[2-2630] Applicable principles of forum non conveniens

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

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

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

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

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

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

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

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

[2-2640] Relevant considerations for forum non conveniens

Connecting factors

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

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

Legitimate personal or juridical advantage

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

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

Parallel proceedings in different jurisdictions

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

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

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

Waste of costs

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

Local professional standards

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

Law of the local forum

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

Foreign lex causae

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

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

Agreement to refer disputes to a foreign court

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

Further relevant considerations

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

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

[2-2650] Conditional order

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

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

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

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

Suggested formula for ultimate finding

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

Suggested forms of order

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

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

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

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

[2-2680] Abuse of process

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

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

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

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

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

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

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

- Pending the determination of proceedings in another forum: see *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 and *L & W Developments Pty Ltd v Della* [2003] NSWCA 140; including partial stay of proceedings where not all parties to litigation are parties to the relevant exclusive jurisdiction clause: see *Australian Health and Nutrition Assoc Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419.
- Concurrent criminal proceedings: see [2-0280] in "Adjournment".
- Consolidation of arbitral proceedings: *Commercial Arbitration Act* 2010, ss 27C(3)(c), 33D(3).
- Agreement to mediate and/or arbitrate before action: *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514.
- Failure to pay the costs of discontinued proceedings involving substantially the same claim: r 12.4.
- Failure to pay the costs of dismissed proceedings involving substantially the same claim: r 12.10.
- Failure to answer interrogatories: r 22.5.
- Failure to comply with directions. Section 61 of the CPA provides that, in the event of non-compliance with a direction, the court may (amongst other things) dismiss or strike out the proceedings, or may make such other order as it considers appropriate, which would appear to include an order for a stay pending compliance with the direction.
- Failure to conform to timetable for medical examination: *Rowlands v State of NSW* (2009) 74 NSWLR 715.
- Significant delay between the events giving rise to the cause of action and the commencement of proceedings, which delay has resulted in relevant evidence becoming unavailable or impoverished: *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [77], [87]; [182]; [207]; *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292 at [303]; [428].
- Where it is demonstrated on the balance of probabilities that a fair trial would not be possible in the circumstances. Such circumstances may include where the defendant's oral evidence goes to a critical aspect of liability but the defendant is unable to give evidence for example due to incapacity: *Moubarak by his tutor Coorey v Holt* at [88], [92]–[96]; [182]; [207]; or where the

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

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

This list is not necessarily comprehensive.

Legislation

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

Rules

- UCPR rr 12.4, 12.10, 22.5

Further references

- A Monichino QC and G Rossi, "Staying court proceedings in the face of ADR clauses" (2022) 52 *Australian Bar Review* 94.

[The next page is 1255]

Security for costs

Acknowledgement: the following material was originally prepared by Her Honour Judge J Gibson of the District Court and updated by Judicial Commission staff.

Portions of this chapter are adapted from NSW Civil Practice and Procedure, Thomson Reuters, Australia.

[2-5900] The general rule

The purpose of an order for security for costs is to ensure justice between the parties, and in particular to ensure that unsuccessful proceedings do not disadvantage defendants. However, as the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 notes at [1.5] and [2.4]–[2.6], the court has a wide discretion both at common law and pursuant to the *Civil Procedure Act* 2005 and UCPR. That discretion means that an order need not be made merely because grounds can be established: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026 at [85]–[86]. "The basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established": *Pearson v Naydler* [1977] 1 WLR 899 at 902. The general principle that poverty "is no bar to a litigant": *Cowell v Taylor* (1885) 31 Ch D 34 at 38; *Oshlack v Richmond River Council* (1998) 193 CLR 72 is now set out in r 42.21(1B).

This general rule is not, however, absolute: *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at 108; *Morris v Hanley* [2000] NSWSC 957 at [11]–[21]. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [47].

Rule 42.21 provides direction in achieving that balance by adding a non-exhaustive list of matters to which the court may have regard: r 42.21(1A). Further, provisions enable a court to order security where there are grounds for believing that a plaintiff has divested assets with the intention of avoiding the consequences of the proceedings (r 42.21(1)(e)) or changed their place of residence without reasonable notification of the change: r 7.3A. In addition, r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of impecuniosity. See further at [2-5930] and [2-5940].

[2-5910] The power to order security for costs

The sources of the court's power to order a party to provide security or pay money into court are "many and varied": *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11] per Lindsay J, listing (at [11]–[13]) not only the Supreme Court's inherent and statutory powers, but examples where money may be paid into court where no order for security for costs has been made: see also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [34].

The Supreme Court has inherent jurisdiction to make orders for security for costs (*Bhagat v Murphy* [2000] NSWSC 892), but the District Court and Local Court do not: *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598 at [50]–[53]. While it has been held that the District Court has an implied power under *District Court Act* 1973 s 156 to order security for costs (*Phillips Electronics Australia Pty Ltd v Matthews*, above, at [45]), the provisions of the *Civil Procedure Act* 2005 and UCPR render this unnecessary. Additionally, where an order for security for costs is sought against a corporate plaintiff, *Corporations Act* 2001 (Cth) s 1335 gives power.

[2-5920] Exercising the discretion to order security

The power to order security for costs is discretionary and the order will not be automatic: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [20], [56]–[57] and [60]–[62]. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent":

Oshlack v Richmond River Council, above, at [22]. Exercise of the power requires consideration of the particular facts of the case: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502. Although r 42.21(1A) now provides a list of factors, these are not exhaustive; the factors that may be taken into account are unrestricted, provided they are relevant: *Morris v Hanley*, above; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [12].

[2-5930] General principles relevant to the exercise of the discretion

The relevant factors have been summarised and discussed in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1977) 14 ALR 52, most recently by the NSW Court of Appeal in *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [26]–[35]. The NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 led to amendment to the rules: Uniform Civil Procedure Rules (Amendment No 61) 2013 (NSW).

These factors are set out below, in headings which mirror the provisions of rr 42.21(1A) and (1B):

(a) The prospects of success or merits of the proceedings: r 42.21(1A)(a)

A consideration of the plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at an early stage of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success: *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, above, at 197; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643 at [12]–[13].

(b) The genuineness of the proceedings: r 42.21(1A)(b)

Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a plaintiff in bringing the proceedings: *Bhagat v Murphy*, above, at [20]–[21]. Examples include an unsatisfactory pleading, or a vexatious claim (*Bhagat* at [26]), particularly where the plaintiff is self-represented with "abundant time" to pursue incessant and numerous applications: *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313–314.

(c) The impecuniosity of the plaintiff: r 42.21(1A)(c)

The court must first consider the threshold question of whether there is credible testimony to establish that the plaintiff will be unable to pay the defendant's costs if the defendant is ultimately successful: *Idoport Pty Ltd v National Australia Bank Ltd* at [2], [35] and [60]. However, once the defendant has led credible evidence of impecuniosity, an evidentiary onus falls on the plaintiff to satisfy the court that, taking into account all relevant factors, the court's discretion should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the defendant: *Idoport Pty Ltd v National Australia Bank Ltd* at [62] and [65]. In other words, proof of the unsatisfactory financial position of the plaintiff "triggers" the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [35]–[36]; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [12]–[13]; *Acohs Pty Ltd v Ucorp Pty Ltd*, above, at [10]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [29]–[41].

While "mere impecuniosity" does not justify an order for security for costs in itself, impecuniosity when combined with other factors led to an order for security for costs in *Levy v*

Bablis [2011] NSWCA 411 at [9], although payment was adjusted to be made in two tranches (at [11], [13] ff). Particular note should be taken of UCPR r 42.21(1B). Where the plaintiff is a natural person, an order cannot be made because of mere impecuniosity.

(d) Whether the plaintiff's impecuniosity is attributable to the defendant: r 42.21(1A)(d)

Where the plaintiff's lack of funds has been caused or contributed to by the defendant, the court will take this consideration into account. This has been described as the "causation" factor: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [85]–[101]. It is a relevant consideration that an order would effectively shut a party out of relief in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd*, above, at [26.4(g)]. However, a plaintiff cannot rely on the poverty rule where he or she has so organised their affairs so as to shelter assets: *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 452. See also UCPR r 42.21(1)(f).

In *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11 at [34] the court noted that, in determining the causation factor, it is not inappropriate to have regard to the apparent strength of the case.

(e) Whether the plaintiff is effectively in the position of a defendant: r 42.21(1A)(e)

It is appropriate to examine whether the impecunious plaintiff is, in reality, the defender in the proceedings, and not the attacker: *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 88 ALR 63 at 67–8.Where a plaintiff has been obliged to commence proceedings, and is effectively in the position of a defendant, security may not be ordered: *Hyland v Burbidge* (unrep, 23/10/92, NSWSC). Each case will turn on its facts. In *Hyland v Burbidge*, the claim that an overseas plaintiff was effectively in the position of a defendant and should not be ordered to provide security was dismissed. However, in *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* [2009] NSWSC 1095 at [13]–[15] the court held that the plaintiff's principal claim was a defence to the defendant's claims of forfeiture of a lease and the retaking of possession. The plaintiff was effectively in the position of a defendant, and the application for security dismissed.

(f) The "stultification" factor: r 42.21(1A)(f)

Where the effect of an order for security would be to stifle the plaintiff's claim, this is an important consideration to be weighed, particularly in light of the poverty rule: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [72]; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia*, above, at [39]. It may also be appropriate to look behind the actual litigant to examine the means of others who stand to benefit from the litigation: *Acohs Pty Ltd v Ucorp Pty Ltd* at [49]; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1672 at [38.8]. In *Pioneer Park Pty Ltd (In Liq) v ANZ Banking Group Ltd* [2007] NSWCA 344 at [56], Basten J noted that it might be seen as oppressive to allow a large corporate defendant to obtain an order for security for costs likely to stifle the litigation, in circumstances where the claim had potential merit and the security sought, although a relatively insignificant amount, was beyond the capacity of the corporate plaintiff to pay. However, in *Odyssey Financial Management Pty Ltd v QBE Insurance (Australia) Ltd* [2012] NSWCA 113, McColl JA held that to demonstrate that there was such oppression, it would be necessary for those who stood behind the corporate plaintiff to demonstrate that they were also without the means to provide an order for security in the relatively modest amount sought by the corporate defendant: at [17].

(g) Whether the proceedings involve a matter of public importance: r 42.21(1A)(g)

If the proceedings raise matters of general public importance, this may be a factor relevant to the discretion. This may be the case where the area of law involved requires clarification for the

benefit of a wider group than the particular plaintiff: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* at [31]; *Soh v Commonwealth of Australia* (2006) 231 ALR 425 at [26].

(h) Whether there has been an admission or a payment into court: r 42.21(1A)(h)

The circumstances in which parties may pay money into court are outlined in *JKB Holdings Pty Ltd v de la Vega*, above, at [11]–[13]. Where there has been an existing order made, and a further order sought, this may be a factor to take into account: *Welzel v Francis (No 3)* [2011] NSWSC 858.

(i) Whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant: r 42.21(1A)(i)

In addition to bringing the application for security promptly, the conduct of the litigation may be taken into account, including delay in the commencement of the proceedings, where there is evidence that the defendant is prejudiced by that delay.

(j) The costs of the proceedings: r 42.21(1A)(j)

The party seeking the order generally tenders evidence of costs estimates for preparation for hearing and hearing costs and, if overseas enforcement is required, information about the likely costs and difficulties. In *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601 at [82] Jagot AJ took into account that the defendant would incur "substantial legal costs" in defending the proceedings.

(k) Proportionality of the security sought to the importance and complexity of the issues: r 42.21(1A)(k)

The court may have regard to the proportionality of the costs to the activity or undertaking the subject of the claim. An example would be where the amount sought is so minuscule as to impose an undue hardship on an already vulnerable plaintiff, see *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427 at 432. The court may also take into account the relative disparity of resources of the parties (*P M Sulcs v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826 at [82]) and the modesty of the sum sought in comparison to the importance of the issue: *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

(l) The timing of the application for security: r 42.21(1A)(l)

Applications for security should be brought promptly. Delay by a defendant is a relevant factor in the exercise of the discretion: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [68]. A corporate plaintiff is expected to know its position "at the outset", before it embarks to any real extent on its litigation: *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 309.

The passage of time is only one item in the list of factors to be taken into account in the balancing exercise: *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 123 ff; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [25]–[26]; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826. The delay must be weighed not only in terms of prejudice, but also in terms of the factors that have led to the delay: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [61] ff; *Re GAP Constructions Pty Ltd* [2013] NSWSC 822 at [14]–[15] (order for security made notwithstanding the delay).

(m) Whether an order for costs is enforceable in Australia: r 42.21(1A)(m)

The Law Reform Commission report, above, identifies the problem of recoverable costs in terms of overseas enforcement. This provision should be read in conjunction with r 42.21(1A)(n).

(n) Ease and convenience (or otherwise) of overseas enforcement: r 42.21(1A)(n)

A defendant is not expected to bear the uncertainty of enforcement in a foreign country: *Cheng Xi Shipyard v The Ship "Falcon Trident"* [2006] FCA 759 at [9], *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992 at [29]. It has been stated that this principle is not absolute and must be weighed against other discretionary considerations: *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245. However, the difficulty in enforcing an order for costs overseas against a non-resident plaintiff will usually be sufficient to ground an order: *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction or legislation which may make recovery difficult: *Dense Medium Separation Powders Pty Ltd v Gondwana Chemicals Pty Ltd (in liq)* [2011] NSWCA 84.

A list foreign jurisdictions where there is a reciprocal right of enforcement is set out in the *Foreign Judgments Act* 1991 (Cth); Sch 2 to the *Foreign Judgments Regulations* 1992 (Cth).

The residence of an appellant outside Australia is a powerful factor in favour of ordering security, even where enforcement may not be an issue. Security for costs was ordered where the appellant resided in Papua New Guinea in *Batterham v Makeig (No 2)* [2009] NSWCA 314 at [8] (see [2-5940] below) and in *Mothership Music v Flo Rida (aka Tramar Dillard)* [2012] NSWCA 344, where the appellant resided in the United States.

The non-exhaustive nature of the list

This list is non exhaustive. The court will always take into account factors peculiar to the circumstances of the proceedings: *Equity Access Ltd v Westpac Banking Corp* [1989] ATPR ¶40-972. Other relevant factors considered by the courts include: that the parties or some of them are legally aided, see *Webster v Lampard* (1993) 177 CLR 598; that the likely order as to costs, even if successful, may not be in favour of the winning defendant, see *Singer v Berghouse* (1993) 67 ALJR 708 at 709.

Security may be ordered in any cause of action. Although it has been suggested that security for costs will not be ordered against a plaintiff in personal injury or similar tortious proceedings (*De Groot (an infant by his tutor Van Oosten) v Nominal Defendant* [2004] NSWCA 88 at [29]–[30] per Handley JA), such orders have been made where the plaintiff resides overseas: *Li v NSW* [2013] NSWCA 165 (appeal from order for security for costs dismissed); *Chen v Keddie* [2009] NSWSC 762; *Jennings-Kelly v Gosford City Council* [2012] NSWDC 84.

[2-5935] The impoverished or nominal plaintiff: r 42.21(1B)

UCPR r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of his or her impecuniosity. Prior to this rule coming into force, security against a person was ordered where a plaintiff brings repeated applications *Mohareb v Jankulovski* [2013] NSWSC 850 (security of $5,000 ordered), and where the claim was hopelessly framed: *Nanitsos v Pantzouris* [2013] NSWSC 862 (security of $5,000 ordered). In both cases the plaintiffs were litigants in person.

The court will also take into account, in balancing the interests of a defendant, that the plaintiff is suing for the benefit of other persons who are immune from the burden of an adverse costs order: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [31] ff. This factor has received increased attention in modern litigation with the advent of commercial litigation funding and insurance. The relevant principles are discussed more fully below in "Nominal plaintiffs" at [2-5950]. Representative plaintiffs are to be distinguished from nominal plaintiffs who have no personal interest and merely act in a representative capacity (such as executors, and trustees).

[2-5940] Issues specific to the grounds in r 42.21(1)

Additional factors are set out in r 42.21(1):

(a) The plaintiff is ordinarily resident outside Australia: r 42.21(1)(a)

The question of what the term "ordinarily resident" means is discussed in *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245.

UCPR r 42.21(1)(a) was amended to replace "New South Wales" with "Australia" by Uniform Civil Procedure Rules (Amendment No 61) 2013. This provision is designed to be read in conjunction with r 42.21(1A)(m) and (n), as to which see [2-5930], above.

(b) Misstatement of address: r 42.21(1)(b)

It was previously the case that the defendant must prove a plaintiff has failed to state an address, or has misstated an address, with the intention to deceive, or has changed address with a view to avoiding the consequences of an adverse costs order: *Knight v Ponsonby* [1925] 1 KB 545 at 522. The requirement for compliance with this rule will lighten the evidentiary burden.

(c) Change of address after proceedings are commenced: r 42.21(1)(c)

This is a rarely used provision. In *Ghiassi v Ghiassi* (unrep, 19/12/2007, NSWSC), Levine J rejected an application made after the plaintiff left to travel overseas, on the basis that it was unsupported by evidence. In *Kealy v SHDS Services Pty Ltd as Trustee of the SHDS Unit Trust* [2011] NSWSC 709 the defendant complained that the plaintiff returned to Ireland without notice, although he later disclosed his new address in an affidavit of documents. Johnson J considered that the basis of the application was essentially that the plaintiff resided outside the jurisdiction, and made an order for security for costs in the sum of $40,000.

(d) The plaintiff is a corporation: r 42.21(1)(d)

It is not sufficient to prove simply that the plaintiff is a corporation. There must be some credible testimony that the corporation is likely to be unable to pay the defendant's costs, if unsuccessful. The test for the application of r 42.21(1)(d) is substantially similar to that for s 1335 of the *Corporations Act* 2001 (Cth) (*Fitzpatrick v Waterstreet* (1995) 18 ACSR 694), and this topic is therefore considered together with the section below on "Corporations" at [2-5960].

(e) The plaintiff is suing for the benefit of some other person: r 42.21(1)(e)

See *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd* (1981) 34 ALR 653. This ground overlaps the inherent jurisdiction and is discussed more fully below in the section on "Nominal plaintiffs". The discretion is more likely to be exercised where the nominal plaintiff has insufficient assets within the jurisdiction: *Bellgrove v Marine & General Insurance Services Pty Ltd* (1996) 5 Tas R 409. See [2-5950] below, "Nominal plaintiffs".

(f) There is reason to believe the plaintiff has divested assets to avoid the consequences of the proceedings: r 42.21(1)(f)

This new provision was added on 9 August 2013. Applications have been brought on such a basis in other jurisdictions in Australia, as summarised in *Vizovitis v Ryan t/as Ryans Barristers & Solicitors* [2012] ACTSC 155 at [49]–[54] (the application in those proceedings failed due to lack of evidence). In *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230, Leeming JA made an order for security for costs of $15,000 where the respondent alleged that a series of withdrawals contrary to Mareva orders.

[2-5950] Nominal plaintiffs

A nominal plaintiff is "nothing but a puppet for some third party, a mere shadow, in the sense that he has parted with any right he may have had in the subject matter": *Andrews v Caltex Oil (Aust) Pty Ltd* (1982) 40 ALR 305 at 309.

The poverty rule must be qualified in circumstances where the claim is put forward on behalf of others: *Grizonic v Suttor* [2006] NSWSC 1359 at [20]. See also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [79].

The real plaintiff is not allowed to seek to enforce a right through a nominal plaintiff who is a person of straw: *Sykes v Sykes* (1869) LR 4 CP 645 at 648; *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd*, above.

The involvement of third-party funders with no pre-existing interest in the proceedings, who are in some instances resident out of Australia but who stand to benefit substantially from any recovery from the proceedings is a material consideration: *Idoport Pty Ltd v National Australia Bank Ltd* at [107]; *Chartspike Pty Ltd v Chahoud* [2001] NSWSC 585. It is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [83]; *Chartspike Pty Ltd v Chahoud*, above, at [5]. This topic is discussed in the Law Reform Commission report, above, 3.3–3.40.

[2-5960] Corporations

The power to order security for costs against corporations is derived from UCPR r 42.21(1)(d) (and r 51.50 in the case of appeals) and from s 1335 of the *Corporations Act* 2001 (Cth). The Supreme Court also has inherent jurisdiction in order to regulate the court's procedures and processes and to prevent abuse of process: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 at [33]–[35].

Corporations are in a different category from natural person plaintiffs: *Pacific Acceptance Corp Ltd v Forsyth (No 2)* [1967] 2 NSWR 402 at 407; *Fiduciary Ltd v Morningstar Research Pty Ltd* at [53]; *Idoport Pty Ltd v National Australia Bank Ltd* at [53]–[59]; *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Whyked Pty Ltd v Yahoo Australia and New Zealand Ltd* [2006] NSWSC 1236 at [25].

A corporation which seeks to rely on the stultification factor must also demonstrate that those standing behind it, likely to benefit from the litigation (such as shareholders and creditors) are also without means to satisfy an adverse costs order: *Re Staway Pty Ltd (in liq)(rec and mgrs appted)* [2013] NSWSC 819 at [57]–[60] (application for security deferred due to merits of corporation's claim). It is not for the party seeking security to raise such issues: *Thalanga Copper Mines Pty Ltd v Brandrill Ltd*, above, at [12]–[18]; *Acohs Pty Ltd v Ucorp Pty Ltd* at [42] ff. The same is the case where there is a third party funder: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*, above, at [51].

Undertakings or offers to pay the surety by directors or other persons may be accepted: *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 532 (company principal agreeing to meet costs); *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr* [2005] NSWCA 240 (shareholders agreeing to meet costs liability); *Jazabas Pty Ltd v Haddad* (2007) 65 ACSR 276 (security ordered as shareholders were not prepared to provide formal undertaking to meet costs).

Where a liquidator conducts the litigation on behalf of the company in liquidation, the court should not treat an application for security at large, but should have regard to guidelines as set out in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* at [45].

[2-5965] Ordering security in appeals

The differences in principle between security for costs at trial level and on appeal have been noted and explained in *Tait v Bindal People* [2002] FCA 332 at [3]; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247 at [18]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [13]–[28]; and *Swift v McLeary* [2013] NSWCA 173 at [27]–[30]. Under UCPR r 51.50(1), the court may, *in special circumstances*, order that such security as the court thinks fit be given for the costs of an appeal. Rule 51.50 (3) provides that

r 51.50(1) does not affect the powers of the court under UCPR r 42.21. There are no fixed rules for determining what will amount to special circumstances: *Zong v Wang* [2021] NSWCA 214 at [45], and the question of what constitutes special circumstances should not be fettered by any general rule of practice. Impecuniosity, without more, is normally insufficient to satisfy the requirement for special circumstances: *Zong v Wang* at [17].

While security for costs is more likely to be awarded because the issues have been the subject of findings by a primary judge, security for costs was refused where an impecunious appellant had reasonable prospects of success on appeal: *Neale v Archer Mortlock & Woolley Pty Ltd* [2013] NSWCA 209. See also *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust* [2021] NSWCA 32, where special circumstances justified the order for security for costs (security of $40,000). These included that the appellants had resolved to pursue an appeal which was more likely to fail than not (at [41]). Because of the appellants' impecuniosity, in the absence of any provision of security, the respondents faced the reality of incurring substantial further legal costs with no realistic prospect of recovering them if the appeal was unsuccessful. Similarly, in *Zong v Wang*, special circumstances justified the order for security for costs (security of $50,000) including that the respondent had obtained judgment against the appellant that was unlikely to be recovered and had incurred substantial costs in excess of $100,000 in obtaining that judgment, also unlikely to be recovered from the appellant. It was also relevant that the respondent would be put to the further cost of responding to the appellant's appeal, with no prospect of recovering his costs if the appeal is dismissed. See also *Cassaniti v Katavic* [2022] NSWCA 230 where special circumstances justified the order for security of $75,000 for future costs where there was reason to doubt the appellants' ability to satisfy an adverse costs order.

The security for costs procedure is intended to ensure that the beneficiary of a security for costs order is not left out of pocket in the event of success on appeal: *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230 (security of $15,000 ordered); *Swift v McLeary* [2013] NSWCA 173 (security of $40,000 ordered where unexplained dissipation of assets was alleged); *Yu Xiao v BCEG International (Australia) Pty Ltd* [2022] NSWCA 223 (security of $120,000 ordered where there had been substantive findings that the appellants had engaged in fraud).

In *Porter v Gordian Runoff Ltd* [2004] NSWCA 69 at [41], Hodgson JA considered a factor in favour of an order for security to be that the appellant's legal advisors were owed substantial amounts of money giving them a "large stake" in the success of the appeal. The relevance of that factor is that lawyers with such an interest may reasonably be expected to provide some financial support for the prosecution of the appeal. See also *Porter v Gordian Runoff Ltd* [2004] NSWCA 171 at [32] (application to discharge the order dismissed) and *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust*, above, at [34]. In the latter case, in the unlikely event that the appeal succeeded, the appellants stood to recover their costs incurred at first instance and the beneficiaries of their doing so were their lawyers and others whose fees at first instance remain unpaid.

The court's role includes a re-exercise of the discretion to award security for costs: *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [53]; *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366.

In *Batterham v Makeig (No 2)* [2009] NSWCA 314, Macfarlan JA was of the view that the reference to "plaintiff" in r 42.21(1)(a) encompasses an appellant, even if the appellant was not a plaintiff in the court below: at [6]. In that case, the first appellant's residence outside Australia, his manifested preparedness to place what hurdles he could in the path of enforcement by the respondent of the judgment, and the limited financial resources available to the first appellant combined to require security to be ordered: at [10].

[2-5970] Amount and nature of security to be provided

The order should not provide a complete indemnity for costs: *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 at 175. Fixing the amount to be provided by way of security is part of the exercise of the

court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [132]. The court will therefore require evidence by which it might estimate the defendant's probable recoverable costs: see, for example, the evidence adduced in such cases as *Fiduciary Ltd v Morningstar Research Pty Ltd*; *Idoport Pty Ltd v National Australia Bank Ltd*; and *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 1131; *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601.

Evidence generally consists of an affidavit from a solicitor or costs assessor as to the amount of costs, although the court may accept a general estimate from a costs assessor or senior solicitor. Factual matters, such as proof of the plaintiff's residence overseas, or a corporation's financial circumstances, may be the subject of affidavit or tender.

The court may initially only order security for the costs of preparing the matter for hearing and make further orders at a later date, or order the sum to be paid in tranches (*KDL Building v Mount* [2006] NSWSC 474 at [36]; *Porter v Aalders Auctioneers and Valuers Pty Ltd* [2011] NSWDC 96 at [29]–[30]), or make such other order as may be appropriate to ensure that the party paying the security has adequate opportunity to do so. The security may take such form as the court considers will provide adequate protection to the defendant. In lieu of the more traditional payment into court, guarantees, charges or the provision of a bank bond: *Estates Property Investment Corp Ltd v Pooley* (1975) 3 ACLR 256. Other examples of how security may be provided are set out in the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, at [1.6]. The basic principle is that so long as the defendant can be adequately protected, the security should be given in the way that is least disadvantageous to the giver: G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018 at [29.96].

[2-5980] Practical considerations when applying for security

1. **Timing of an application**
   It is important to foreshadow any application in correspondence: *Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68 at 71. The court will exercise care when assessing the proportionate strength of the cases of the parties at the early stages of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

2. **Multiple parties**
   Difficulties arise where there are two or more plaintiffs, including one or more individuals and one or more corporations, or where one or more of the plaintiffs resides overseas; or where the prospects of success vary as amongst the co-plaintiffs: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [54] ff. Similarly, when only one of several defendants applies for security: *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992.

3. **Ordering security against a defendant**
   An order for security will not ordinarily be made against parties defending themselves and thus forced to litigate: *Weily's Quarries v Devine Shipping Pty Ltd* (1994) 14 ACSR 186 at 189. Where, however, the defendant is in fact pursuing a claim as, in substance, the claiming party, the position is reversed: *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 12 ACLC 334; *Motakov Ltd v Commercial Hardware Suppliers Pty Ltd* (1952) 70 WN (NSW) 64. Where a corporation, which is a defendant, brings a cross-claim, an application for security for costs in relation to the cross-claim may be made.

[2-5990] Dismissal of proceedings for failure to provide security

The court has power to dismiss proceedings where the plaintiff fails to comply with an order to give security: r 42.21(3): *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377 at [36]. Relevant circumstances to be taken into account are discussed in *Idoport v National Australia Bank Ltd* [2002] NSWCA 271 at [24] ff and [69] ff and in *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235. UCPR r 50.8 has been amended to enable a court to which Pt 50 applies to

dismiss an appeal or cross-appeal for failure to provide security for costs. UCPR r 51.50 has similarly been amended to enable the NSW Court of Appeal to dismiss appeals or cross-appeals for failure to comply with security for costs orders.

A party unable to provide security within the time frame ordered may seek an extension: *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366 (application for extension dismissed).

An order for security for costs should not be used as an alternative way of striking out an appeal. Nor should it be used to push an appellant towards discontinuing an appeal. Rather, it is a process available to secure, in advance, the costs of a respondent to an appeal where the circumstances justify reversing the sequence which usually applies: namely that costs orders are made, if at all, after a proceeding has been heard and determined: *Nyoni v Shire of Kellerberrinin (No 9)* [2016] FCA 472.

[2-5995] Extensions of security for costs applications

Applications for further security may be brought at any time: *Welzel v Francis* [2011] NSWSC 477; *Welzel v Francis (No 2)* [2011] NSWSC 648; *Welzel v Francis (No 3)* [2011] NSWSC 858.

Applications to vary or extinguish the terms may be made during the proceedings before the primary court or on appeal: *Nicholls v Michael Wilson & Partners (No 2)* [2013] NSWCA 141 (application for release of security).

[2-6000] Sample orders

Although judgments may refer to payment of money into court under these provisions, parties generally prefer to provide security by way of a bank bond or a deposit of funds, placed in an interest bearing account in the joint names of solicitors on either side of proceedings: *JKB Holdings v de la Vega* [2013] NSWSC 501 at [12].

The following sample orders contemplate payment into court, but may be varied to suit the parties' convenience:

1. The plaintiff is to provide security for the defendant's costs by paying into court the sum of $35,000 or by otherwise providing security for that amount in a manner satisfactory to the defendant. Until that security is provided, there will be a stay of the proceedings. The security is to be provided before 23 June 2007, on which date the matter is to be listed before the court for consequential orders, or, in the event that the security has not been provided, an order for the dismissal of the proceedings under r 42.21(3).
2. All orders currently in place for the case management of the proceedings are presently stayed until the motion seeking security for costs is determined.
3. The first defendant is to provide security on or before 22 June 2007, for the costs of the first defendant and the second defendant up to the end of the first day of the trial, in the amount of $150 000, by way of unconditional bank guarantee, or otherwise to the satisfaction of those defendants.
4. The parties have liberty to apply for additional security for costs at any stage of the proceedings.

Legislation

- *Corporations Act* 2001 (Cth), s 1335
- *Foreign Judgments Act* 1991 (Cth)
- *Foreign Judgments Regulations* 1992 (Cth)

Rules

- UCPR Pt 7 r 7.3A, Pt 42, r 42.21, Pt 50, Pt 51 r 51.50

Further references

- G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018
- NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, <www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf>, accessed 15 August 2013
- P Blazey and P Gillies, "Recognition and Enforcement of Foreign Judgments in China", *International Journal of Private Law*, Macquarie University, 2008, (cited in *Chen v Keddie* [2009] NSWSC 762 at [18]).

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Judgments and orders

[2-6300] Introduction

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

[2-6310] Duty of the court

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

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

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

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

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

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

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

[2-6320] Consent orders

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

[2-6330] All issues

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

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

[2-6340] Cross-claims

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

[2-6350] Effect of dismissal

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

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

[2-6360] Possession of land

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

[2-6370] Detention of goods

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

[2-6380] Set off of judgments

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

[2-6390] Joint liability

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

[2-6400] Delivery of judgment

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

[2-6410] Written reasons

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

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

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

[2-6420] Deferred reasons

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

[2-6430] Reserved judgment

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

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

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

[2-6440] Reasons for judgment

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

The obligation to give adequate reasons is well established. The need for transparency in decision-making and what is required in any particular case is discussed in numerous authorities, including: *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [56], citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 260 and *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444. Concision in judgments is desirable, but not if it comes at the expense of failing to give adequate reasons: *Cavanagh v Manning Valley Race Club Ltd* [2022] NSWCA 36 at [24]. See also *Rialto Sports Pty Ltd v Cancer Care Associates Pty Ltd* [2022] NSWCA 146 at [59]–[64] (judge failed to consider material arguments and relevant evidence on substantial

issues and judge's reasons were patently insufficient in being "strikingly short" and failed to explain a preference for one expert's evidence over another); *The Nominal Defendant v Kostic* [2007] NSWCA 14 (failure to provide adequate reasons regarding medical evidence); *Whalan v Kogarah Municipal Council* [2007] NSWCA 5 (judge's reasons did not engage with the case presented by plaintiff). As to reasons for demeanour findings, see *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186. As to amendments or additions to ex tempore reasons, see *Spencer v Bamber* [2012] NSWCA 274.

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

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

See commentary at [2-6600].

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

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

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

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

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

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

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

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

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

[2-6480] Arrest warrants

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

[2-6490] Entry of judgments and orders

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

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

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

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

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

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

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

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

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

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

Legislation

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

Rules

- UCPR rr 36, 40.7

Further references

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

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Vexatious litigants

[2-7600] Introduction

Prior to 1 December 2008 the provision dealing with vexatious litigants in NSW was *Supreme Court Act* 1970 s 84. See *Attorney-General v Wentworth* (1988) 14 NSWLR 481 and see [2-6920] under the subtitle Vexatious proceedings.

Subsequently the relevant legislation has been the *Vexatious Proceedings Act* 2008 (the Act). That Act repeals s 84.

The *Vexatious Proceedings Amendment (Statutory Review) Act* 2018 amended the Act in a number of "minor" respects, to deal with issues that had arisen in its application. It did not alter the basic scheme of the Act.

For an examination of the relevant principles and the Act, see *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [16]–[19], [41]–[56].

[2-7610] Inherent jurisdiction and powers of courts and tribunals

The Act does not limit, affect or displace any inherent jurisdiction or any powers that a court or tribunal has apart from the Act to restrict vexatious proceedings: s 7. It is also clear that there is power to make orders appropriately adapted to the circumstances of the case; see for example *Ghosh v Miller (No 2)* [2018] NSWCA 212. Also see *Choi v Secretary, Department of Communities and Justice* [2022] NSWCA 170 at [222]; *Hassan v Sydney Local Health District (No 5)* [2021] NSWCA 197 and *Samootin v Shea* [2013] NSWCA 312.

[2-7620] Vexatious proceedings order

Pursuant to s 8, the Supreme Court (or the Land and Environment Court) may make a vexatious proceedings order in relation to a person if it is satisfied that the person has frequently instituted or conducted vexatious proceedings in Australia (s 8(1)(a)) or acting in concert with a person subject to a relevant vexatious proceedings order has instituted or conducted vexatious proceedings in Australia: s 8(1)(b).

The court may have regard to proceedings conducted in any Australian court or tribunal (s 8(2)(a)) or orders made by such court or tribunal: s 8(2)(b).

Such orders must not be made in relation to a person without hearing the person or giving the person an opportunity of being heard: s 8(3).

The order may be made on the court's own motion or on the application of persons identified in s 8(4). One of these persons is the person against or in relation to whom another person has instituted or conducted vexatious proceedings: s 8(4)(d).

A judicial officer, member or registrar of a court or tribunal may make a recommendation to the Attorney General for consideration of an application for a vexatious proceedings order in relation to a specified person s 8(6).

The order made by the Supreme Court may be an order staying all or part of any proceedings in NSW already instituted by the person (s 8(7)(a)), or an order prohibiting the person from instituting proceedings in NSW (s 8(7)(b)) or any other order that the court considers appropriate in relation to the person (s 8(7)(c)).

The Land and Environment Court may make similar orders but only in respect of proceedings in that court: s 8(8).

Orders may be varied or set aside (s 9) or reinstated (s 10).

[2-7630] "Frequently"

For a consideration of that word, see *Teoh v Hunters Hill Council (No 8)* at [46]–[49] and the cases referred to in those passages. See also *Quach v Health Care Complaints Commission* [2017] NSWCA 267 at [113] where the meaning of "frequently" in s 8(1)(a) was considered.

[2-7640] Discretion

Section 8 provides that the court "may" make a vexatious proceedings order and accordingly the relief is discretionary. For a consideration of that issue, see *Teoh v Hunters Hill Council (No 8)*, above, at [44], [56], [68]–[71].

[2-7650] Vexatious proceedings

In the Act, "vexatious proceedings" includes proceedings that are an abuse of the process of a court or tribunal (s 6(a)), proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose (s 6(b)), proceedings instituted or pursued without reasonable ground (s 6(c)), and proceedings that are conducted to achieve a wrongful purpose, or in a way that harasses, or causes unreasonable annoyance, delay or detriment, regardless of the subjective intention or motive of the person who instituted the proceedings (s 6(d)). The comprehensive definition of what is included in the term "proceedings" is to be found in s 4 and includes any civil and criminal proceedings or proceedings before a tribunal.

[2-7660] Contravention of vexatious proceedings order

Section 13 provides for the stay (s 13(2)) or dismissal (ss 13(3), (4), (5)) of proceedings instituted in contravention of such an order.

[2-7670] Applications for leave

Sections 14 and 16 provide that a person who is subject to an order, or another person acting in concert with someone subject to an order, may seek leave to commence proceedings and makes provision for the appropriate procedure. As to the relationship between ss 9 and 14, see *Quach v NSW Health Care Complaints Commission; Quach v NSW Civil and Administrative Tribunal* [2018] NSWCA 175, obiter, at [22]–[26]. Section 16(3) provides that leave may be granted subject to conditions and s 16(4) that leave may only be granted if the court is satisfied that the proceedings are not vexatious proceedings (s 16(4)(a)) and that are one or more prima facie grounds for the proceedings (s 16(4)(b)).

Further, s 15 provides that the court must dismiss an application for leave if it considers that the required affidavit does not comply with s 14(3), that the proceedings are vexatious proceedings or there is no prima facie ground for the proceedings. The application may be dismissed even if the applicant does not appear at any hearing: s 15(2).

Despite any other Act or law, the applicant may not appeal from a decision disposing of an application for leave: s 14(6).

[2-7680] Orders limiting disclosure

Section 17 provides for the making of orders limiting or prohibiting disclosure and for orders that proceedings be conducted in private.

Legislation

- SCA s 84
- *Vexatious Proceedings Act* 2008 ss 4, 8(1)–8(8), 9, 10, 14, 15, 17
- *Vexatious Proceedings Amendment (Statutory Review) Act* 2018

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Relevance

Evidence Act 1995, Pt 3.1 (ss 55–58).

[4-0200] Relevant evidence — s 55

In deciding whether evidence is relevant, the trial judge is neither required nor permitted to make any assessment of whether the jury would or might accept that evidence, but must proceed on the assumption that it will be accepted: *Adam v The Queen* (2001) 207 CLR 96 at [22], [60]; *R v Shamouil* (2006) 66 NSWLR 228 at [60]–[62]. It is suggested that the same assumption should be made where the judge is also the tribunal of fact. The test of relevance — that the evidence could rationally affect (directly or indirectly) the assessment of the existence of a fact in issue in the proceeding — directs attention to the capability rather than the weight of the evidence to perform that task, but the issues of credibility or reliability may be such in the particular case that it is possible for the judge to rule that it would not be open to the jury to conclude that the evidence could perform that task: *R v Shamouil* at [62]–[63]; *DSJ v R* (2012) 215 A Crim R 349 at [8], [53]–[56].

The threshold test is whether there is a logical connection between the evidence and a fact in issue: *Papakosmas v The Queen* (1999) 196 CLR 297 at [81]. The definition of relevance in s 55 reflects the common law: *Washer v Western Australia* (2007) 234 CLR 492 at [5], n 4. The requirement that the capacity of the evidence to rationally affect the assessment of the evidence is significant, and it is necessary to point to a process of reasoning by which the evidence could do so: *Washer v Western Australia* at [5]; *Evans v The Queen* (2007) 235 CLR 521 at [23]. Where the effect of the evidence is so ambiguous that it could not rationally affect the assessment of the fact in issue, the evidence is irrelevant: *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [26].

A majority of the High Court in *BBH v The Queen* (2012) 245 CLR 499 has endorsed the proposition that evidence is relevant and therefore admissible so long as it has probative value. This is so notwithstanding that it may ultimately be categorised by the tribunal of fact as carrying no weight: Heydon J at [97]–[104]; Crennan and Kiefel JJ at [152], [158]–[160]; Bell J at [194]–[197]. Moreover, the tribunal of fact is entitled to assess the particular piece of evidence by having regard to the whole of the evidence in the light of the issues at trial: Bell J at [196]. Where there is an issue regarding the authenticity of a document, it may still be admissible if it is relevant or arguably so. This is so as long as there is material from which its authenticity may reasonably be inferred. That material will include what may reasonably be inferred from the document itself: *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 301 ALR 326.

The general proposition stated by French CJ (at [57] and [58]) that "equivocal" evidence is not relevant and should thus be rejected (see also Hayne J at [80]–[81], Gummow J at [61]) was not supported by the majority decisions: see *Criminal Trial Courts Bench Book* Special Bulletin 26.

In a criminal case, s 55 directs attention to the elements of the offence charged, the particulars of those elements and any circumstances which bear upon the assessment of probability; facts in issue are not limited to the ultimate issues, but include facts relevant to those issues: *Smith v The Queen* (2001) 206 CLR 650 at [7]. The prosecution may set out to establish that an accused had a motive to commit an offence charged. Motive may rationally affect the assessment of the probability of the existence of one or more of the elements of an offence; evidence that tends to establish motive, therefore, may rationally affect such assessment: *HML v The Queen* (2008) 235 CLR 334 at [5] (Gleeson CJ).

The evidence must affect the probability of the existence of the fact sought to be proved. In a case where it was alleged that the accused had acted in self-defence, evidence that the victim had previously carried a firearm did not go to the probability that he was carrying a firearm on the occasion in question: *Elias v R* [2006] NSWCCA 365 at [26]; although it would have been relevant to the issue of his tendency to carry such a weapon (at [31]); *R v Cakovski* (2004) 149 A Crim R 21 at [36], [56]–[57], [70] (see [4-1610]) doubted.

Observing how the accused walked or how he spoke certain words would be relevant to the identification of the accused as the person seen and heard by the witnesses, but dressing the accused in the clothing worn by the person seen by the witnesses gave no assistance to the jury in determining whether he was the person seen by the witnesses: *Evans v The Queen*, above, at [27].

Where evidence of identification depends on a photograph taken by a security camera, it is for the jury to determine whether the accused is shown in the photograph, and evidence by a police officer that he had made such an identification from the photograph cannot logically affect the jury's task: *Smith v The Queen*, above, at [11]. A complainant who has no recollection of an alleged sexual assault cannot be asked whether her interview video recorded shortly after the event demonstrated that she had consented: *R v TA* (2003) 57 NSWLR 444 at [6], [24], [26].

The Law Reform Commission's intention — that only a minimal logical connection between the evidence and the fact in issue was required, sufficient to make the fact in issue more probable or less probable than it would be without the evidence (*ALRC Report 26*, vol 1) — was accepted as the appropriate interpretation of s 55, in *R v Clark* (2001) 123 A Crim R 506 at [111]–[112]. Evidence is either relevant or it is not; no discretion falls to be exercised in determining relevance: *Smith v The Queen* at [6]; *Phillips v The Queen* (2006) 225 CLR 303 at [50].

The "probative value" of evidence and the "credibility" of a witness are defined in the Dictionary to the *Evidence Act*. Section 55(2) does not of itself make the credibility of a witness relevant to a fact in issue in the proceeding unless it is of such a nature as to tend rationally and logically to weaken confidence in the veracity of the witness: *R v Slack* (2003) 139 A Crim R 314 at [31]–[34].

The probative effect of telling a lie is logically the same in a civil case as it is in a criminal case: *Barrett Property Group Pty Ltd v Carlisle Homes Pty Ltd* [2008] FCA 375 (Heerey J) at [75]–[76].

[4-0210] Relevant evidence to be admissible — s 56

If evidence is not relevant, it is not admissible: *Smith v The Queen* at [12].

This section raises the vexed question as to whether a miscarriage of justice may have occurred if no objection is taken to "irrelevant evidence": see [4-0400] and also at [4-1630]. The better view is that "not admissible" means "not admissible over objection", although in a criminal trial the judge has an overriding duty to ensure a fair trial and to prevent a miscarriage of justice: *Perish v R* [2016] NSWCCA 89.

Evidence relevant to the case against one of a number of defendants is relevant to the proceedings within the meaning of s 55, and its use against the other defendants may only be limited by the terms of s 136; the evidence is not unfairly prejudicial against another defendant within the meaning of s 136 only because it is not relevant to the case against that defendant, although it may be regarded as so prejudicial if the case is tried with a jury: *Johnstone v State of NSW* (2010) 202 A Crim R 422 at [102]–[103].

Whilst evidence relating to the prior sexual history of the complainant may be relevant, statutory proscriptions may make it inadmissible — see *Criminal Trial Courts Bench Book* at [5-100] and ff.

[4-0220] Provisional relevance — s 57

This provision is similar to the practice before the *Evidence Act* of admitting evidence subject to relevance: *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336 (Young J) at 338. Where the relevance of particular evidence is initially unclear, it remains appropriate under the Act for evidence to be admitted in a non-jury case subject to relevance, and for a ruling to be made as to its effect at the conclusion of the case: *Merrylands Bowling, Sporting and Recreation Club Ltd v P & H Property Services Pty Ltd* [2001] NSWCA 358 at [35].

The issue as to whether s 57 permits the issue of a document's authenticity to be postponed until after its relevance has been determined has not yet been satisfactorily determined. In *National*

Australia Bank Ltd v Rusu (1999) 47 NSWLR 309 (SC) at [19] et seq, Bryson J held that relevance depends on the authenticity of the evidence, and must be established before relevance can be determined. S Odgers, *Uniform Evidence Law* has argued (at [EA 57.120]) that, as s 57(1) requires only that it is "reasonably open" to make a finding of authenticity, the ruling in *National Australia Bank Ltd v Rusu*, above, is wrong. In *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1250, Einstein J relied in part on s 57 as sanctioning a widening of the circumstances in which evidence may be admitted subject to relevance, but did not elaborate the basis for that view.

The Court of Appeal referred inconclusively to *National Australia Bank Ltd v Rusu* in *Daw v Toyworld* (2001) 21 NSWCCR 389 at [46], but with apparent approval in *Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [30]. In *Trimcoll* at [30], the Court of Appeal held that the relevance of a document in the particular proceedings may depend on the identity of its author, when it was created and whence it was extracted, whereas its authenticity depended on whether the document is what it purports to be; there is no entirely clear dividing line between questions of authenticity and identity and each may provide a basis for admissibility. *National Australia Bank Ltd v Rusu* was followed by Austin J in *ASIC v Rich* (2005) 216 ALR 320 at [116]–[119] and at [152] et seq. He emphasised that the question is, as the Law Reform Commission had stated (*ALRC Report 26*, vol 1, at [641]): could the evidence, if accepted, affect the probabilities?

In *O'Meara v Dominican Fathers* [2003] ACTCA 24, Gyles and Weinberg JJ (at [85]) expressed "considerable doubt" as to the decision in *National Australia Bank Ltd v Rusu*, but in the end (at [88]) they were satisfied on the evidence that the document in issue in that case was authentic, and they held that, by reason of its potential to be misleading or confusing, the document should have been rejected in the exercise of the general discretion afforded by s 135 (at [90]).

In *Smith v The Queen* (2001) 206 CLR 650 at [45], Kirby J said, in his dissenting judgment, that it was undesirable, as a matter of legal policy, and unnecessary in the terms of admissibility stated in s 55, "to set the hurdle of relevance too high". In *ASIC v Rich*, above, (at [157]), Austin J accepted that this statement was not inconsistent with the test of relevance adopted by the majority judgment in *Smith*.

Section 57(2) ("Provisional relevance") permits the use of evidence that a party to the proceedings is a member of a joint criminal enterprise for the purpose of determining whether or not he or she is in fact a member of that enterprise. The Law Reform Commission explained (at *ALRC Report 26*, vol 1, par 646 "Conspirators") that such evidence — tendered on the basis that it is reasonably open to the tribunal of fact to find that he or she is a member of the enterprise — is not tendered for a hearsay purpose and thus is not caught by the hearsay provisions in the Act; cf *Ahern v The Queen* (1988) 165 CLR 87 at 93–94, 99–100; *R v Masters* (1992) 26 NSWLR 450 at 460–461. See also s 87(1)(c) ("Admissions made with authority") at [4-0870].

[4-0230] Inferences as to relevance — s 58

See also s 183 of the statute, which permits any reasonable inferences to be drawn from a document where a question arises about the application of a provision of the statute in relation to that document.

Legislation

- *Evidence Act* 1995, ss 55–58, 135, 183, Dictionary

Further References

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- *The Law Reform Commission Evidence Report No 26*, vol 1, Australian Government Publishing Service, Canberra, 1985

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Hearsay

The hearsay rule — Pt 3.2 Div 1 (ss 59–61)

[4-0300] The hearsay rule — s 59; exception: evidence relevant for a non-hearsay purpose — s 60

This chapter is predominantly concerned with the *Evidence Act*'s treatment of hearsay evidence. The High Court has recently confirmed its earlier view (*Bannon v The Queen* (1995) 185 CLR 1) that, in jurisdictions where the *Evidence Act* has not been enacted, hearsay confessional statements made by one accused prior to a joint trial will not ordinarily be admitted to exculpate the other accused: *Baker v The Queen* (2012) 245 CLR 632 at [54]–[56]. To be admitted, it must be shown that the maker of the confessional statement apprehended that it was to his prejudice to have made admissions implicating himself alone as opposed to having acted in concert with the other accused: at [49]. The High Court held that even in these circumstances there will invariably be a real issue as to the reliability of the confession: at [52]. There was no warrant in altering the common law of evidence simply because of the enactment of the *Evidence Act* in a number of states throughout Australia.

The hearsay rule is stated in s 59: evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation (subs (1)); and in determining that issue the court may have regard to the circumstances in which the representation was made (subs (2A)). The specific exceptions to the hearsay rule provided by the *Evidence Act* otherwise than by s 60 are listed in the Note to the text of s 59, and include contemporaneous statements about a person's health or state of mind (s 66A) (previously s 72), business records (s 69), Aboriginal and Torres Strait Islander laws and customs (s 72) and admissions (s 81).

The terms "previous representation" and "representation" are defined in the Dictionary to the *Evidence Act*.

A representation includes both statements and conduct, and encompasses all that those statements or that conduct would convey to the listener, reader or observer: *Lee v The Queen* (1998) 195 CLR 594 at [21]–[22]. (That statement does not appear to be affected by the amendments made to ss 59–60 by the *Evidence Amendment Act* 2007 as a result of *ALRC Report 102*, responding to the decisions of *Lee v The Queen* and *R v Hannes* [2000] NSWCCA 503, but the restriction which *Lee* imposed — that it is limited to those assertions which were in fact intended by the maker of the representation — has been removed by the deletion from what is now s 60(1) of the words "the fact intended to be asserted by the representation".)

Silence in the face of an allegation can amount to a representation that the allegation is true where in the circumstances it is reasonable to expect that the allegation would be answered by an explanation or denial; such an expectation would not be reasonable where the allegation is made to a suspect who has been warned that he has the right to remain silent: *R v Rose* (2002) 55 NSWLR 701 at [260]–[261].

A finding pursuant to s 88 of the *Evidence Act*, that it is reasonably open that a person made a particular admission (representation), is made only for the purpose of determining whether evidence of an admission is admissible; it is not a finding made for all purposes, and if the evidence is admitted the question of whether the admission was in fact made remains: *R v Lodhi* (2006) 163 A Crim R 526 at [23]; *ACCC v Pratt (No 3)* (2009) 175 FCR 558 at [63]–[64].

"can reasonably be supposed that the person intended to assert": In determining whether a person can reasonably be supposed to have intended to assert the existence of facts contained in a previous representation, the test to be applied is an objective one — what, in the circumstances in

which the representation was made, it can reasonably be supposed that a person in the position of the maker of the representation intended to convey: *ALRC Report 102*, 7.60-62. The ALRC stated (at 7.61) that this test is "external" to the maker of the representation, and that an investigation into the subjective mindset of the representor is "not required".

The operation of the hearsay rule requires consideration first of why it is sought to lead evidence of something said or done out of court (a previous representation). What is it that the previous representation is led to prove? If it is sought to lead it to prove the existence of a fact that the person who made the representation intended to assert, it is hearsay: *Lee v The Queen* (1998)195 CLR 594 at [22]; *Li v R* (2010) 199 A Crim R 419 at [50]–[54].

A representation is not confined to a matter which is relevant to the immediate facts in issue; it may include a matter which is relevant to facts relevant to the facts in issue: *R v Ambrosoli* (2002) 55 NSWLR 603 at [18]–[25], [36]–[37].

A previous representation in s 59 is, in general law parlance, an out-of-court statement, although it may also be a representation by conduct: *Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [29].

A recorded telephone conversation between two people who are not called as witnesses may be admissible to establish a relevant fact in issue in the case such as the association of the accused with the money being discussed: *Li v R* (2010) 199 A Crim R 419. It is respectfully suggested that care be taken in the application of this decision.

"personal knowledge": In *Lee v The Queen*, at [34]–[35], the High Court held that the "first-hand" hearsay provisions in Div 2 (ss 62–68) of the *Evidence Act* were confined to previous representations made by persons who had personal knowledge of the asserted facts, because the ALRC had made the point in *ALRC 26* (at par 678) that second-hand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility. Section 60(2) was inserted to provide that s 60 applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of s 62(2)).

Section 60(3) excludes the operation of s 60 in relation to admissions in criminal trials.

"purpose": The "purpose" in s 60 for which the evidence is led does not refer to the motive or the subjective purpose of the party seeking to adduce the evidence; the word "purpose" refers to the use to which the evidence, if admitted, would be put as objectively ascertained: *R v Adam* (1999) 47 NSWLR 267 at [115]–[116] (an appeal to the High Court was dismissed, without specific reference to this issue: *Adam v The Queen* (2001) 207 CLR 96). (This statement does not appear to be affected by the amendments made to ss 59–60 by the *Evidence Amendment Act* as a result of *ALRC Report 102*, responding to the decision of *Adam v The Queen* on a different issue.) The issue is: What is it that the previous representation is led to prove? If it is led in order to prove the existence of a fact that the person who made the representation intended to assert by it (in the sense already discussed under "can reasonably be supposed that the person be intended to assert"), the hearsay rule applies to it, and the evidence is not admissible to prove the existence of that fact: *Lee v The Queen* at [22]; *R v Adam* at [121]–[124].

Facts intentionally asserted out of court by a witness (in the same sense) and adduced in evidence, if adduced in order to prove the truth of those facts, necessarily involves a hearsay use of that evidence. However, if the evidence is led merely to prove, for example, a previous statement by the maker of the representation which is inconsistent with evidence he subsequently gives, that purpose is a non-hearsay one and, subject to relevance and issues of unfair prejudice, the previous statement is evidence of the fact asserted in that previous statement. In this way, s 60 reverses the common law as stated in, for example, *Ramsay v Watson* (1961) 108 CLR 642 at 649; *Kilby v The Queen* (1973) 129 CLR 460 at 472; and *Walton v The Queen* (1989) 166 CLR 283 at 307. See *ALRC* 26, vol 1, par 685; *R v Welsh* (1996) 90 A Crim R 364 at 367–369; *Eastman v R* (1997) 158 ALR 107 at 170;

R v BD (1997) 94 A Crim R 131 at 137. Thus, the history given to a medical practitioner, and recited by the practitioner as the basis for his expert opinion, establishes the truth of that history: *R v Welsh*, above, at 367–369; subject to the power to limit its use for that purpose pursuant to s 136 (see, for example, *Quick v Stoland Pty Ltd* (1998) 157 ALR 615 at 625).

Another example of a non-hearsay use of evidence is to be found where, in a trial on a charge of deemed supply (based on the possession of the required quantity of drugs), an agreement to supply the drugs was also established — based on oral statements between the accused and an undercover police officer: *R v Macraild* (unrep, 18/12/97, NSWCCA) at 10.

In *Lee v The Queen* (1998) 195 CLR 594, the High Court agreed (at [39]) that s 60 was intended to make previous inconsistent statements made by a witness evidence of the truth of that inconsistent statement, and the history given to a medical practitioner evidence of the truth of that history. However, the High Court's view (at [40]) that there was no basis for concluding that s 60 was intended to provide a gateway for the proof of any form of hearsay, however remote, has now been met by the amendments made to s 60, which confirm that the section operates for such evidence to prove the truth of the facts asserted in the representation whether or not the evidence is first-hand or more remote hearsay — but subject to the exclusionary provisions in Pt 3.11 of the *Evidence Act* (Discretionary and mandatory exclusions, ss 135–139): *ALRC Report 102*, 7.105.

Where the evidence of prior statements of a witness is admitted to establish that witness's state of mind (and where that is a relevant issue), they are admissible for that purpose pursuant to s 66A (previously s 72) (Exception: contemporaneous statements about a person's health etc) as an exception to the hearsay rule: see [4-0365].

Statements made by way of complaint in sexual assault cases frequently ascribe a particular state of mind to the accused; such evidence is admissible to show consistency on the part of the complainant and becomes evidence of the truth of what was stated pursuant to s 60: *R v Whyte* [2006] NSWCCA 75 at [28]–[31], [65].

Where the Crown relies on a previous representation of a witness contained in statements made by him for the purpose of identifying the evidence he would give, and thus not subject to the hearsay rule (in accordance with s 66), the previous representation may still be admissible in cross-examination as to the credit of the witness (once leave to cross-examine has been granted pursuant to s 38) and thus becomes evidence of its truth in accordance with s 60: *Aslett v R* [2006] NSWCCA 49 at [71]–[72], following *Adam v The Queen*, above, at [36]–[37]. (This statement does not appear to be affected by the amendments made to ss 59–60 by the *Evidence Amendment Act* as a result of *ALRC Report 102*, responding to the decision of *Adam v The Queen*.)

Evidence given through an interpreter is not regarded as hearsay; it is an integral part of communicating the evidence in another language so that it is intelligible. That was the position at common law: *Gaio v The Queen* (1960) 104 CLR 419 at 421, 429, 430; *R v Salameh* (1985) 4 NSWLR 369 at 373. Those cases have been applied to the *Evidence Act* in *Tsang Chi Ming v Uvanna Pty Ltd t/as North West Immigration Services* (1996) 140 ALR 273 at 281–282 and in *R v Morton* (2008) 191 A Crim R 333 at [38].

A witness who asserts that he agrees with the evidence given (either orally or by affidavit) by another witness infringes the hearsay rule, and caution is required before that evidence is permitted where the evidence in question is in dispute; the *Evidence Act* requires a witness to give unambiguous evidence of what that witness saw or heard where the subject of that evidence is in dispute: *Singh v Singh* [2007] NSWSC 1357 at [8]–[14].

There remains the difficult question whether "not admissible" in s 59 means "not admissible over objection" or "not admissible" regardless of whether an objection has been taken. The NSWCCA has recently affirmed a strong preference for the former view: *Perish v R* (2016) 92 NSWLR 161; [2016] NSWCCA 89. However it refrained from an affirmative position on the proper interpretation of s 137: see [4-1630]. The better view is that in a criminal trial there is always a positive and

overriding duty to ensure a fair trial and to prevent a miscarriage of justice. In *Panayi v DC of T* [2017] NSWCA 93, the NSW Court of Appeal agreed with the Court of Criminal Appeal decision in *Perish v R*, above, that the words "not admissible" in s 59 mean "not admissible over objection".

[4-0310] Exceptions to the hearsay rule dependent on competency — s 61

Section 61(1) requires that a previous representation may not be used to prove the existence of the fact asserted in the hearsay evidence tendered if the person who made the representation was not competent him or herself to give evidence of that fact because of s 13(1).

Section 13(1) has been reformulated by the *Evidence Amendment Act*. The test of competence remains the capacity of the witness to understand a question about the particular fact or to give an answer to a question about that fact: s 13. It permits a person not competent to give sworn evidence to give unsworn evidence about that fact. A person not competent to give evidence about the particular fact may give evidence about other facts if competent to do so.

Section 61(2) excludes the operation of s 61 in relation to evidence of a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind (see s 66A, previously s 72, discussed in [4-0365]).

In *R v Baladjam (No 43)* [2008] NSWSC 1461 an accused, charged with conspiracy to do acts in preparation for a terrorist act, was found to be unfit for trial. A number of statements to his alleged co-conspirators were sought to be tendered by the Crown in the trial against the other men. Objection was taken on the basis that lack of competency required exclusion of the material. The scope and purpose of the section was discussed (Whealy J) at length. Ultimately, the material was allowed as falling within the exception contained in s 61(2).

Anderson, Williams and Clegg, in *The New Law of Evidence* (2nd edn, 2009), suggest (at 61.1) that hearsay evidence of a toddler's cry of pain (assuming that it can reasonably be assumed in the circumstances of the particular case that there was an intention to communicate pain) would be admissible to prove the existence of that pain, even though the toddler would not be competent to give evidence of that fact for the purposes of s 13(1).

Odgers, *Uniform Evidence Law*, had suggested in editions prior to the ninth (2010) edition (at [1.3.1020]) that s 61 — which had not been expressly recommended by the Australian Law Reform Commission — was intended to ensure that the out-of-court representations were made by a person who was competent at the time the representations were made but not at the time of trial, as that such a person is "unavailable to give evidence" as that phrase is defined in the Dictionary, Pt 2 cl 4(1)(b).

"First-hand" hearsay — Pt 3.2 Div 2 (ss 62–68)

[4-0320] Restriction to "first-hand" hearsay — s 62

The phrase "personal knowledge of an asserted fact" is defined in s 62(2). It does not require a finding that the person did have the requisite knowledge; the judge need conclude only that the representation might reasonably be supposed to have been based on personal knowledge. Such a conclusion cannot be reached where it is at least equally possible (and where there is no other indication on face of the material) that the person may have been given the information by somebody else: *Citibank Ltd v Liu* [2003] NSWSC 69 at [4].

Proof that the person had the requisite personal knowledge requires the judge's satisfaction of that fact on the balance of probabilities (s 142); the gravity of the charge in a criminal trial is irrelevant to that decision (notwithstanding *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362–363): *R v Vincent* (2002) 133 A Crim R 206 at [19].

Where first-hand hearsay is sought to be tendered, the first task is to identify the "previous representation" sought to be admitted and by whom it is said to have been made; the second task is to identify the "fact" that person intended to assert in that representation; and the third task is to

identify the fact in issue (or the fact relevant to a fact in issue) the probability of the existence of which is said to be affected by the evidence: *Vickers v R* (2006) 160 A Crim R 195 at [51]. (The third task invokes the issue of relevance in accordance with s 55; see [4-0200].) Thus, if the fact to be established is said to be relevant to the issue of whether a party did a particular act, and if that fact is sought to be proved by a previous representation by a person who intended to say only that he had heard the party say (or imply) that he had done that act, such a representation is inadmissible to establish that he had done that act because the person had not seen the party do so: *Vickers v R* at [50]–[53]. See also *Caterpillar Inc v John Deere Ltd (No 2)* (2000) 181 ALR 108 at [15].

Section 62(3) (a person has personal knowledge of an asserted fact if it is about that person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation was made) was inserted in order to limit the exception to the hearsay rule relating to the admissibility of contemporaneous statements concerning those matters (in s 66A, previously s 72) to first-hand hearsay: *Explanatory Memorandum to the Evidence Amendment Act*, Item 25.

[4-0330] Exception: civil proceedings if maker not available — s 63

The terms "civil proceeding", "previous representation" and "representation" are defined in Pt 1 of the Dictionary to the *Evidence Act*: see [4-0300]. The phrase "not available to give evidence" is dealt with in Pt 2 of the Dictionary. The fact "intended to be asserted" by the maker of the representation is also discussed at [4-0300].

"not available": The Dictionary to the *Evidence Act* provides that a person is taken to be not available to give evidence about a fact if that person is not competent to do so. Section 13(1) provides that a person is not competent to give evidence about a fact:

(i) if that person, for any reason (including a mental, intellectual or physical disability), does not have the capacity either to understand a question about that fact or to give an answer that can be understood to a question about that fact, and

(ii) if that incapacity cannot be overcome.

This provision is expressed in substantially different terms to those considered in *Cox v NSW* (2007) 71 NSWLR 225 at [15]–[17], which appears to be no longer relevant to the issues raised under s 13 in its present form.

The fact that giving evidence may be detrimental to a witness's psychological health and welfare does not render the witness unavailable within the meaning of s 63: *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D* [2022] NSWCA 119 at [70].

"attendance": The attendance (to give evidence) referred to in cl 4(1)(f), in Pt 2 of the Dictionary (Unavailability of persons), is attendance by way of physical presence in the courtroom or other place in which the relevant proceedings are being conducted, with that courtroom or other place being understood as encompassing any remote location deemed by relevant legislation such as the *Evidence (Audio and Audio Visual Links) Act* 1998 to be included within it; whereas a person examined pursuant to the *Evidence on Commission Act* 1995, on the other hand, is never "in attendance" to give evidence in a New South Wales court: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 769 at [24]; *Singh v Newbridge Property Group Pty Ltd* [2010] NSWSC 411 at [14].

"reasonable steps": Reasonable steps to have the maker of the representation attend to give evidence include the retention of an experienced investigator who has carried out inquiries that might reasonably be expected to have been taken by a competent investigator to locate a proposed witness: *AJW v State of NSW* [2003] NSWSC 803 at [15].

There is a distinction drawn in the Dictionary between taking all reasonable steps without success:

- to secure a person's attendance (cl 4(1)(f)); and
- to compel that person to give evidence: cl 4(1)(g).

The requirements are disjunctive, and it is only necessary to satisfy one or the other of them: *Quintano v BW Rose Pty Ltd* [2008] NSWSC 1012 at [13]–[14].

A conclusion that a witness is unavailable within the definition in cl 4(1)(f) is an evaluative determination and is not an exercise of the court's discretion: *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D*, above, at [73] (disapproving the judgment of Stein AJA in *Longhurst v Hunt* [2004] NSWCA 91 at [43]). Hence, the constraints on appellate intervention imposed by *House v The King* (1936) 55 CLR 499 are not applicable.

Clause 4(1)(f) might be satisfied by a compulsive process such as a subpoena: *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D*, above, at [69] and [74] (in this case no subpoena had been served — nothing had been done to secure the child witness's attendance beyond asking her mother — hence the Court of Appeal's finding that the primary judge erred in holding the child witness was not available to give evidence).

Clause 4(1)(g) becomes applicable only where, despite that person's attendance, he or she declines to give evidence — on the basis of a claim of privilege, or simply refuses to give evidence notwithstanding the consequences of being in contempt of court: *Mindshare Communications Ltd v Orleans Investments Pty Ltd* [2007] NSWSC 976 at [14]–[16]. If the witness refuses to answer, he or she is taken to be "not available" within cl 4(1)(g): *R v Suteski* (2002) 56 NSWLR 182 at [83] (this statement would appear to have survived other criticisms of that decision by the Law Reform Commission in *ALRC Report 102*; *note: cl 4 was renumbered by Evidence Amendment Act 2010, Sch 1 [7], commenced 14.1.2011*). However, the mere fact that a witness refuses to answer questions, without more, will not always satisfy the requirements of cl 4(1)(g); there must be some evidence that "all reasonable steps" have been taken to compel the witness to give evidence: *RC v R* [2022] NSWCCA 281 at [114]–[115]. What constitutes "all reasonable steps" will depend upon the circumstances of the particular case, with some relevant considerations including the nature of the case, the importance of the evidence, the higher standard of proof in a criminal trial and the importance of the liberty of the individual.

Whether "reasonable steps" require the trouble and expense of taking evidence from an absent witness in a foreign court depends on whether the witness would give evidence in such proceedings in any useful form: *Mindshare Communications Ltd v Orleans Investments Pty Ltd*, above, at [23]. Where a witness has given a statement of evidence critical to the success of a party, but departs or is about to depart for overseas for an indefinite period shortly before the trial, "reasonable steps" may require taking the witness's evidence prior to that departure, or serving a subpoena to attend the trial and obtaining a bench warrant to prevent the departure, or taking evidence by way of audio-visual link after the departure, or seeking an adjournment of the trial: *Longhurst v Hunt*, above, at [41]–[42]. However, if the witness, having been served with a subpoena to attend and give evidence, leaves the country in order to avoid giving evidence, it is open to a trial judge to rule that all reasonable steps had been taken to compel the witness to give evidence: *Puchalski v R* [2007] NSWCCA 220 at [98].

The mere unwillingness of a witness to attend in compliance with a subpoena is not sufficient to establish that the witness is unavailable if reasonable steps are not taken to enforce the subpoena: *Darlaston v Parker* (2010) 196 IR 307 at [252]–[255].

"reasonable notice": Reasonable notice enables the opposing party to reconsider how it is going to conduct its case and whether it needs to call another witness to prove what it reasonably hoped to elicit from the unavailable witness: *Puchalski v R* [2007] NSWCCA 220 at [102].

Miscellaneous: An affidavit is not documentary hearsay, and may be read into evidence in accordance with the rules of court, and in accordance with the previous practice of the court; it thus does not fall within the terms of s 63: *Protective Commissioner v B* (unrep, 23/6/97, NSWSC) at 3–4; *In the Marriage of Chang and Su* (2002) 29 Fam LR 406 at [45]–[49].

The representation need not be in a form which could, over objection, properly have been given as direct oral evidence by its maker if called as a witness: *John Fairfax & Sons Ltd v Vilo* [2001] NSWCA 290 (reported on other issues at (2001) 52 NSWLR 373) at [74].

There will always be a degree of prejudice to another party where the maker of the statement is unavailable for cross-examination. Generally speaking, that degree of prejudice is treated by s 63 as not rendering the admission of the material necessarily unfair. The effect of ss 63 and 135 in combination is that the party opposing admission will generally bear the persuasive burden of satisfying the court that any probative value is substantially outweighed by the danger of unfair prejudice to it: *Workers Compensation (Dust Diseases) Board of NSW v Smith* [2010] NSWCA 19 at [84].

Representations made by a person as to the contents of a will he had made are, contrary to the common law, admissible after his death as evidence of the execution of that will and its contents: *In the Estate of Ralston* (unrep, 12/9/96, NSWSC) at 7–8.

Where the person who made the representation has not and will not be called as a witness, evidence relevant only to that person's credibility is admissible where it has substantial probative value: s 108A.

Notice: Notice of an intention to adduce evidence in accordance with s 63(2) is required: s 67.

[4-0340] Exception: civil proceedings if maker available — s 64

Clause 4(1) of the Dictionary identifies the various situations in which a person is taken to be *not available* to give evidence about a fact — where the person is dead or not competent to give evidence about the fact (otherwise than in accordance with s 16); where it would be unlawful for that person to give evidence about the fact or the *Evidence Act* prohibits the evidence to be given; and where all reasonable steps have been taken by the party seeking to find or to secure the attendance of the person or to compel that person to give evidence, without success. Clause 4(2) provides that in all other cases the person is taken to be *available* to give evidence about that fact.

The hearsay rule applies if the person who made the previous representation is available to give evidence about an asserted fact, but not if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Whether the expense would be "undue" if the person who made the representation were to be called to give evidence may be determined by comparison of that cost with the value of what is at stake in the litigation and an assessment of the importance of the evidence that person might give: *Caterpillar Inc v John Deere Ltd (No 2)* (2000) 181 ALR 108 at [25]; *Citibank Ltd v Liu* [2003] NSWSC 69 at [6]–[9]. Whether the delay caused by having to call that person to give evidence is "undue" may be determined by comparison with the overall length of the proceedings, taking into account the importance of the evidence and the extent to which the evidence to be given is disputed: *De Rose v South Australia (No 4)* [2001] FCA 1616 at [13]–[16]; *Citibank Ltd v Liu*, above, at [5]. Also relevant is the willingness of the witness to give evidence, whether in person or by means of electronic technology: *Citibank Ltd v Liu* at [6], [8].

The hearsay rule will not apply to the previous representation made by a person if that person gives evidence: s 64(3). Since the *Evidence Amendment Act*, where the maker of the representation is available and giving evidence, it is no longer a requirement that the occurrence of the asserted fact was fresh in the memory of that person when making the representation. The previous representation must, however, have been made with personal knowledge of the asserted fact: s 64(2)(a).

Where a witness has concluded his evidence and is not to be recalled, evidence from another source of a representation made by that witness is not admissible pursuant to s 64(1): *Osborne Metal Industries v Bullock (No 1)* [2011] NSWSC 636 at [26].

Where the person who made the representation has not and will not be called as a witness, evidence relevant only to that person's credibility is admissible only where it has substantial probative value (s 108A) — the same phrase used in s 103, where the evidence must be capable of bearing

significantly on the assessment of that person's credibility: *R v RPS* (unrep, 13/8/97, NSWCCA) at 29; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [85]–[88]; *R v El-Azzi* [2004] NSWCCA 455 at [179]–[183].

Notice: Notice of an intention to adduce evidence in accordance with s 64(2) is required: s 67.

[4-0350] Exception: criminal proceedings if maker not available — s 65

The terms "criminal proceeding", "previous representation" and "representation" are defined in Pt 1 of the Dictionary to the *Evidence Act*. The second and third of those phrases and the phrase "intended to be asserted" by the maker of the representation are also discussed in Div 1 of this Chapter at [4-0300]. The phrase "not available to give evidence" is dealt with in Pt 2 of the Dictionary, and is discussed under s 63, at [4-0330].

The *Evidence Amendment Act* has amended s 65(2)(d) so as to require that a representation, made against the interests of the person who made it at the time it was made, must *also* be made in circumstances that made it likely that the representation is reliable, thus overcoming a previous interpretation of s 65 that the two indicia were alternatives (*R v Suteski* (2002) 56 NSWLR 182 at [83]–[84]), and strengthening the comment made by Gleeson CJ, when the High Court refused special leave to appeal (*Suteski v R* [2003] HCATrans 493 at 3), that s 65 required some "[r]easonable assurance" of reliability. The proposition stated in *R v Morton* (2008) 191 A Crim R 333 at [35], insofar as it may suggest that it is sufficient if either test is satisfied, is no longer applicable.

Section 65 does not render admissible an entry in a document where that entry was neither seen nor otherwise perceived to have been made: *Conway v R* (2000) 172 ALR 185 at [154] (this issue did not arise in the appeal to the High Court: *Conway v The Queen* (2002) 209 CLR 203).

The previous representation is not confined to the alleged crime itself: *R v Ambrolosi* (2002) 55 NSWLR 603 at [25].

Evidence given by doctors in other proceedings recited in a judgment and given in a judgment on appeal from those proceedings does not constitute first-hand hearsay evidence of the facts stated by those doctors in that evidence in subsequent proceedings: *Cvetkovic v R* [2010] NSWCCA 329 at [300].

Section 65 is not restricted in its application to prosecution witnesses only; its terms extend to previous representations by a co-accused and, insofar as the previous representation identifies an admission made by the accused, the admissibility of that evidence is governed by s 65 and not s 82 (Exclusion of evidence of admission that is not first-hand): *Taber v R* (2007) 170 A Crim R 427 at [38].

An example of a person under a duty to make a representation of a particular kind in giving information to the authorities to whom s 65(2)(a) would apply, who may also be an accomplice with an interest to serve, was suggested in argument in a special leave application in the High Court, to be a corporate wrongdoer: *Suteski v R*, above, at 4 (see *R v Suteski (No 4)* (2002) 128 A Crim R 275, Kirby J, at [21], [27]).

Reliability: Evidence which tends only to prove the asserted fact is irrelevant to this issue: *R v Ambrosoli*, above, at [34]; *Harris v R* (2005) 158 A Crim R 454 at [41]. Evidence other than of the immediate circumstances in which the representation was made may, however, be relevant to establish either a subsequent (genuine) retraction by the maker of the representation or an incapacity of the witness to have seen, heard or otherwise perceive the matter which was the subject of the representation being made: *R v Ambrosoli* at [29]. The identified statements in these two cases appear to have survived the amendment made to s 65.

For a fabrication to have been unlikely the representation must have been made "when or shortly after" the asserted fact occurred, in the context of demonstrating that the circumstances make it unlikely that the representation is a fabrication the phrase "when or shortly after" is not directed

to the state of recollection by the maker of the representation; the reliability of the representation is dependent on the representation having been made spontaneously during or under the proximate pressure of the events: *Williams v R* (2000) 119 A Crim R 490 at [47]–[49]; *R v Ambrolosi* at [25]. Compare *Harris v R*, above, at [37]–[46], where it was held that it had been open to the trial judge to hold that twenty-four hours was "shortly after" the events. The decision in *Harris* has been criticised by S Odgers, *Uniform Evidence Law* at [1.3.2060]. The Full Court of the Federal Court, when deciding *Williams v R*, above, did not refer to its earlier decision in *Conway v R* (2000) 98 FCR 204 where it had held (at [134]) that the phrase "shortly after" was intended to reflect "the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind". It is suggested that the approach of the Full Court of the Federal Court in *Williams* and of the NSW Court of Criminal Appeal in *Ambrolosi* is to be preferred to that in *Conway v R* and *Harris*.

The requirements of s 65(2)(c) (reliability highly probable) are more onerous than those of s 65(2)(b) (fabrication unlikely): *R v Toki (No 3)* (2000) 116 A Crim R 536 at [95]; *Williams v R* at [55], following *Conway v The Queen* on this point. The Law Reform Commissions saw no harm in the overlap between the two requirements: *ALRC Report 102* (at 8.49).

Where a witness claims no present recollection of facts of which he had given evidence in previous proceedings, in circumstances demonstrating that he is not telling the truth in relation to that recollection, s 65 has no application to make that previous evidence admissible, and s 38 (leave to cross-examine) provides the appropriate remedy: *Tan v R* (2008) 192 A Crim R 310 at [56]–[61].

Against interest: In determining whether a representation was against the interests of the person who made it at to the time (s 65(2)(d)), s 65(7) provides a non-exhaustive list of circumstances in which are taken for the purposes of s 65(2)(d) to be against the interests of the person who made the representation.

A statement made by a person implicating himself in a joint criminal enterprise with the accused to bash the victim was held to be against that person's interests; notwithstanding that his interests as an accomplice may also have been served, the statement he made (albeit with mixed motives) was nevertheless objectively against his interests at the time they were made: *R v Suteski (No 4)* [2002] NSWSC 218 (Kirby J) at [25]–[28], [50]. That decision was held to be correct on appeal: *R v Suteski* (2002) 56 NSWLR 182 at [92]–[94]. Special leave to appeal was refused by the High Court ([2003] HCATrans 493), the point being made by Gleeson CJ during argument that s 65(7) is in part a deeming provision. The absence of knowledge on the part of the maker of the representation that it was against his interests may be relevant to the exercise of the discretion under s 137 (*R v Suteski (No 4)* (Kirby J) at [53]), where the weight to be given to the representation was held to be less substantial because its maker had not fully perceived that the statement was against his interests.

The High Court has recently examined the requirement in s 65(2)(d), "made in circumstances that make it likely that the representation is reliable", in *Sio v The Queen* (2016) 259 CLR 47. The appellant was convicted of armed robbery with wounding for his role in the robbery of a brothel by his co-offender who had stabbed and killed an employee of the brothel. The co-offender (who was tried separately) had given an ERISP interview to police. In the interview, he claimed the appellant had encouraged him to commit the robbery ("he gave me the knife"): see [14]. These hearsay statements were admitted against the appellant at trial pursuant to s 65(2)(d). The High Court allowed the appellant's appeal unanimously. One basis was the erroneous admission of the co-offender's hearsay statements. The NSWCCA had erred in taking a "compendious approach" to s 65 (see [51]); it had considered the issue of the likely reliability of the accomplice's statement by examining the timing of the statement and the "overall impression" gained from his evidence as a whole. Properly understood, s 65 requires that the court identify each material fact that would be proved by a hearsay statement and that the section be applied to that statement. Here, the accomplice's statement was "apt to minimise his own culpability by maximising" that of the appellant and did not satisfy the statutory test: see [68].

Opportunity to cross-examine: The admissibility of evidence pursuant to s 65(3) of a previous representation given in earlier proceedings by a person who is not available to give evidence is not limited to the situation where that person saw, heard or otherwise perceived the representation being made. The Law Reform Commission explained that the previous evidence was already the subject of "the pressures against fabrication", but it suggested that it may be appropriate to restrict such evidence to routine matters and to reject other such evidence on discretionary grounds where the accused would be prejudiced by the inability of the jury to judge the witness's demeanour and by the absence of the opportunity to cross-examine: *ALRC Report 26*, vol 1, par 692.

An example of the application of s 65(3) is to be found in *R v Cross* (unrep, 8/9/98, NSWCCA) at 9–10, where the transcript of evidence given by a witness in the committal proceedings (who had since died) was tendered at the trial.

The accused has been regarded as "unavailable" for the purposes of s 65 where the prosecution tenders evidence of statements made by him to the police in the course of their investigation: *R v Salama* [1999] NSWCCA 105 at [85]. Section 17(2) of the *Evidence Act* specifically provides that the accused is not competent to give evidence as a witness for the prosecution. However, in *R v Parkes* (2003) 147 A Crim R 450 at [47]–[49], it was held by majority that the concept of "availability" in ss 65–66 makes the accused "notionally" available in his own case to give evidence to confirm the statement he made to the police. No reference was made by the majority to *Salama*. In *R v Lodhi* (2006) 163 A Crim R 526 at [43], Whealy J cited *Parkes* at 459 (which page includes [47]–[49]) as authority for the obvious proposition that the accused is not available in the Crown case to give evidence in relation to the asserted facts, but found it unnecessary to go further because there was no evidence that the accused had made the representations in question. Although not expressly stated, it appears that it would follow that such a statement made by the accused thereby becomes admissible in the Crown case pursuant to s 65.

Subsections (3), (4) and (5) of s 65 are concerned with the application of the hearsay rule where evidence of a previous representation made by an accused person is admitted in other proceedings where that accused person cross-examined, or had a reasonable opportunity to cross-examine, the witness giving that evidence. In such a case, the hearsay rule does not apply: s 65(3). In subsequent proceedings in which evidence of that previous representation is tendered pursuant to s 65(3), and if there is more than one accused person, s 65(4) provides that the evidence cannot be used against the accused person to whom the evidence related if that accused person did not cross-examine, and did not have a reasonable opportunity to cross-examine, the witness who gave it in the earlier proceedings. Section 65(5) provides that the accused person is taken to have had a reasonable opportunity to cross-examine the witness if the accused person was not present when the evidence was given but could have been present at that time, or if present at that time could have cross-examined the witness.

Where the accused had the opportunity to cross-examine a Crown witness at a committal hearing, but the witness does not comply with a subpoena to appear at the trial, s 65(3)(b) may be applicable but the fact that the nature of cross-examination at the committal may be in practice very different to that of cross-examination at the trial is not relevant: *Puchalski v R* [2007] NSWCCA 220 at [95].

An alternative method of producing such evidence where it was given in previous proceedings before a judge is to be found in s 285 of the *Criminal Procedure Act* 1986 if the evidence was given in the presence of the accused and he had the opportunity to cross-examine the witness at that time. Section 285 was inserted (originally as s 112) in the *Criminal Procedure Act* in 1999, and it must be considered as operating according to its own terms notwithstanding the more stringent terms of s 65 of the *Evidence Act* (*Patterson v R* [2001] NSWCCA 316 at [40], [48]), where it was held that the Crown did not have to demonstrate that reasonable efforts had been made to secure the attendance of a witness who gave evidence at the committal but who was overseas at the time of the trial.

Section 65(8) permits the accused to adduce evidence of a previous representation if the person giving the evidence saw, heard or otherwise perceived the representation being made where

the maker of the representation is unavailable to give evidence. Proof of the reliability of that representation such as is required of the prosecution by s 65(2) is not required of the accused, but s 65(9) permits the prosecution (or another accused) the same freedom to retaliate without proof of the reliability required by s 65(2).

There does not appear to have been any consideration given so far to the relationship between s 65(8) and the requirement now imposed by the amendment to s 65(2)(d) requiring a representation against interest also to be made in circumstances that make it likely that the representation is reliable.

Section 65(8) makes it easier for an accused to lead evidence of a third party confession where the circumstances in which it was made are capable of rationally affecting the issue of the accused's guilt: *R v Hemmelstein* [2001] NSWCCA 220 at [17], [41]. Such evidence was generally held to be inadmissible at common law: see *Bannon v The Queen* (1995) 185 CLR 1, in which the High Court denied any relevance of the reliability of hearsay to its admissibility.

Credit of representor: Where the person who made the representation has not and will not be called as a witness, evidence relevant only to that person's credibility is admissible where it has substantial probative value: s 108A. The phrase "substantial probative evidence" is discussed under s 64, at [4-0340].

"Retaliatory" evidence: It has been suggested that the "retaliatory" provisions of s 65(9) (so described in MJ Beazley, "Hearsay and Related Evidence — A New Era?" (1995) 18 *UNSWLJ* 39 at 49) may be wide enough to apply where evidence of a previous representation has been admitted under some provision of the *Evidence Act* other than s 65(8) (such as s 60): *Eastman v R* (1997) 158 ALR 107 at 173. There is also an issue (so far unresolved) as to whether "the matter" in relation to which the first previous representation was admitted should be given a liberal or a narrow construction: *R v Mankotia* (unrep, 27/7/98, NSWSC) at 13; the point did not arise in the appeal against conviction in that case: *R v Mankotia* (2001) 120 A Crim R 492.

It has been said that s 65(9) appears to require the prosecution to lead its retaliatory hearsay in reply where part of the hearsay evidence was to be led in the accused's case: *R v Mrish* (unrep, 4/10/96, NSWSC) at 3. In that case, the Crown prosecutor accepted that all of the hearsay should be led in its case in chief so as to comply with *R v Chin* (1985) 157 CLR 671 at 676–679, and the parties agreed pursuant to s 190(1) to waive the requirements of s 65(9).

Where the retaliatory evidence is contained in a document, s 65(9) requires the document to be proved by a person who saw the document being produced, notwithstanding that s 65(8)(b) permits the accused to tender the previous representation without evidence from such a witness: *R v Mrish*, above, at 9–10.

Recorded representations: Where the representation was made in the course of a video-recorded police interview, the making of the representation may be established by playing the video-recording, together with a transcript if necessary to follow what was being said: *R v Suteski (No 4)* [2002] NSWSC 218 at [30]–[35].

Notice: Notice of an intention to adduce evidence in accordance with s 65(2), (3) and (8) is required: s 67.

[4-0360] Exception: criminal proceedings if maker available — s 66

The terms "criminal proceeding", "previous representation" and "representation" are defined in Pt 1 of the Dictionary to the *Evidence Act*. The second and third of those phrases and the phrase "intended to be asserted" by the maker of the representation are also discussed in Div 1 of this Chapter, at [4-0300].

The hearsay rule does not apply to a representation made by a person where that person has been or is to be called to give evidence if, when the representation was made, the occurrence was "fresh in the memory" of that person.

“fresh in the memory”: In determining this issue, the court may take into account all matters it considers are relevant to the question, including the nature of the event concerned, the age and health of that person, and the period of time between the occurrence of the asserted fact and the making of the representation: s 66(2A). This subsection was inserted as a response to the decision of the High Court in *Graham v The Queen* (1998) 195 CLR 606, which had restricted the meaning of “fresh” to “recent” or “immediate”, a decision that had being interpreted as very likely requiring the representation to have been made within hours and days and not months: see, for example, *Langbein v R* (2008) 181 A Crim R 378 at [82]–[84].

It is for the trial judge to determine as a preliminary question of fact whether the fact asserted in the representation was fresh in the memory of the maker, and if need be that question should be determined in a voir dire; the issue will depend on, among other things, the nature of the fact, its significance to the person making the representation, and the interposition of other events that may interfere with a clear recollection: *R v Crisologo* (1997) 99 A Crim R 178 at 188–189; *R v Moussa (No 2)* (2002) 134 A Crim R 296 at [12]–[13]. It is not necessary for the trial judge to explain to the jury the basis on which such evidence is admitted, unless there is a limitation on the use to which it is put: *R v Lebler* [2003] NSWCCA 362 at [1], [103], [106].

Section 66(2A) now makes it clear that, in determining whether the *occurrence* of the asserted fact was “fresh in the memory” of that person, the court may take into account “all matters that it considers are relevant to the question”. The views of the High Court in *Graham v The Queen*, above, that “fresh” means “recent” or “immediate”, requiring a temporal relationship between the occurrence of the asserted fact and the time of making the representation that will very likely be measured in hours and days, have been rejected. The new sub-section makes it clear that *all* matters considered by the court are relevant, of which the temporal relationship remains relevant but by no means any longer determinative of the question. Importantly, the court must now take into account the nature of the event concerned: *R v XY* (2010) 79 NSWLR 629 at [76]–[79].

Where a person identifies the accused from a photograph, the phrase “fresh in the memory of the person who made the representation” in s 66(2)(b) relates to the remembered circumstance (seeing the person committing the crime) and not to the identification of that person from the photograph: *R v Barbaro* (2000) 112 A Crim R 551 at [34].

Evidence of a conversation — prior to an attack alleged to have been made by the accused on the victim — between the victim and another person which demonstrated a friendly relationship between the victim and the accused, and which would have militated against the probability that the accused would have been the attacker, was held to have been admissible under s 66(2) and wrongly rejected at the trial: *R v Diamond* (unrep, 19/6/98, NSWCCA), Ground 1.

Evidence that a complaint was made some time after the offence occurred, led in order to disprove subsequent concoction and not in order to prove its truth, does not breach the hearsay rule: *Bellemore v State of Tasmania* (2006) 170 A Crim R 1 at [175] et seq (Blow J).

> Where there has been a continuing course of conduct, and no complaint made until the end of that course, it is not appropriate to treat that complaint as “fresh” in relation to all episodes: *R v DWH* [1999] NSWCCA 255 at [29]–[31] (the course extended over three months); cf *R v Vinh Le* [2000] NSWCCA 49 at [52], [126].

Identification: Where the asserted fact in the previous representation is the identification of the accused, and where the representation was that the maker had *recognised* the person shown in a security camera photograph as the accused, what must be fresh in the memory of the person who made the representation is his or her continuing familiarity with the features of the person depicted in that photograph at the time of recognition; whereas where the subsequent identification of the accused as the person *seen* by the witness at the time of the event in question, what must be fresh in the memory of the person who made the representation is the event itself, the formation of the image which is later drawn on at the time of making the representation: *R v Gee* (2000) 113 A Crim R 376 at [1], [10].

Proofs of evidence: Section 66(3) excludes statements or proofs of evidence from the exception to the hearsay rule, unless the representation made concerns the identity of a person, place or thing. The Australian Law Reform Commission (in *ALRC Report 26*, vol 1 at par 694) recognised that proofs of evidence are usually compiled by skilled interrogators who are accustomed to converting jumbled and half-coherent answers into passages of connected prose, and not really the witness's own narrative. Some limitation was seen to be needed as a safeguard.

In each case, the issue under s 66(3) will turn on the purposes for which the representations were made; a formal proof of evidence will be caught, but a representation made during the course of routine investigations, where it is not known whether the maker of the representation is a suspect or a potential witness, will not: *R v Esposito* (1998) 45 NSWLR 442 at 450. Nor does s 66(3) prevent a witness being examined on a formal proof of evidence, when a ground has been properly laid, pursuant to either ss 38 or 108 of the *Evidence Act*: *R v Esposito* at 450.

Exculpatory evidence: The *Evidence Act* has effected a substantial change to the common law (or to a practice long accepted in New South Wales and elsewhere prior to the statute) whereby evidence of what was said by an accused by way of denial when first questioned by the police was admissible in order to show his reaction to the allegations against him: *R v Coats* [1932] NZLR 401 at 407, Adams J; *Woon v The Queen* (1964) 109 CLR 529 at 537–538; *Ratten v R* [1972] AC 378 at 387, 389, 391; *R v Pearce* (1979) 69 Cr App R 365 at 369–370 (even when the evidential value of such statements is "small"); *R v R E Astill* (unrep, 17/7/92, NSWCCA) at 8–9; *R v S L Astill* (1992) 63 A Crim R 148 at 156; *R v Reeves* (1992) 29 NSWLR 109 at 114–115; *R v Keevers* (unrep, 26/7/94, NSWCCA) at 4; *R v Familic* (1994) 75 A Crim R 229 at 235.

In *R v Rymer* (2005) 156 A Crim R 84, it was accepted (at [32]) that such was long standing practice in this State both before and (to a significant extent) since the *Evidence Act*, but it was held (at [52]–[53]) that s 59 of the *Evidence Act* had subordinated the common law to the terms of the statute and that such exculpatory evidence was admissible only pursuant to s 60 after it had been tendered for a non-hearsay purpose, although the Court of Criminal Appeal did state (at [59]–[61]) that, absent some particular reason for refraining from doing so, such evidence of the response by the accused to confrontation by denial should continue to be put before the court by the prosecution. The accused's denial is admissible as an exception to the hearsay rule as demonstrating his credibility by the circumstances of his denial, and thus becomes evidence of its truth pursuant to s 60 (at [64]). The decision is not authority enabling the prosecution to call evidence in its case challenging the general credibility of the accused: *R v Rymer* at [62]; *R v Sood (Ruling No 3)* [2006] NSWSC 762 at [80]–[84].

Statements made by a suspect during an ERISP interview do not fall within s 66(3) ("representation made for the purpose of indicating the evidence that the person who made it would be able to give"): *Stevens v McCallum* [2006] ACTCA 13 at [161].

Representations by vulnerable persons: Evidence from vulnerable persons (including children and complainants in sexual assault case) is now governed by the *Criminal Procedure Act* 1986, Ch 6 (Evidentiary matters), Pt 6 (Giving of evidence by vulnerable persons), Div 3 (Giving evidence of out-of-court representations) which inter alia permits evidence of previous representations made by such persons when interviewed by investigating officials to be given in the form of a recording of that interview. Section 306V provides that neither the hearsay rule nor the opinion rule prevents such evidence being given in that way. Division 4 permits such evidence to be given by closed-circuit television. The new legislation commenced on 12 October 2007, and applies to proceedings commenced on or after that date. The proceedings for trial on indictment commence on the filing or presentation of a valid indictment (*R v Janceski* (2005) 64 NSWLR 10 at [219]); the practice as to when such an indictment (rather than a draft indictment) is filed or presented differs: *R v Howard* (1992) 29 NSWLR 242 at 247. The trial itself commences with the presentation of the indictment and arraignment of the accused before the jury panel: *R v Nicolaidis* (1994) 33 NSWLR 364 at 367; *DPP v B* (1998) 194 CLR 566 at [17], [32]; *The Queen v Gee* (2003) 212 CLR 230 at [43]–[44];

Gilham v R (2007) 73 NSWLR 308 at [174]–[176], [237]. See also s 130 of the *Criminal Procedure Act*: *Cornwell v The Queen* (2007) 231 CLR 260 at [87]–[88]; *R v JS* (2007) 175 A Crim R 108 at [49].

[4-0365] Exception: contemporaneous statements about a person's health etc — s 66A

This was previously s 72, except that this section now refers to a *previous* representation made by a person, rather than merely *a* representation. Section 72 had not been in the draft statute originally proposed by the ALRC, and the only amendment recommended by it was to bring the provision within Pt 3.2 Div 2 so that it is necessarily restricted to *first-hand* hearsay: *ALRC Report 102*, pars 8.171–174.

The common law provided that statements made by a person as to his health, intentions, state of mind etc are admissible to prove that fact even though self-serving and whether or not contemporaneously expressed: *R v Beserick* (1993) 30 NSWLR 510 at 521; *Gross v Weston* (2007) 69 NSWLR 279 at [32].

Otherwise than in relation to its restriction to *first-hand* hearsay, s 66A (as did the former s 72) appears otherwise to reflect the common law, although individual members of the High Court have, inconclusively, expressed doubts as to the extent to which a person's intention to carry out a particular act can establish that the fact that the intention was in fact carried out: *Kamleh v The Queen* (2005) 213 ALR 97 at [27]–[28], [33], [39]; cf [22]–[23]. *Kamleh* has been referred to in subsequent cases, but not any further in the context of the *Evidence Act*. See, for example *R v Efandis (No 2)* [2008] VSC 274 at [10]. *ALRC Report 102*, after referring to this point (at 8.165–166) as being "unclear", states (at 8.167) that the *Evidence Act* appeared to be operating satisfactorily in this respect and that there had been no suggestion that the provision should be amended. It pointed out (at 8.169) that the former s 72 was a statutory counterpart to the common law res gestae exception under which evidence within the exception is admissible as evidence of its truth.

In *R v Clark* (2001) 123 A Crim R 506 at [147], Heydon JA (at [158]) commented that the former s 72 was "significantly wider than the equivalent common law rules" that had been stated in the older cases such as *Wilson v The Queen* (1970) 123 CLR 334 and *Ratten v R* [1972] AC 378, and he drew attention to *Walton v The Queen* (1989) 166 CLR 283. The comment would appear to apply equally to the new s 66A. Although referring to *R v Clark* in relation to a different issue, *ALRC Report 102* is silent in relation to this comment.

Evidence of an intention on the part of the victim in a murder case may be called by the Crown to establish a motive for killing the deceased (*R v Serratore* (1999) 48 NSWLR 101 at [19]); or of an intention on the part of the accused to murder the victim: *R v Serratore* [2001] NSWCCA 123 (an appeal from the retrial) at [33]–[41]. But the intention of an accused must be relevant to the time the criminal act is alleged to have been committed by him: *R v Hannes* [2000] NSWCCA 503 at [480] (this statement does not appear to have been affected by the amendments directed to that decision on a different issue — as to whether the representor intended to assert a particular fact: see [4-0300], above).

Evidence given by affidavit of the terms of a conversation was admissible pursuant to the former s 72 to show that one of the participants in the conversation held a belief manifested by the terms of that conversation: *McGregor v Nichol* [2003] NSWSC 332 at [31]. That decision has been described as "clearly correct": *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* [2006] NSWSC 615 at [8]–[9].

Evidence of a state of mind may be elicited by the defence to establish a reason for the possession of otherwise incriminating property (*R v Hemmelstein* [2001] NSWCCA 220 at [8], [14]–[15], [27]); or as indicating a willingness to have sexual intercourse with the accused in a sexual assault case: *R v Van Dyk* [2000] NSWCCA 67 at [31], [52]–[57].

Expressions of concern by the deceased that the accused may obtain a key to her residence would be admissible to rebut any possible innocent explanation for evidence that the accused had been inside her residence: *R v Hillier* (2004) 154 ACTR 46 at [27].

If the person alleged to have made the previous representation denies when called to give evidence that he made it, evidence is admissible from another person that the first person did make it, as he "could give evidence of it": *R v Nguyen* (2008) 184 A Crim R 207 at [21].

Whether protestations of innocence when confronted by allegations of illegally importing cigarettes would be admissible as contemporaneous statements of state of mind has been queried: *CEO of Customs v Pham* [2006] NSWSC 285 at [35]–[36]. It is suggested that the evidence would strictly be admissible, but usually of only minimal weight.

In a trademark and copyright infringement suit between two foreign language newspapers, in which it was alleged that one newspaper used four Chinese characters as a trademark in a style that was deceptively similar to the way in which the other newspaper used the same characters, evidence was led from newsagents that, shortly after the defendant changed the style of its trademark, customers picked up one newspaper and then replaced it by the other newspaper after conversations with the newsagent, in order to demonstrate that the customers were confused by the deceptive similarity of the characters adopted by the defendant to those adopted by the plaintiff: *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1954) 91 CLR 592 at 595, 597–598; *Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd* (2004) 63 IPR 38 at [51]. It was tentatively held (at [50]) that evidence of what was said to the newsagents fell within the definition of hearsay in s 59 of the *Evidence Act*, but was subject to the specific exclusion from the hearsay rule by the former s 72. The evidence of the newsagents' observations of their customers' confusion was direct and not hearsay evidence of that confusion (at [50]). Finally, it was held (at [54]) that the intention to deceive should be presumed to be likely to deceive or confuse in accordance with *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 657:

> The rule that[,] if a mark or get-up for goods is adopted for the purpose of appropriating part of the trade or reputation of a rival, it should be presumed to be fitted for the purpose and therefore likely to deceive or confuse […] is as just in principle as it is wholesome in tendency. […] [W]hen a dishonest trader fashions an implement or weapon for the purpose of misleading potential customers he at least provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive. Moreover, he can blame no one but himself, even if the conclusion be mistaken that his trade mark or the get-up of his goods will confuse and mislead the public.

This passage was quoted with approval as relevant to the *Evidence Act* by the Full Court of the Federal Court in *Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd* at [49].

Evidence admissible under s 66A may be subject to a limitation on its effect pursuant to ss 135–137. Examples of such an exclusion are to be found in *R v Lock* (1997) 91 A Crim R 356 at 358ff (discussed in Anderson, Williams and Clegg, in *The New Law of Evidence* (2nd edn, 2009), at 66A.3); and *R v Burrell* [2001] NSWSC 120 (Sully J) at [111]–[119], discussed in Anderson, Williams and Clegg, (2nd edn, 2009), at 251 (n 384).

Note that s 61(2) provides that the requirement of s 61(1), that evidence of the making of the relevant representation is admissible only if the person making that representation was competent to give evidence about the fact represented, does not apply to the exception now provided by s 66A.

[4-0370] Notice to be given — s 67

Sections 63(2) (see [4-0330]), 64(2) (see [4-0340]) and 65(2), (3) and (8) (see [4-0350]) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence. The court has power to permit the evidence to be given despite the party's failure to give notice, subject to such conditions (if any) as the court thinks fit: ss 67(4) and 67(5).

Lack of notice is unimportant where the other party is unlikely to have found the missing witness either: *Quintano v BW Rose Pty Ltd* (2008) 186 A Crim R 448 at [7].

Both the Commonwealth *Evidence Regulations* 1995 and the *Evidence Regulation* 2005 (NSW) make provision (by cl 4 "Exceptions to hearsay rule—notices of previous representations") as to the content of the notice required. The notice must identify the substance of the particular representation and the relevant part of any document in which it is to be found: *ACCC v CC (NSW) Pty Ltd* [1998] ATPR #41-650 at 10. It must also notify the substance of all other representations made by the person who made that previous representation, so far as they are known to the notifying party; for that reason, knowledge of the contents of a statement which is later tendered without notice may not be a sufficient basis for dispensing with the notice requirement: *Trewin v Felton* [2007] NSWSC 919 at [2].

Section 67 requires the notice to be given at least 21 days prior to the occasion upon which the evidence to be used. UCPR 31.5 nominates a period of no later than 21 days before the callover to fix dates for hearing or (if no date is fixed for determining the date for hearing) no later than 21 days before the date on which the court in fact determines the date for hearing. This rule has been rigorously applied: *Tobin v Ezekiel* [2009] NSWSC 1209 at [5]–[6].

[4-0380] Objections to tender of hearsay evidence in civil proceedings if maker available — s 68

The intention of this section is to provide a procedure whereby the obligation to call witnesses at the trial may be determined before the trial: *ALRC Report 26*, vol 1, par 695.

Other exceptions to the hearsay rule — Pt 3.2 Div 3 (ss 69–75)

[4-0390] Exception: business records — s 69

The word "document" is defined in Pt 1 of the Dictionary to the *Evidence Act*. The "references to documents" and "references to businesses" are dealt with in Pt 2 of the Dictionary. It was thought that the fact that statements in business records are to be used in the business provided a strong incentive for accuracy: *ALRC Report 26*, vol 1, par 703.

Intention of statute: The business records provisions of the *Evidence Act* introduced fundamental changes to the previous business records provisions of Pt IIC of the *Evidence Act* 1898: *Schipp v Cameron (No 3)* (unrep, 9/10/97, NSWSC) at 2. Both the inclusive and the exclusionary provisions of s 69 of the *Evidence Act* 1995 should be regarded as being of wide import and construed accordingly (*Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1083 at [4](3)); as should the term "business": *Valoutin Pty Ltd and Harpur v Furst, Tremback and Official Trustee in Bankruptcy* (1998) 154 ALR 119 at 129; *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] FCA 1862 at [293].

The purpose of the current provisions is to prevent the introduction through this exception to the hearsay rule of hearsay material prepared in an atmosphere or context which may cause it to be self-serving: *Vitali v Stachnik* [2001] NSWSC 303 at [12]; *ACCC v Advanced Medical Institute Pty Ltd (No 2)* (2005) 147 FCR 235 at [27]; *Mid-City Skin Cancer and Laser Centre Pty Ltd v Zahedi-Anarak* [2006] NSWSC 615 at [9]; *Street v Luna Park Sydney Pty Ltd* [2007] NSWSC 695 at [4].

See also *Hillig v Battaglia* [2018] NSWCA 67. Also *Averkin v Insurance Australia* (2016) 92 NSWLR 68.

"business records": Business records are the documents or other means of holding information by which the activities of the business are recorded: *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98 at [47], citing *Compafina Bank v ANZ Banking Group Ltd* [1982] 1 NSWLR 409 at 412; *Atra v*

Farmers and Graziers Co-op Co Ltd (1986) 5 NSWLR 281 at 288; *Roach v Page (No 15)* [2003] NSWSC 939 at [5]; *Silver v Dome Resources NL* [2005] NSWSC 348 at [7]. However, such records are restricted to those kept in the ordinary course of business, and they do not include the products or marketing documents of that business — even where such documents purport to record activities of the business: *Roach v Page (No 27)* [2003] NSWSC 1046 at [9]; *ASIC v Rich* (2005) 216 ALR 320 at [180]–[182], [188]; *Hansen Beverage Co v Bickfords (Australia) Pty Ltd* (2008) 75 IPR 505 at [133]. An expert audit report on a company's financial position can fall within that description, and the lack of opportunity to test the contents of the report is not automatically fatal to its admission as a business record: *Forbes Engineering (Asia) Pte Ltd v Forbes (No 4)* [2009] FCA 675 at [103]–[104].

The activities of a Royal Commission constitute a business as defined in cl 1(1)(d) of Pt 2 of the Dictionary to the *Evidence Act*: *Thomas v NSW* [2007] NSWSC 160 at [3]; and statements made in the course of the Royal Commission are not made in the course of a proceeding in a court: at [15].

Minutes prepared by an officer of the Department of Foreign Affairs and Trade, present at a meeting between the Minister and the Chairman of AWB Ltd, recording statements made by the Chairman to the Minister are admissible pursuant to s 69 as business records made by a person who had personal knowledge of what the Chairman had said: *AWB Ltd v Cole (No 5)* (2006) 234 ALR 651 at [82].

A solicitor's bill of costs, and correspondence with the client, are business records: *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 at [59]; the certificates and reasons for determination by the Costs Review Panel are also business records, but are excluded because they are prepared for, or obtained in contemplation of or in connection with, a legal proceeding: at [60].

Documents prepared by the plaintiff, as the manager of the defendant's business, at the end of each business day relating to what had been said to him by the defendant during that day for the future management of the business are the defendant's business records, and the representations made therein are the defendant's representations: *Gordon v Ross* [2006] NSWCA 157 at [37]–[38].

A report commissioned by the respondent to address a clean-up notice from the Council at a time when litigation was not likely or reasonably probable was found to be a business record of the respondent within s 69: *Di Liristi v Matautia Developments Pty Ltd* [2021] NSWCA 328 at [55], [60]. The file copy of the report held by the commissioned company and the file copies of the laboratory certificates produced by a third party were also business records.

A valuation is an opinion expressed by an expert, and becomes both an asserted fact and a business record within the meaning of s 69: *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569 at [13]–[18]; *Investmentsource v Knox St Apartments* [2007] NSWSC 1128 at [19]–[21]; *Street v Luna Park Sydney Pty Ltd* [2007] NSWSC 688 at [5].

Similarly, an expert auditor's report on the financial position of a company can fall within the terms of s 69 as "part of the records belonging to or kept by … [an] organisation in the course of, or for the purposes of, a business": *Forbes Engineering (Asia) Pte Ltd v Forbes (No 4)* [2009] FCA 675 at [103].

A document may be a business record even if it is a draft, or otherwise appears to be a document "along the way" to completion of a final document: *Timms v Commonwealth Bank of Australia* [2003] NSWSC 576 at [17]; *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA 1549 at [9]; *ASIC v Rich* (2005) 216 ALR 320 at [188]. A "one-off" record of a meeting may be a business record; it need not be part of systemic record-keeping involving more than a single document: *Feltafield Pty Ltd v Heidelberg Graphic Equipment* (1995) 56 FCR 481 at 483; *ASIC v Rich* at [190].

A faxed copy of a document may be a business record of the person who received the facsimile even though the original document faxed may not be a business record of the person who sent the fax: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 654 at [36]. A rough diagram

made by a police officer based on what he had been told by two witnesses, and which denied the basic allegation by the plaintiff that another vehicle was involved in his accident, is a business record of what is recorded in accordance with s 69 and, as such, is evidence of the facts recorded: *Tran v Nominal Defendant* (2011) 58 MVR 462 at [177]–[178].

In *Panayi v DC of T* [2017] NSWCA 93, the appellant sought review of penalties imposed on him as a director of a company. The evidence against him had included an ASIC report providing reasons for disqualifying him from managing companies for a period. The court held that the ASIC document plainly fell within the definition of a business record. Thus it was, in the circumstances of the case, properly admitted and capable of rebutting the appellant's assertions that he was not responsible for the unremitted tax at the core of the proceedings against him. The ASIC report did not fall within the language of s 69(3). This subsection "carves out" certain representations from the exception to the hearsay rule.

In *Averkin v Insurance Australia Ltd* , see above, the court examined s 69(3)(b) which makes the section inapplicable "if the representation … was made in connection with an investigation relating or leading to a criminal proceeding". In a claim for theft and loss of a motor vehicle, the insurance company sought to tender a bundle of documents including a police record and pages from a police notebook. There was no doubt that the documents formed part of a business record. The majority held that the initial part of the police report (dealing with the finding and location of a burnt vehicle at some distance from the plaintiff's home) was both relevant and admissible. The remainder of the material was not. The distinction arose because s 69(3)(b), while it does not require the litigation to be in existence when the representation is made (indeed it may never eventuate), does require that the investigation be extant at the time the representation is made. "Investigation" is not defined, and will turn on the facts of the case. The court held that an investigation had not commenced merely upon the police recording a report of a burning vehicle in a particular location. When the vehicle was examined, an investigation had commenced. See also *Hillig v Battaglia* [2018] NSWCA 67; *Di Liristi v Matautia Developments Pty Ltd*, above, at [55].

Leeming JA's decision in *Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, is a valuable illustration of the approach to be taken in determining whether representations in business records tendered at a hearing may be accepted as an exception to the hearsay rule. In this case, the appellant sought possession of a property at Heatherbrae owned by the respondents. The claim was based in default under a guarantee arising in connection with a mortgage. The appellant's claim was dismissed by the primary judge. An important issue in the trial related to copies of Baycorp "file notes" produced on subpoena and subsequently included in the Court Book. Ultimately, these documents were rejected by the primary judge on the basis that they were not accurate business records and that they contained errors or misleading statements. In the event, this aspect of her decision was incorrect. She also rejected them under s 135 *Evidence Act* as being overly prejudicial.

The Court of Appeal overruled each of these findings and upheld the appeal. Leeming JA (with whom Basten and Gleeson JJA agreed) made these points:

1. Sections 47(2), 48(1) and 183 *Evidence Act* alleviate the "best evidence" rule at common law. Where no real issue of authenticity arises, the tender of a copy document purporting to have been produced from electronic records maintained for the purpose of a business will commonly be permitted.

2. The onus lies on the party seeking to tender the documents to establish that the exception in s 69 (business records) applies.

3. The first limb in s 69 turns on the nature of the document; the second limb turns on the particular representation contained in the document — the court must be satisfied that the representation "was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact or on the basis of information directly or indirectly supplied" by such a person.

4. The court may draw inferences not just from the form of the document, but from the nature of the information in it. Section 48(1)(b) *Evidence Act* allows inferential reasoning from the form and content of the document.
5. The court may also draw inferences from other matters as well — s 183 *Evidence Act*. Here, the file notes were clearly derived from documents which comprised business records of Baycorp. They were provided in response to a third party subpoena which called for the very records which the prosecuting party asserted had been produced. The fact that the "heading and footer" bore the date "2017" did not detract from the fact that the copies of the electronic file notes themselves related to the relevant years. The representations in the file notes were highly probative and accordingly relevant to the issues at trial.
6. The primary judge's discretionary exercise under s 135 *Evidence Act* miscarried because she had not correctly evaluated the probative value of the representations in the copy business records.

"previous representation": The phrase "previous representation" is discussed under s 62 at [4-0320]. The fact that the person who made the representation in a business record is not an employee of the business does not necessarily lead to the conclusion that it was not made for the purposes of the business: *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569 at [12].

"personal knowledge": The phrase "personal knowledge of a fact" is defined in s 69(5) in the same terms as the phrase "personal knowledge of an asserted fact" is defined in s 62(2) at [4-0320].

It is enough that the court is able to conclude, on the balance of probabilities, that the representation was made by, or on the basis of information supplied by, someone (not necessarily identified) falling within one of the alternative descriptions in s 69(2): *ASIC v Rich*, above, at [197]; and it would greatly diminish the utility of s 69 if such a requirement existed: *Guest v FCT* 2007 ATC 4265 at [25]–[29].

The court may draw inferences from the form of the document and from the nature of the information contained in it as to whether the person who supplied the information to the person making the representation "might reasonably be supposed to have had personal knowledge of the asserted fact" (see s 69(2)(a)): *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 at [19] where the finding was based on the precision of the information recorded in the document: *Wood v Inglis* [2009] NSWSC 313 at [5].

Evidence has been rejected on the basis that personal knowledge on the part of the person making the representation has not been established where the documents were unsigned and, although some sources of information are referred to, it is not possible to attribute any particular source to any particular statement, let alone come to any view as to whether the source had the requisite personal knowledge of the particular fact: *Watson v AWB Ltd (No 4)* [2009] FCA 1175 at [11].

Opinion: A previous representation may include an expression of opinion — such as an opinion by a valuer as to the value of property: *Ringrow Pty Ltd v BP Australia Ltd*, above, at [13]–[21]. The valuer would have personal knowledge of the asserted fact because the asserted fact consists of the opinion formed and expressed by the valuer: *Ringrow Pty Ltd v BP Australia Ltd* at [19]. That decision has been accepted in a number of cases: *Young v Coupe* [2004] NSWSC 999 at [12]–[13]; *New South Wales v Mannall* [2005] NSWCA 367 at [145]; *Covington-Thomas v Commonwealth* [2007] NSWSC 779 at [496]; *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128 at [19]–[21]. *Ringrow* has been criticised by Odgers, Uniform Evidence Law at [1.3.2860], but the subsequent Report of the three Law Reform Commissions (*ALRC Report 102; NSWLRC Report 112; VLRC Final Report*, at 8.144) recommended against an amendment of s 69 to overcome the *Ringrow* decision, and no such amendment was made by the *Evidence Amendment Act* 2007.

Reliability: There is no requirement that the representation be recorded contemporaneously with the facts recorded; rather, the section assumes that the status of the document as a business record will give sufficient assurance as to its reliability for it to be admissible. The weight of the business

record may nevertheless need to be carefully assessed if it is made sometime after the representation was made: *Gordon v Ross* [2006] NSWCA 157 at [37] (Basten JA, with whom Hodgson and Bryson JJA agreed on this issue).

"in contemplation of": A representation prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with legal proceedings or in connection with an investigation relating to or leading to a criminal proceeding, is excluded from the business records exception by s 69(3). This provision does not exclude statements made or kept in documents as part of a regular system merely because they may be of utility if legal proceedings were to occur: *Atra v Farmers and Graziers Co-op Co Ltd* (1986) 5 NSWLR 281 at 290; *Creighton v Barnes* (unrep, 18/9/95, NSWSC) at 2–3. The provision includes statements made in contemplation of or in connection with proceedings other than the proceedings in which they are tendered, and no question of dominant or substantial purpose arises: *Vitali v Stachnik* [2001] NSWSC 303 at [17]; *Street v Luna Park Sydney Pty Ltd* [2007] NSWSC 695 at [5]–[12].

The words "in contemplation of" add something to the words "for the purpose of"; they express more than a temporal connection, and suggest that the prospect of legal proceedings must at least be the occasion for the representation being made: *S and Y Investments (No 2) Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1986) 21 A Crim R 204 at 152. It is sufficient that the maker of the representation had the proceedings "in mind" when making the representation: *Atra v Farmers and Graziers Co-op Co Ltd*, above, at 290; or if the possibility of a legal proceeding played "some part in the decision to prepare it": *Timms v Commonwealth Bank of Australia* [2003] NSWSC 576 at [15]; *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 at [25]. The expression "in connection with" is a notoriously wide one: *Vitali v Stachnik*, above, at [17]. See also *Street v Luna Park Sydney Pty Ltd*, above, at [9].

This provision is expressed in words of wide meaning: *R v Rondo* (2001) 126 A Crim R 562 at [96]; *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1083 at [4](3). The person whose contemplation is relevant is the person who prepared or obtained the representation — that is, all who might cause a representation to be made in the form in which it takes: *ACCC v Advanced Medical Institute Pty Ltd (No 2)* (2005) 147 FCR 235 at [27].

The legal proceedings in contemplation may be any such proceedings; it is unnecessary that the precise proceedings in which the evidence is tendered were contemplated: *Lewis v Nortex Pty Ltd (in liq)*, above, at [4](4). This is because any proceedings in contemplation may lead even persons of good intent to make purely self-serving statements: *Lewis v Nortex Pty Ltd (in liq)* at [4](6). Nevertheless, the mere possibility or chance of proceedings is insufficient; legal proceedings must be likely or reasonably probable: *Creighton v Barnes*, above, at 2; *Waterwell Shipping Inc v HIH Casualty and General Insurance Ltd* (unrep, 8/9/97, NSWSC) at 5–6; *Lewis v Nortex Pty Ltd (in liq)* at [9]; *ACCC v Advanced Medical Institute Pty Ltd (No 2)*, above, at [40]–[43]; *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 at [61] (although a dissenting judgment, this was not the issue on which the disagreement was based).

It has been held that the proceedings contemplated must mean proceedings to which the party otherwise entitled to the document is a party: *Sellers Fabrics Pty Ltd v Hapag-Lloyd*, (unrep, 15/10/98, NSWSC) at 2. Rolfe J conceded that, by reference to the generality of the definition of "Australian or overseas proceeding", it was open to argument that the reference was to any such proceeding, but he said that it seemed that "the only sensible meaning that can be attributed is one to which the owner of the business record is a party". Odgers, *Uniform Evidence Law*, at [1.3.2880], has criticised the decision of Rolfe J in *Sellers Fabrics Pty Ltd v Hapag-Lloyd* as "surprising".

In *Vitali v Stachnik* [2001] NSWSC 303 at [13]–[14], Barrett J found it unnecessary to determine whether the *Sellers Fabrics* decision was a "surprising" one because the representation in that case was made by a company of which the party to the proceedings was the sole director and shareholder, and thus its alter ego. In *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 at [35], McDougall J found it unnecessary to determine whether the decision of Rolfe J was correct because

he had already found (at [32]) that the document was prepared to enable the recipient to consider its prospects of recovery in the event it was held liable in other litigation. In *Kang v Kwan* [2002] NSWSC 1187, Santow J (at [177]) gave consideration only to the contemplation of the proceedings before him (which he held had been a mere possibility at the relevant time) and disregarded other proceedings in the District Court then in contemplation, having stated the purpose of the exclusion described by Barrett J in *Vitali v Stachnik*, above. There does not appear to be any reference to this issue in the Report of the three Law Reform Commissions, and certainly no amendment has been made to s 69.

A document prepared in contemplation of a coronial inquiry has been held to fall within the terms of s 69, a coroner being a "person … authorised by an Australian law … to hear, receive and examine evidence" referred to in the Dictionary definition of "Australian court": *BestCare Foods Ltd v Origin Energy LPG Ltd* [2010] NSWSC 1304 at [12].

"in connection with": The phrase is of considerable width, and is satisfied by a link or association or a relationship, summed up in the phrase "having to do with": *Elkateb v Lawindi* (1997) 42 NSWLR 396 at 402; *Thomas v NSW* (2008) 74 NSWLR 34 at [19]. They are words of wide import, and their meaning is to be gained from their context: *R v Orcher* (1999) 48 NSWLR 273 at [30]–[32].

"Negative hearsay": Where a system of business records has been followed of making and keeping a record of all events of a particular kind, s 69(4) permits proof that such an act did not occur if no record of it has been kept in that system. This has been described as "negative hearsay" in J Heydon, *Cross on Evidence* at [35545]. In *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, one issue was whether an orthopaedic surgeon, having recognised a physical indication of the probability that the plaintiff's spine was abnormal and that he should therefore obtain the advice of a neurosurgeon colleague before applying traction to her spine, went ahead and applied that traction without obtaining that advice (which would have been not to do so), causing irreversible injury to the plaintiff. The defendant hospital called no evidence. It was held that, on the evidence of the hospital records (which had been wrongly rejected at the trial), the neurosurgeon was under a duty to record any advice he gave in the hospital records. There was no record that he had done so. A new trial was ordered: see *Albrighton*, above, at 555 ([31]–[32]), 556 [39], 557 [44] (the paragraph numbers have been added to the NSWLR report in CaseBase). See also *Baiada v Waste Recycling & Processing Service of NSW* [1999] NSWCA 139 at [57], in which reliance was placed on the principle that, if a duty existed to record matters when they occur, and if no record of such matters is found, such matters did not occur.

General: As the purpose of the exclusion in s 69(3) is to avoid purely self-serving hearsay statements in business records to establish the truth of what they state (*Lewis v Nortex Pty Ltd (in liq*) [2002] NSWSC 1083 at [4](6)), it is suggested that the inquiry should be as to the extent of the interest of the maker of the representation in the contemplated proceedings at the relevant time, whether as a party or otherwise.

[4-0400] Exception: contents of tags, labels and writing — s 70

The definition of "document" identified in the business records section at [4-0390] is also relevant to this section.

The party tendering this evidence need establish only that it "may reasonably be supposed" that the circumstances in which the tag etc was attached or placed fall within the terms of the section — a phrase used in s 62 and now added to s 59. Section 182 of the Commonwealth *Evidence Act* 1995 extends the operation of s 70 in relation to documents which are Commonwealth records (as defined in the Dictionary), and it defines "tags or objects attached to objects" as including "writing placed on objects". (There is no s 182 in the NSW *Evidence Act*.) Section 183 permits reasonable inferences to be drawn from the document or thing and from other matters from which inferences may properly be drawn as to the application of this provision.

At common law, secondary evidence of labels affixed to objects was admissible to identify the object (*Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535 at 546, 548–549, 552–553, 556–557); but both the label itself and secondary evidence of its contents remained only hearsay evidence of the facts stated in the label. There were, however, many common law cases where inferences as to the truth of labels could be drawn; for example, as circumstantial evidence of the contents of the container: *R v Leroy* [1984] 2 NSWLR 441 at 445, 447; *Rybicki v Lynch* [2006] SASC 34 at [31]–[33]. Such documents now become evidence of the representations contained in them pursuant to s 70. The section enables a person carrying out tests to rely on the labels for identification of the material tested: *Sharwood v R* [2006] NSWCCA 157 at [33].

It has been suggested that provisions such as s 70 refer to material that has an inherent likelihood of its integrity and accuracy: *Australian Petroleum Pty Ltd v Parnell Transport Industries Pty Ltd* (1998) 159 ALR 477 at 481.

The tag or label must be attached to or written on the object to be identified before the exception applies; signs in the near vicinity of objects on display containing representations do not fall within that exception: *Daniel v Western Australia* (2000) 173 ALR 51 at [25]–[26].

The Commonwealth Act, by s 70(2), excludes this exception in relation to customs and excise prosecutions conducted in all Australian courts.

[4-0410] Exception: telecommunications — s 71

The definition of "document" identified in the business records section, above at [4-0390], is also relevant to this section.

There are a number of statutory presumptions in aid of the application of this section. Where a document purports to be a record of a telex, lettergram or telegram, ss 161–162 make such presumptions (unless the evidence is sufficient to raise doubt about the presumptions is raised) except where the proceedings relate to certain contracts. Section 163 of the Commonwealth *Evidence Act* 1995 presumes (unless the evidence is sufficient to raise doubt about the presumption) a letter from a Commonwealth agency addressed to a person at a specified address to have been sent by prepaid post to that address on the fifth business day after the date on which the letter purports to have been prepared. (There is no s 163 in the NSW *Evidence Act*. Section 29 of the *Acts Interpretation Act* 1901 (Cth) may provide some assistance.)

In *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408 at [11]–[28] accepted that a fax transmission report that a six page document had been sent by one party's fax machine to the other party's fax number and that the "result" shown by the machine was "OK", coupled with the absence of any suggestion that someone had faxed another six page document at that time, as establishing that the particular six page document in question had been sent to the other party. He also accepted the evidence of the other party that its fax was malfunctioning and from time to time did not print out faxes sent to it, but he nevertheless held that the document had been communicated to it, relying on the presumption in s 147 of the *Evidence Act* that, unless evidence sufficient to raise doubt about the presumption is adduced, the other party's fax machine is presumed to have produced the document.

Section 183 permits reasonable inferences to be drawn from the document or thing and from other matters from which inferences may properly be drawn as to the application of this provision.

[4-0420] Exception: Aboriginal and Torres Strait Islander traditional laws and customs — s 72

Note: The former s 72 (Exception: contemporaneous statements about a person's health etc) is now s 66A. See [4-0365].

The experience gained in litigation under the *Native Title Act* 1993 demonstrated serious problems in the proof of Aboriginal and Torres Strait Islander traditional laws and customs in accordance

with the *Evidence Act*, in particular with the way in which that statute dealt with hearsay evidence, largely because the basis of an Aboriginal connection with land is usually based on oral traditions and history which do not easily accord with either the common law or the *Evidence Act*: *ALRC Report 102*, Ch 19. The Explanatory Memorandum accompanying the Bill for the *Federal Evidence Act* accepted (at [96]) that it was not appropriate for the legal system to treat orally transmitted evidence of traditional law and customs as prima facie inadmissible when this has been the very form by which such laws and customs are maintained under Indigenous traditions.

The new s 72 provides that the hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group. A similar provision is made excepting such evidence from the opinion rule: s 78A. See [4-0625].

The Dictionary to the *Evidence Act* already provided that traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

[4-0430] Exception: reputation as to relationships and age — s 73

This provision widens the range of matters which may be proved by reputation to some extent beyond the common law relating to pedigree, but the family history of real estate transactions represented in a hearsay statement does not fall within the exception: *Day v Couch* [2000] NSWSC 230 at [69]. Family history does not mean family gossip; it encompasses date and place of birth, date and place of marriage, date and place of cohabitation over the last century and place of work of ancestors of the maker of the representation, and it is not to be understood as making admissible broad genealogical material: *Ceedive Pty Ltd v May* [2004] NSWSC 33 at [9]. The information may be based on a conversation of only one blood relative: *Ceedive Pty Ltd v May* at [10]. Odgers, at [1.3.3500], has suggested that the statement in [9] of *Ceedive Pty Ltd v May* may be an unduly narrow approach to the provision.

An illustration of the use to which s 73 may be put is referred to in *Yarmirr v Northern Territory of Australia* (1998) 156 ALR 370 at [21], as establishing traditional laws and customs practised more than 150 years earlier and genealogical connections to ancestors living at or prior to European settlement in the necessary absence of official records. Reliance was also placed on s 74, below (the new s 72 would appear now to have covered that particular area).

Section 73 would permit hearsay from a witness's mother as to the birth date of that witness. In *Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 55 at [9]–[10], a witness was permitted to give evidence of what was said to him by another person as to that other person's age (matter of critical importance in the proceedings), on the basis that common sense must intrude on the construction of the *Evidence Act* in order to avoid the artificiality of the objection taken to it. It is suggested that this decision be treated with caution.

[4-0440] Exception: reputation of public or general rights — s 74

This exception is wider than permitted by the common law. The textbook authors are apparently agreed that it avoids the common law restrictions to the admission of representations made by persons since deceased and persons with special "competence" or "competent knowledge" and representations made prior to the dispute arising.

The evidence allowed by s 74 has been described as being, "in the main", inherently reliable: *Adam v The Queen* (2001) 207 CLR 96 at [68].

Section 74 permits anthropological evidence as to the "reputation" of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period: *Yarmirr v Northern Territory of Australia*, above; *De Rose v South Australia* [2002] FCA 1342 at [265]–[270]; *Gumana v Northern Territory of Australia* (2005) 218 ALR 292

at [157]. Evidence of Aboriginal custom and tradition is not a special exception to the usual rules of evidence: *Gumana*, above, at [157]–[160]. These issues did not arise in the unsuccessful appeal: *Gumana v Northern Territory of Australia* (2007) 239 ALR 272 (the new s 72 would appear now to have covered that particular area).

[4-0450] Interlocutory proceedings — s 75

Interlocutory proceedings are to be distinguished from proceedings which, subject only to appeal, finally dispose of an action or an existing dispute between the parties: *Hall v Nominal Defendant* (1966) 117 CLR 423 at 444. It is the legal rather than the practical or real effect of the order sought in the proceedings in question: *Sanofi v Parke Davis Pty Ltd (No 1)* (1982) 149 CLR 147 at 152. If, for example, the orders sought are to have only an interim effect, the proceedings will be considered to be interlocutory: *Director of Public Prosecutions (ACT) v Hiep* (1998) 156 ALR 110 at 124–125.

An application brought pursuant to UCPR Pt 5.2 against a newspaper to reveal its sources, usually as a precursor to proceedings for defamation or similar relief, is not an interlocutory proceeding pursuant to s 75: *Liu v The Age Company Ltd* [2010] NSWSC 1176 at [46].

Where proceedings are brought pursuant to s 39B of the *Judiciary Act* 1903 (Cth) to enforce a common law right or immunity based on legal professional privilege, and where they are to resolve the dispute or controversy between the parties on that issue, they are final and not interlocutory in nature: *Kennedy v Wallace* (2004) 208 ALR 424 at [112].

Section 9 of the *Evidence Act* (providing that that Act does not affect the operation of a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding) does not create an independent statutory basis for dispensing with the operation of the rules of evidence. Rather, it recognises (so as not to affect) any rule of common law or in equity in relation to evidence in a proceeding insofar as it relates to the court's power to dispense with the operation of a rule of evidence in an interlocutory proceeding: *International Finance Trust Co Ltd v NSW Crime Commission* (2008) 251 ALR 479 at [12]–[15]. This is because, in the latter, the purpose of the evidence is to determine whether there is a serious issue to be tried, not to determine the issue itself: *Geoffrey W Hill & Associates v King* (1992) 27 NSWLR 228 at 229–230.

A *voir dire* hearing pursuant to s 189 of the *Evidence Act* in relation to an objection to evidence tendered is not an interlocutory proceeding for the purposes of s 75: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 637 at [9]–[16]; *R v JF* [2009] ACTSC 104 at [6].

Section 75 recognises that interlocutory applications frequently need to be made on an urgent basis, when direct evidence may not be able to be gathered in sufficient time or where it is undesirable to alert the other party of particular evidence: *NSW Crime Commission v Vu* [2009] NSWCA 349 at [43].

The party seeking to rely on the exception under s 75 must identify a particular source who is reasonably likely to have knowledge of the relevant fact (*NSW Crime Commission v Vu* at [46]), although this does not necessarily require identification of the "ultimate source" of the information: ibid at [42]. However, in a case where the evidence is tendered by a party to establish that the party has a particular state of mind relevant to the application (such as a suspicion that the other party has committed an offence), the failure to identify the ultimate source of the information will affect the determination of whether that state of mind exists: ibid at [48]–[50].

The weight to be given to a hearsay representation apparently based on the maker's interpretation of certain facts may be affected by the qualifications of the person making the representations to interpret them: *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347 at [25]. Otherwise, such conclusions are not saved by s 75 and are inadmissible: *International Finance Trust Co Ltd v NSW Crime Commission*, above, at [24].

A telephone survey conducted with persons who answered the telephones of identified companies, without ascertaining whether those persons were appropriate persons from whom the required

information could be obtained was rejected in *Humphries v SAS Signage Accessories Supplier Pty Ltd* [2009] FCA 1238 at [14]. On the other hand, a survey taken of customers of the party tendering it before there was any question of litigation, who had been telephoned by its employees and asked specified questions which were contemporaneously recorded on the documents that identified the questions to be asked, was held to be admissible notwithstanding that the employees had no memory of the conversations with them: *Mobileciti Pty Ltd v Vodafone Pty Ltd* [2009] NSWSC 891 at [1]–[3].

Where the proceedings are interlocutory, the "source" which must be identified in s 75 is the maker of the representation as to the asserted fact to which s 59 applies: *Levis v McDonald* (1997) 155 ALR 300 at 307. A somewhat broader rule was stated by Hunter J in *Proctor and Gamble Australia Pty Ltd v Medical Research Pty Ltd* [2001] NSWSC 183 at [55], where he held that this requirement had been satisfied where the deponent of the affidavit had identified compendiously all of his sources for all of his statements, without identifying the source of each individual statement.

Section 75 applies notwithstanding the evidentiary provisions in ss 76–77 of the *Australian Securities and Investments Commission Act* 2001 (Cth): *ASIC v Elm Financial Services Pty Ltd* [2004] NSWSC 306 at [12].

A judgment obtained by a plaintiff as a result of a summary judgment application is a final order, and the application for such a judgment does not constitute interlocutory proceedings for the purposes of s 75: *King Investment Solutions Pty Ltd v Hussain* (2005) 64 NSWLR 441 at [22]–[26]; *Scott MacRae Investments Pty Ltd v Baylily Pty Ltd* [2011] NSWCA 82 at [135] at [1].

[4-0455] Hearsay statements to explain delay — full weight to be given

Brierley v Ellis [2014] NSWCA 230 establishes that in a "late" claim against the Nominal Defendant the plaintiff may, in appropriate circumstances, justify and explain delay by reliance upon hearsay statements. In this case, the delay was sought to be explained by a series of written statements and declarations. These were admitted by consent. The plaintiff was not required to give oral evidence or to be cross-examined. The Court of Appeal held that the plaintiff was entitled to rely upon the declarations as evidence of the facts stated therein and it was not open to the defendant to argue that, in the absence of cross-examination, little weight should be given to the hearsay nature of the evidence.

[4-0460] Hearsay — Discretionary and Mandatory exclusions — Pt 3.11, ss 135–139

The Notes relating to Pt 3.11 commence at [4-1600].

Legislation

- *Australian Securities and Investments Commission Act* 2001 (Cth) ss 76–77
- *Criminal Procedure Act* 1986, s 285, Ch 6 Pt 6 Div 3 and Div 4
- *Evidence Act* 1995, ss 17(2), 55, 59–77, 103, 108A, 135–139, 142, Dictionary
- *Evidence Act* 1995 (Cth), ss 161, 162, 163, 182, 183
- *Evidence Amendment Act* 2007
- *Evidence Regulations* 1995 (Cth)
- *Evidence Regulation* 2005, cl 4

Further references

- S Odgers, *Uniform Evidence Law*, 9th edn, Thomson Reuters, Sydney, 2010
- J Anderson, N Williams and L Clegg, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts*, 2nd edn, LexisNexis, Sydney, 2009

- Hon M J Beazley (1995) 18 *UNSWLJ* 39
- J D Heydon, *Cross on Evidence*, 8th edn, LexisNexis, Sydney, 2010
- *Uniform Evidence Law*, ALRC Report 102; NSWLRC Report 112, VLRC Final Report, Australian Law Reform Commission, Sydney, 2005
- *ALRC Report 26*, vol 1, Australian Government Publishing Service, Canberra, 1985
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005.

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Possession List in the Supreme Court

Acknowledgement: the following material has been prepared by the Honourable Justice D Davies of the Supreme Court of New South Wales.

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[5-5000] Introduction

Prior to the enactment of the *Supreme Court Act* in 1970, a person not in actual possession of the land but who had an immediate right to obtain possession of the land, brought an action in ejectment. Section 79 of the *Supreme Court Act* 1970 replaced the action of ejectment by providing that any person who might have brought such an action could commence proceedings and claim judgment for possession of land and claim such other relief as the matter of the case required. *Civil Procedure Act* 2005 s 20 is now the governing provision and it provides that a claim for judgment for possession of land takes the place of a claim in an action for ejectment that could have been brought under the practice of the Supreme Court as it was immediately before 1 July 1972, the date of commencement of the *Supreme Court Act* 1970.[1]

There is a specialist list in the Common Law Division called the Possession List (UCPR r 45.1(1)) and proceedings in which a claim for possession of land is made are to be entered in the Possession List: r 45.4(1). However, that requirement does not apply to proceedings involving a professional negligence claim, being proceedings which have been entered in the Professional Negligence List: r 45.4(2).

Although most claims for possession of land arise from mortgage transactions and defaults thereunder, other types of claims for possession of land regularly appear in the Possession List. These include claims by executors or administrators for possession of property forming part of the estate of a deceased and which is occupied by some other person, claims by trustees in bankruptcy in respect of property forming part of the estate of a bankrupt, claims by trustees for sale appointed under *Conveyancing Act* 1919, s 66G against one or both of the owners of the land (eg *Rambaldi v Woodward* [2012] NSWSC 434 at [45]: cf *Van Oosterum v Van Oosterum* [2011] NSWSC 663), and claims by councils for possession of land in the context of the exercise of a power of sale for unpaid rates: *Harden Shire Council v Richardson* [2012] NSWSC 622.

Because the vast majority of claims result from defaults under mortgages the practices and procedures of the court have been directed to these claims.

The Possession List was the largest specialist list in the court in 2022, during which time 1,059 claims were filed. In 2021, 710 claims were filed. All Possession List cases are assumed to be uncontested at the time of filing, and the majority of claims were disposed either by default judgment for the plaintiff or by administrative dismissal when the plaintiff did not take further steps to progress its claim. Of the 858 disposals in 2022, approximately 6% (54 matters) were contested.

There is one significant group of claims in which possession is sought that may not be brought in the Supreme Court or indeed in the District Court or Local Court. Those are proceedings to recover possession of residential premises subject to a Residential Tenancy Agreement: *Residential Tenancies Act* 2010, s 119. It has been held that the similarly, but not identically, worded predecessor to this section (*Residential Tenancies Act* 1987, s 71) did not deny jurisdiction to the Supreme Court but merely provided tenants or former tenants a defence to such proceedings when commenced in the

1 See also, s 92 of the CPA provides that judgment for possession of land takes the place of, and, subject to the uniform rules, has the same effect as, a judgment for the claimant in ejectment given under the practice of the Supreme Court as it was immediately before 1 July 1972.

court: *Whiteford v Commonwealth of Australia* (1995) 38 NSWLR 100; *Rossi v Alameddine* [2010] NSWSC 967 at [42]–[44]. For example, by agreement of the parties, the Supreme Court has made declarations as to the continuance or termination of a Residential Tenancy Agreement where it was procedurally expedient to consider the issue in conjunction with the issue of unconscionable conduct under the Australian Consumer Law, with a view to parties entering consent orders in the Civil and Administrative Tribunal consistent with those declarations: see *Aboriginal Housing Company Limited v Kaye-Engel (No 3)* [2014] NSWSC 718; *Aboriginal Housing Company Ltd v Kaye-Engel (No 7)* [2015] NSWSC 1554 at [60]. However, s 81 of the *Residential Tenancies Act* 2010 has the result that no order terminating a residential tenancy, and thereby giving possession of the land, can be made by the Supreme Court.

The practice of the Possession List is regulated by Practice Note SC CL 6.

[5-5010] Commencement of proceedings

Proceedings claiming possession of land must be commenced by Statement of Claim: UCPR r 6.3(f). They are to be entered in the Possession List: r 45.4. The proceedings may be commenced either by filing a hard copy of the Statement of Claim at the registry or by e-filing.

The Practice Note enables, but does not prescribe, a short form of Statement of Claim to be used where the claim for possession arises out of a loan. The short form of the Statement of Claim is Annexure 1 to the Practice Note and enables the material facts concerning the loan, the mortgage, the default and the consequent entitlement to possession to be pleaded in brief terms including the provision of particulars of default. It is necessary for a Statement of Claim, whether or not in short form, to comply with the requirements as to pleadings contained in UCPR r 14.15.

The originating process that is to be entered in the Possession List is to have a cover sheet in the approved form: r 6.8A. That cover sheet is Form 93 of the UCPR forms. It contains what is described as an "Important Notice" issued by the court in 17 different languages including English. The notice informs the recipient that he or she has 28 days from receipt of the originating process to file a defence and it provides information concerning where full legal advice may be obtained to assist the person.

If there is a person in occupation of the whole or any part of the land when proceedings are commenced, and that person is not joined as a defendant, the plaintiff must either state in the originating process that the plaintiff does not seek to disturb the occupier's occupation of the land or must serve the originating process on the occupier together with a notice to the effect that the occupier may apply to the court to be added as a defendant. If the occupier does not do so within 10 days after service, the occupier may be evicted under a judgment entered in the occupier's absence: r 6.8. The customary practice is for such a notice to be served whether or not it is known that anybody other than the defendant is in occupation of the land. For a discussion of this rule, see *National Australia Bank Ltd v Nikolaidis* [2011] NSWSC 506. It is also common for process servers serving the originating process to enquire when the defendant is served who else is in occupation of the land.

Regulation 36 of the *National Consumer Credit Protection Regulations* 2010 (Cth) requires possession proceedings to be brought in the jurisdiction where the mortgagor lives regardless of where the land is situated. The regulation permits application to be made to transfer the proceedings to a court of another State or Territory, presumably where the land is situated. If the proceedings remain in a court outside NSW, problems may arise at the time of enforcing any judgment which is registered in NSW, because of the need to serve occupiers of the land. Rule 36.8A (LW 5.4.2019) deals with this situation.

If no defence is filed within 28 days the plaintiff may move for default judgment by the filing of a Notice of Motion. Rules 16.3, 16.4 and 36.8 govern this procedure. In particular what must be included in the affidavit in support of the motion is set out in rr 16.4 and 36.8. Ordinarily default judgment is entered within three weeks of the filing of such Notice of Motion.

Applications to set aside a default judgment are usually dealt with by the Common Law Case Management ("CLCM") Registrar. The CLCM Registrar has delegated power with respect to applications under r 36.16 but not under r 36.15. Although a defendant usually needs to point to an arguable defence in addition to providing an explanation for not acting to file a defence (*Vacuum Oil Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 244; *Balanced Securities Ltd v Oberlechner* [2007] NSWSC 80 at [19]) there may be circumstances, particularly involving irregularity or absence of good faith, where this will not be necessary: *Commonwealth Bank of Australia v Wales* [2012] NSWSC 407.

As Annexure 2 to the Practice Note makes clear, all matters in the Possession List are automatically entered into the Online Court and will be managed there in the absence of an order to the contrary. Matters concerning the Online Court appear in Annexure 2 to the Practice Note and also in Practice Note SC Gen 12.

[5-5020] Defended proceedings

Where a matter is defended, the procedures set out in the Practice Note will be followed. A directions hearing will be appointed before the CLCM Registrar. At that directions hearing the proceedings will ordinarily be referred to one of the judges who deal with case management of Possession List matters. This directions hearing before the judge is known as a Judicial Directions Hearing.

Paragraphs 18–20 of the Practice Note deal with the usual practice at a Judicial Directions Hearing. The principal purpose is for the judge to examine any defence and/or cross-claim which has been filed to ascertain if it discloses either a reasonable defence or a reasonable claim against the plaintiff or some other person. The judge has the power to strike out a pleading, whether or not a Notice of Motion has been filed by the plaintiff, but will ordinarily only do so in the absence of a motion in a clear case. In other cases it will be necessary for the plaintiff to file a motion to strike out and/or for summary judgment.

An example of a clear case is where the defendant is bankrupt. In such a case, any interest in the property is held by that person for the benefit of the official trustee, and the defendant has no standing in proceedings brought against them claiming possession of the property: *NAB Ltd v Strik* [2009] NSWSC 184; *Scott v Wondal* [2015] NSWSC 1577. The bankruptcy does not prevent the mortgagee obtaining an order for possession of the land including signing default judgment, but it does prevent obtaining a judgment for the debt owed: *Hanshaw v NAB Ltd* [2012] NSWCA 100; see also r 6.30.

Where a document purporting to be a defence is sought to be filed, but contains a fatal and obvious deficiency such as a complete absence of any pleaded or particularised defence, the appropriate course is for the officer in the registry to refuse to accept the document for filing. If it is accepted for filing the court may nonetheless subsequently refuse to accept it under r 4.10(4) with the effect that the document will not have been filed: *Bendigo and Adelaide Bank Ltd v Chowdhury* [2012] NSWSC 592 at [12]–[16].

If the judge determines that no defence to the claim is shown, the defendant is likely to be given one further opportunity to file a defence that properly discloses a defence to the claim, particularly if unrepresented. If such a defence is filed, the judge who conducted the Judicial Directions Hearing will continue to case manage the proceedings.

Interlocutory applications are discouraged. The Practice Note stipulates that leave must be sought from the judge case managing the particular proceedings, or in other cases, from the judge administering the Possession List, except for particular specified applications. This is partly to prevent unnecessary motions by self-represented litigants, and partly to ensure that time is not wasted on summary judgment motions when a final hearing is likely to be more effective in bringing finality to proceedings.

At an appropriate time, the judge who is case managing the proceedings will either fix a hearing date or give the parties leave to approach the listing manager to obtain a hearing date. The Practice Note provides that upon a hearing date being allocated, the usual order for hearing is deemed to be made unless the court otherwise orders. The usual order involves the filing of a court book containing the pleadings, evidence, objections to evidence, joint statement of issues and outline submissions.

The most commonly filed defences include reliance upon the following statutory provisions:

- the *Contracts Review Act* 1980
- the Australian Consumer Law s 18, Sch 2 to the *Competition and Consumer Act* 2010 (Cth) (formerly *Trade Practices Act* s 52 and *Fair Trading Act* s 42), for matters of misleading or deceptive conduct
- the *Australian Securities and Investments Commission Act* 2001 (Cth) Pt 2 Div 2 for matters of unconscionable conduct in relation to financial services
- the National Credit Code, Sch 1 to the *National Consumer Credit Protection Act* 2009 (formerly Uniform Consumer Credit Code, Sch 1 to the *Consumer Credit (New South Wales) Act* 1995)
- the *Farm Debt Mediation Act* 1994, and
- the *Code of Banking Practice* (2013).

In addition, general common law and equitable doctrines including unconscionability in equity, and principles derived from *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Yerkey v Jones* (1939) 63 CLR 649 are often raised.

Significant recent cases discussing the *Contracts Review Act* 1980 include *First Mortgage Managed Investments Pty Limited v Pittman* [2014] NSWCA 110; *Provident Capital Ltd v Papa* [2013] NSWCA 36; and *Knezevic v Perpetual Trustees Victoria Ltd & Anor* [2013] NSWCA 199. Earlier decisions of note include: *St George Bank Ltd v Trimarchi* [2004] NSWCA 120; *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; *Mizzi v Reliance Financial Services Pty Ltd* [2007] NSWSC 37.

Reliance on the National Credit Code generally involves an assertion that a loan is subject to the provisions of that Code despite the borrower having signed a "business purpose declaration" (in the form prescribed by the *National Consumer Credit Protection Regulations* 2010, r 68): s 13(2). Such cases frequently involve an enquiry into the reasonableness of the lender's knowledge or belief about the purpose of the loan in order to determine whether the declaration is ineffective: s 13(3). For a discussion about the issues that arise in such claims, see *ANZ Banking Group Limited v Fink* [2015] NSWSC 506. The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Cth) means that decisions under the repealed Uniform Consumer Credit Code are likely to be relevant for some time notwithstanding the commencement of the new Commonwealth legislation: *Perpetual Trustees Victoria Ltd v Monas* [2010] NSWSC 1156.

The *Farm Debt Mediation Act* 1994 provides for mediation where a creditor seeks possession of a property under a farm mortgage and where there is a dispute, for instance, as to whether the farmer is in default, or whether the lender is entitled to rely on such default: *Waller v Hargraves Secured Investments Ltd* (2012) 245 CLR 311. For issues associated with the *Farm Debt Mediation Act*, see also *Ciavarella v Hargraves Secured Investments Ltd* [2016] NSWCA 304; *Sharpe v Hargraves Secured Investments Ltd* [2013] NSWCA 288; *McMahon v Permanent Custodians Ltd* [2013] NSWCA 275; and *Roxo v Normandie Farm (Dairy) Pty Ltd* [2012] NSWSC 765.

Because many lenders engage in what is called securitisation of loans made to borrowers, some defendants put forward a defence based on such securitisation to argue that the plaintiff is not the correct party to make the claim. However, where the plaintiff is the registered mortgagee and where no notice has been served under the *Conveyancing Act* 1919, s 12 such defence is liable to be struck out: *Summerland Credit Union Ltd v Lamberton; Summerland Credit Union Ltd v Jonathan* [2014] NSWSC 547 at [15]; *Perpetual Trustees Victoria Ltd v Cox* [2014] NSWCA 328 at [24]; *Westpac*

Banking Corporation Ltd v Mason [2011] NSWSC 1241 at [27]–[30]; *RHG Mortgage Corporation Ltd v Astolfi* [2011] NSWSC 1526 at [13]–[18]; *Hou v Westpac Banking Corporation Ltd* [2015] VSCA 57 at [61]–[66]; *Puglia v RHG Mortgage Corporation Ltd* [2013] WASCA 143 at [9].

It is common for other parties to be added to defended proceedings. Where a mortgage broker has been involved in the obtaining of the loan, such broker will frequently be joined by the defendant as a cross-defendant in the proceedings. It is not uncommon for plaintiffs thereafter to amend their claim to name the mortgage broker as a defendant, or to bring a cross-claim themselves against the mortgage broker, claiming damages against them on the basis that the allegations made by the original defendant are made out.

Although a mortgage broker is ordinarily the agent of the borrower (*Morlend Finance Corporation (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284 at 308; *Fitzgerald v Watson* [2011] NSWSC 736 at [25]), *ANZ Banking Group Ltd v Bragg (No 3)* [2017] NSWSC 208 at [47]–[51]; *Perpetual Trustee Company Limited v Bowie* [2015] NSWSC 328 at [38]) an issue often arises about whether the broker should instead be characterised as the agent of the lender: see, for example, *Permanent Trustee Co Ltd v O'Donnell* [2009] NSWSC 902. In *Michalopoulos v Perpetual Trustees Victoria Ltd* [2010] NSWSC 1450 (which was followed in *Tran v Perpetual Trustees Victoria Ltd* [2012] NSWSC 1560 at [43]–[44]), the court found (at [75]–[53]) that the broker was an agent of the lender due, in part, to their agreement under which the broker was required to provide all relevant information, including adverse information, about the borrower.

However, it was noted in *Citigroup Pty Limited v Middling (No 4)* [2015] NSWSC 221 at [70]–[79] that *Michalopoulos* may not be consistent with the more recent decision in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389. In *Tonto*, it was held that a similar agreement between broker and lender did not give rise to an agency relationship, but that the fact of agency was not determinative as to the attribution of knowledge and responsibility under the CRA (at [255]–[267]). Ultimately, the language of any instrument executed by the parties is not determinative, and the true character of their relationship emerges from an examination of all the surrounding circumstances in each case: *Tonto Home Loans Australia Pty Ltd v Tavares*; *FirstMac Ltd v Di Benedetto; FirstMac Ltd v O'Donnell* [2011] NSWCA 389, especially at [182] and [194]; *NAB Limited v Smith* [2014] NSWSC 1605 at [253].

A mortgage broker who communicates to a lender or mortgage manager that it has a client who wants to borrow money and who has signed a loan application and associated documents will reasonably be understood to be representing the truth of those matters, and may have a liability for any misleading or deceptive conduct: *Perpetual Trustee Co Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367; *Latol Pty Limited v Gersbeck* [2015] NSWSC 1631 at [39]–[42].

In other cases the solicitor who acted for the borrower is joined. Although such a claim involves a professional negligence claim, the proceedings ordinarily remain in the Possession List to be case-managed in accordance with the Possession List Practice Note. For the limits on the duty of a solicitor to advise on the transaction, particularly in respect of the duty to advise borrowers to seek independent financial advice, see *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at [418] and *Dominic v Riz* [2009] NSWCA 216; cf *Provident Capital Ltd v Papa* [2013] NSWCA 36 at [75]–[82], [120]–[122].

Where the loan in default was obtained by way of refinancing of an earlier loan, it is generally not appropriate that the earlier mortgagee be joined to the proceedings even if allegations are made against that mortgagee involving the unjustness of the earlier contract or unconscionability in the procuring of it: *Bank of Western Australia v Tannous* [2010] NSWSC 1319. However in respect of claims of subrogation, or restitution, made by an incoming mortgagee against an earlier one, courts have been prepared to join earlier mortgagees at an interlocutory stage pending a full determination of the issues at a final hearing, particularly in circumstances where such claims were novel in the context of possession proceedings: *ANZ Banking Group Limited v Londish* [2013] NSWSC 1423 at [102]; *Trust Co Fiduciary Services Ltd v Hassarati (No 2)* [2011] NSWSC 1396.

Where it is not alleged that the earlier loan was unjust it will ordinarily be the case that the defendant will be required to give credit for that part of the impugned loan which was used to pay out the earlier loan: *Collier v Morlend Finance Corporation* (1989) 6 BPR 92,462; [1989] ANZ ConvR 515. The application of this principle may have the result of depriving the defendant of any defence in circumstances where the principal sum advanced by the plaintiff was used to discharge a prior mortgage: *Nibar Investments Pty Ltd v Manikad Pty Ltd* [2014] NSWSC 920 at [12]-[16]; *ANZ Banking Group Ltd v Fink* [2013] NSWSC 1781. However, this is neither an unyielding rule nor an inevitable result: see *National Australia Bank Ltd v Sayed* [2011] NSWSC 1414 at [24]–[25]; *First Mortgage Managed Investments Pty Limited v Pittman* [2014] NSWCA 110 at [172]–[174]; *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 at [24]–[25].

[5-5030] Writs of execution

Where judgment has been entered for possession of land, whether by default or otherwise, the plaintiff may apply for a writ to enforce the judgment of the court: CPA s 104. Such application must be made by Notice of Motion; see UCPR Form 59. Rules 39.1–39.3 deal with the procedure. In particular r 39.3(2) sets out what must be included in the affidavit in support. Notice must be given to tenants under the *Residential Tenancies Act*, s 122 and the *Sheriff Act* 2005, s 7A. Particularly because of the need to serve the notice to tenants, a writ will not ordinarily be executed by the sheriff in a time period of less than six weeks after it is received by the sheriff.

[5-5035] Writs of restitution

A writ of restitution is a writ in aid of another writ of execution: UCPR r 39.1(1)(g); UCPR Forms 61, 62; *Perpetual Ltd v Kelso* [2008] NSWSC 906 at [19]–[21]; *Wiltshire County Council v Frazer* [1986] 1 All ER 65. If, after a writ for possession is issued, executed, and returned the defendant regains possession of the property, ordinarily by trespass, a plaintiff may obtain a writ of restitution to restore the plaintiff to the premises: see *Australia and New Zealand Banking Group Ltd v Rafferty* [2018] NSWSC 960; *Commonwealth Bank of Australia v Maksacheff* [2015] NSWSC 1860. Under a delegation made pursuant to s 13 CPA by the Chief Justice, the Registrar has the power to grant the leave to which s 39.1 UCPR refers. A writ of restitution may be issued in circumstances where a defendant does not trespass to regain possession of the property: see *Capital Access Pty Ltd v Charnwood Constructions Pty Ltd* [2022] NSWSC 1185, where the defendant sought and obtained the right to go back into possession on the basis that a further writ would be executed six weeks thereafter if he had not repaid the debt, who then became a trespasser to the property upon failing to repay the debt and deliver up possession.

Where a defendant has a realistic prospect of obtaining finance so as to discharge its indebtedness to a plaintiff, it remains open to the defendant to pay out the plaintiff before the plaintiff exercises its power of sale: *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; *GE Personal Finance Pty Ltd v Smith* [2006] NSWSC 889 at [17]–[18]; *Perpetual Ltd v Kelso* at [25].

[5-5040] Stay applications

The court has power to stay any proceedings, including by prohibiting the sheriff from taking any further action on a writ of possession: CPA ss 67, 135(2)(b).

The Practice Note deals with such applications at paras 29 to 36. The registrar has a delegated power by virtue of CPA s 13 to grant a stay under s 135(2)(b). Ordinarily, the registrar will deal with stay applications based on a default judgment except where a stay has been previously granted or refused by a judge. In such cases, the application will be heard by the duty judge.

The most common circumstances in which a stay is sought by a defendant include:

- where the defendant is attempting to refinance and to discharge the mortgage
- where the defendant is attempting to sell the property

- where the defendant asserts that an arguable defence to the proceedings exists and wishes to be let in to defend the proceedings
- where a delay in the execution of the writ is sought on hardship grounds.

The Practice Note provides that in non-urgent applications to stay the execution of a writ of possession (where no time has been fixed for the sheriff to take possession of the property or such time has been fixed and that time is more than four working days from the time when the application is brought to stay the execution of the writ) the application should be brought by Notice of Motion and affidavit in support, and these should be served on the opposing party. Annexed to the affidavit should be any documents to be relied upon by the applicant such as:

- where the loan is to be re-financed — proof of steps undertaken to refinance
- where the subject property is to be sold — copies of agent sale agreements, contract for sale of property, advertisements, etc
- where the proceedings are to be defended — a draft defence; and
- where hardship is claimed — the facts and circumstances relied upon in this regard.

For a discussion of the relevant principles see in particular *GE Personal Finance Pty Ltd v Smith* [2006] NSWSC 889 at [9]–[40]. A defendant applying for a stay ought to be in a position to explain his or her inaction prior to making the application: *Smith* at [12]. An important consideration will be whether the defendant has paid any monies to the plaintiff since default: *Smith* at [24]. A defendant can have no expectation of an extended stay on hardship grounds alone if it is inevitable that the plaintiff is otherwise entitled to obtain possession of the property: *Smith* at [22]; *Stacks Managed Investments Ltd v Rambaldi and Cull as trustees of the Bankrupt Estate of Reinhardt* [2020] NSWSC 722 at [40]–[41].

Where the application is a contested one it may be important for the mortgagee to lead evidence of the value of the property so that the equity margin and any likely shortfall on a sale can be ascertained if a stay is granted.

[5-5050] Assistance for debtors

The Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre (NSW)) offers information and various services to consumers in financial stress (see https://financialrights.org.au) including relevant fact sheets, sample letters to lenders and a national debt helpline.

The *Mortgage Stress Handbook* is a helpful publication, the 4th edition of which was published in 2019 by Legal Aid NSW and the Financial Rights Legal Centre. It provides practical assistance to defendants in Possession List matters on a range of issues, including available defences and the manner in which such defences may be pleaded and particularised.

Another source of assistance (referred to in the Important Notice contained in the Statement of Claim) is LawAccess NSW which is a Government telephone service providing legal information and, in some cases, referrals and advice.

Mortgage lenders known as Authorised Deposit-taking Institutions (ADIs) and institutions including banks, building societies and credit unions, are required as part of the Australian Financial Services Licensing System to be a member of an ASIC approved External Dispute Resolution Scheme. This is a scheme under the auspices of the Australian Financial Complaints Authority. It has taken over complaints formerly lodged with the Financial Ombudsman Service and the Credit & Investments Ombudsman Service.

A defendant may make application to this Authority provided that judgment has not been given against them. As part of the arrangement between the services and the Authority, the lender is not able to take any further step in the prosecution of the proceedings until there has been a resolution

by the service of the debtor's application. The practical effect of an application being made to the Authority is that proceedings will need to be adjourned for between three and six months so that a resolution of the application by the service can be made.

Legislation

- *Australian Securities and Investments Commission Act* 2001 Pt 2 Div 2
- *Civil Procedure Act* 2005 ss 13, 20, 67, 104, 135(2)(b)
- *Competition and Consumer Act* 2010 (Cth) Sch 2
- *Contracts Review Act* 1980
- *Conveyancing Act* ss 12, 66G
- *Farm Debt Mediation Act* 1994
- *National Consumer Credit Protection Act* 2009 (Cth) and National Credit Code
- *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Cth)
- *Residential Tenancies Act* 2010 s 119, 122
- *Sheriff Act* 2005 s 7A
- UCPR rr 6.3(f), 6.8, 6.8A, 6.30, 14.15, 16.3, 16.4, 36.8, 36.16, 39.1–39.3, 45.1(1), 45.4, Form 93

Practice Notes

- Practice Note SC CL 6

Further references

- *Ritchie's Uniform Civil Procedure*, LexisNexis Butterworths, Australia, 2006
- A Kelly and N Walker, *The Mortgage Stress Handbook*, Legal Aid NSW and the Financial Rights Legal Centre, 4th ed, Sydney, 2019.

[The next page is 5801]

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 **[5-7115] 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.

[5-7115] 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].

At common law, a ship’s captain has the power to detain or confine a passenger if he or she has reasonable cause to believe, and does in fact believe, that confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or of persons or property on board: *Hook v Cunard Steamship Co* [1953] 1 WLR 682. The existence of a subjective belief that confinement is necessary is an essential element of the master’s authority at common law to detain

or confine: *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 at [24]–[35]; [115]. In this case the respondent, who was on a cruise, was detained by the ship's captain because he was accused of assaulting another passenger. The respondent claimed damages for wrongful detention and false imprisonment.

The Court of Appeal held that it is a correct statement of the Australian common law with respect to a master's power or authority to detain that it must be established that the master has reasonable cause to believe, and does in fact believe, that the relevant detention or confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board: at [35]. The court held that the justification defence was made out for the whole of the relevant period in which the respondent was detained: at [112].

[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

State of NSW v Zreika: 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.

A v State of NSW: In *A v State of NSW*, above, 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.

Spedding v NSW: In *Spedding v NSW* [2022] NSWSC 1627, the plaintiff successfully claimed damages for malicious prosecution, and related torts of misfeasance in public office and collateral abuse of process.

Harrison J held that the plaintiff's arrest on discredited historical allegations of sexual abuse was not based on any reasonable or probable cause but for the purpose of furthering the unrelated police investigation of the disappearance of a young boy, William Tyrrell. The plaintiff had become a suspect in the Tyrrell case as a result of having visited the home where William was last seen, but his alibi had been "unreasonably and inexplicably ignored" by investigators (at [199]) and he was placed in a cell with a known offender in order to obtain evidence about William's disappearance (none was forthcoming).

Harrison J held that "If the institution of the criminal proceedings appears in such circumstances to have been malicious, their maintenance appears to be even more so" (at [200]) as it was quickly evident that the plaintiff was innocent of the sexual abuse allegations. His Honour held that this was a case in which malice could be inferred from the absence of reasonable and probable cause. By the time of his trial, it was clear that the case against the plaintiff was hopeless and doomed to fail: at [204].

[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].

In *Spedding v NSW*, above, the inference of malice could be more readily drawn in circumstances where the then Director and/or his delegates involved in the prosecution had not provided evidence addressing the allegation of malice, or any allegation for that matter: at [204].

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 judgment of Tobias AJA in *State of NSW v Quirk* [2012] NSWCA 216 at [69]–[70].

[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]; *Cornwall v Rowan* (2004) 90 SASR 269 at [729]–[734]; *Spedding v NSW*, above, at [213]–[214]. Psychological injury is enough: *De Reus v Gray* (2003) 9 VR 432; *Spedding v NSW*, above, at [213].

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

Rares J held that the Ban was invalid as an absolute prohibition was not necessary nor reasonably necessary and it imposed unnecessary limitations on the common law right of persons to carry on their lawful business: at [329], [348]–[354], [358]-[361]. Rares J further held the Minister committed misfeasance in public office as he was recklessly indifferent as to: (i) the availability of his power to make the control order in its absolutely prohibitory terms without providing any power of exception, and (ii) the injury which the order, when effectual, was calculated to produce: at [373]–[386], [391]–[395]. To satisfy the test for the tort of misfeasance in public office, the office holder must have known, or been recklessly indifferent to, the fact that the plaintiff/applicant was likely to suffer harm. It does not suffice that there is only a foreseeable risk of harm. In addition, a finding that a Minister has committed misfeasance in public office should only be reached having regard to the seriousness of such a finding based on evidence that gives rise to a reasonable and definite inference that he or she had the requisite state of mind: at [280]–[284].

[5-7190] Damages including legal costs

Proof of damages

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

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

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

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

Damages for malicious prosecution

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

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

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

Damages for sexual assault

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

Legal costs

The legislative scheme in NSW for the award of costs in criminal proceedings is provided for by s 70, *Crimes (Appeal and Review) Act* 2001. Section 70 limits the circumstances in which costs in favour of a party who successfully appeals a conviction may be ordered and for the appeal to be the forum in which that determination is made. A party cannot avoid the constraints of s 70 by later claiming costs incurred in conducting a criminal appeal in later civil proceedings: *State of NSW v Cuthbertson* at [63]–[67]; [114]; [144]–[145]; [161].

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

Damages may not be reduced on account of contributory negligence

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

Legislation

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

Further References

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

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The legal framework for the compensation of personal injury in NSW

Acknowledgement: the following material was originally based on an extract from the NSW Law Reform Commission, Report 131 Compensation to relatives, Sydney, 2011, and is reproduced with permission. This has been updated by his Honour Judge Scotting of the District Court of NSW. This chapter was updated by the Personal Injury Commission in 2022.

Note: The figures in this chapter are current as at 1 October 2022. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act* 1987, Div 6–6B, Pt 3.

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

[6-1000] Introduction

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

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

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

Workers' compensation—no fault schemes

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

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

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

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

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

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

[6-1010] General workers

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

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

- for workers with no current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 80% of their pre-injury average weekly earnings for weeks 14 to 130 (second entitlement period).
- for workers with current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings less current weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 95% of pre-injury average weekly earnings less current weekly earnings for weeks 14 to 130 (second entitlement period) provided the worker has returned to work for not less than 15 hours per week
  - those workers who are working less than 15 hours per week or have not returned to work are entitled to payments of up to 80% of their pre-injury average weekly earnings less current weekly earnings.
- after the second entitlement period (130 weeks) workers' entitlements to weekly benefits continue if they have no current work capacity or they have achieved an actual return to employment for at least 15 hours per week earning at least $211 per week.
- workers with current work capacity (other than a worker with high needs) must apply to the insurer for the payment of weekly benefits after 130 weeks.[6]
- benefits are limited to a maximum of five (5) years except for workers with high needs (defined as a worker with more than 20% permanent impairment), who are eligible to receive weekly payments until reaching Commonwealth retirement age, subject to ongoing work capacity assessments.
- workers with highest needs (more than 30% permanent impairment) are entitled to a minimum weekly payment of $917 per week. If the worker with highest needs is entitled to a lesser payment, the insurer is required to make payments up to the minimum amount. The amount is to be indexed in April and October of each year.
- weekly payments are capped at the maximum amount of $2341.80.[7]

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

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

The pre-2012 scheme provides for:

- indexed maximum weekly payments where a worker is rendered unable to work as a result of a workplace injury at the rate of the worker's current weekly wage to a maximum of $2341.70 for the first 26 weeks,[8] and thereafter at the rate of up to 90% of the worker's current weekly wage per week to a maximum of $550.80, depending on the level of the worker's disability, as well as additions for a dependent spouse or child.[9]

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

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

In situations where a worker dies as the result of an accident or disease associated with his or her employment, the Act also provides for a lump sum death benefit.[16] This is currently $871,200, and is to be apportioned between dependents,[17] or otherwise paid to the worker's legal personal representative.[18] Provision is also made for weekly payments for dependent children[19] and funeral expenses.[20]

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

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

[6-1020] Dust disease workers

Separate provision is made for dust diseases victims, whose total or partial disablement for work was reasonably attributable to the exposure to dust, in the course of their work. The applicable no

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

fault statutory scheme is established under the *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) (the "1942 Act"), which is administered by the icare dust diseases care and also known as the Dust Diseases Authority ("DDA").[25]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[26] by the Medical Assessment Panel, which is also established under the 1942 Act. Decisions of the Medical Assessment Panel and of the DDA are subject to appeal to the District Court.[27]

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

- indexed weekly payments where a worker is rendered totally or partially disabled due to a dust disease, paid at the rate of the worker's current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of $550.80 per week, depending on the extent of the disability;[28]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[29]
- payment for the commercial provision of domestic assistance;[30] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[31]

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

- an indexed lump sum payment which is presently $389,850; and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $321.50 per week,[32] which continues until re-marriage or the commencement of a de facto relationship,[33] or until the death of the spouse; and a[34]
- weekly payment to each surviving dependent child, currently payable at $162.50 per week,[35] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[36]

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

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

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25 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 5.
26 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) ss 7–8.
27 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8I.
28 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2).
29 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
30 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
31 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d). Damages for gratuitous provision of attendant care services are also recoverable via common law action: *Civil Liability Act* 2002 (NSW) s 15A.
32 *Workers' Compensation (Dust Diseases) Act*1942 (NSW) s 8(2B)(b)(ii) which sets an amount of $137.30 per week subject to indexation in accordance withs 8(3)(d).
33 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(bb).
34 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(ii).
35 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(iii) which sets an amount of $69.40 per week subject to indexation in accordance with s 8(3)(d).
36 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(ba) .

The 1942 Act provides the DDA with mechanisms for reducing payments made to an eligible claimant in certain circumstances. If a worker or a worker's spouse is qualified to receive a government pension, the board can adjust the weekly payments to ensure they will still be entitled to receive that pension.[37] Additionally, where the claimant is entitled to receive compensation from another source, the board can require a person to take all appropriate and reasonable steps to claim compensation from that other source and, if he or she fails to do so, it can reduce the dust disease compensation that would otherwise be payable.[38] It is an offence to fail to inform the DDA that a person is receiving compensation under another Act, ordinance, or law of the Commonwealth, or of another State or Territory or of another country.[39]

There are cases where a person who contracted a dust disease, including an asbestos-related disease, in the course of his or her work, will not receive workers' compensation benefits. Such people include employees whose employers did not make contributions to the NSW workers' compensation scheme (such as Commonwealth employees[40]) or independent contractors who were not covered by the workers' compensation scheme.[41] In such cases their dependants will similarly be unable to receive the statutory benefits that are available upon the victim's death.

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

Common law damages—fault-based liability

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

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

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

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

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

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

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

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

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

- a ceiling on the calculation of damages for past and future economic loss by a requirement to disregard any amount by which the victim's net weekly earnings would have exceeded a sum currently fixed at $5461;[42]
- a threshold on the recoverability of damages for non-economic loss (that is compensation for the victim's pain and suffering, loss of bodily function, loss of enjoyment of life, loss of expectation of life, and disfigurement), dependent on the assessment of, or agreement that, there is permanent impairment of greater than 10%;[43]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[44]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[45]
- an exclusion of the damages payable for the loss of the services of a person;[46]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[47] in place of the 3% discount previously applicable at common law;
- an exclusion of the recovery of interest on damages awarded for non-economic loss and attendant care services, and a qualified right to interest in relation to other damages awards;[48] and
- an exclusion of the award of exemplary or punitive damages.[49]

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

Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[52]

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

43 *Motor Accidents Compensation Act* 1999 (NSW) ss 131, 132.

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

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

46 *Motor Accidents Compensation Act* 1999 (NSW) s 142.

47 *Motor Accidents Compensation Act* 1999 (NSW) s 127(2).

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

49 *Motor Accidents Compensation Act* 1999, s 144.

50 *Motor Accidents Compensation Act* 1999, Pt 4.3.

51 *Motor Accidents Compensation Act* 1999, s 108. See Pt 4.4 for details of the claims assessment process.

52 *Motor Accidents Compensation Act* 1999, s 109.

For a summary of the relevant authorities on what constitutes a "full and satisfactory explanation" under s 109 see *Stein v Ryden* [2022] NSWCA 212 at [33]–[38]. The applicant's explanation for the delay is the central focus: at [39].

Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or where the injury or death arose as the result of a blameless accident.[53] In these cases the accident is deemed to have been caused by the fault of the owner or driver of the relevant vehicle, provided it was the subject of motor accident insurance cover.

In addition, the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) has established a statutory compensation scheme that provides compensation for severe motor accident injury victims and that applies regardless of fault.[54] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[55]

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

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

The Act provides for the payment of no fault statutory benefits for persons injured in a motor accident as defined in s 1.4, however those benefits are restricted for persons at fault. The statutory benefits include weekly compensation and treatment and care costs for varying periods, depending on whether the person was at fault and the extent of the impairment suffered. Statutory benefits are not payable if compensation under the *Workers Compensation Act* 1987 is payable in respect of the injuries.[56] Statutory benefit payments are reduced after 26 weeks for contributory negligence, if applicable. A claim for statutory payments must be made within 3 months of the motor accident.

Damages are payable for persons who were not at fault and have more than minor injuries. "Minor injuries" are defined as soft tissue injury and minor psychological or psychiatric injury.[57] Damages are restricted to past and future economic loss unless the permanent impairment as a result of the injuries suffered is more than 10% and then non-economic loss damages to compensate pain and suffering and loss of amenities of life are available up to a maximum of $605,000.[58]

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

For actions commenced prior to 28 November 2022, a claim for damages could not be made until 20 months after the motor accident, unless the claim related to a death or where the extent of permanent impairment was greater than 10% and all claims for damages had to be made within 3 years of the motor accident. A claim for damages could not be settled within 2 years of the motor accident unless the extent of permanent impairment was greater than 10%.[60]

A damages claim cannot be settled unless the claimant is represented by an Australian legal practitioner or the settlement is approved by the Personal Injury Commission. If damages are payable the award will be reduced by the amount of the weekly payments received and there is no entitlement to future statutory payments.

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53 *Motor Accidents Compensation Act* 1999, Pt 1.2.

54 *Motor Accidents (Lifetime Care and Support) Act* 2006, s 4.

55 See *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 58; Lifetime Care and Support Guidelines 2018—Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme, accessed 20 April 2022.

56 Note that journey claims were removed by the 2012 workers' compensation amendments.

57 *Motor Accidents Injuries Act* 2017, s 1.6, "soft tissue injury" is separately defined.

58 *Motor Accidents Injuries Act* 2017, ss 4.11, 4.13, 4.22, as at 1 October 2022.

59 *Motor Accidents Injuries Act* 2017, s 3.4(4), commenced 29 March 2022.

60 Sections 6.14(1), 7.33 and 6.23(1) were repealed on 28 November 2022.

If there is a dispute as to the extent of a person's permanent impairment a court or Member of the Personal Injury Commission may refer a claimant for assessment by a medical assessor. The certificate of a medical assessor is prima facie evidence of the extent of permanent impairment as a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[61] A court can reject the contents of a certificate on the grounds of denial of procedural fairness but only if the admission of the certificate would cause substantial injustice.

When assessing damages consideration must be given to the steps taken by the claimant to mitigate their loss and any other reasonable steps that could have been taken, including by undergoing treatment and undertaking rehabilitation.[62] Contributory negligence applies to the assessment of damages, which must be found where drugs, alcohol or the failure to wear a seatbelt or helmet have been a factor in the accident or injury.

A claimant is not entitled to commence court proceedings until the claim has been assessed by a Member of the Personal Injury Commission, or the Member has issued a certificate that the claim is exempt.[63] Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[64] An insurer may require a claimant to commence proceedings and the claimant must do so within 3 months of the notice, or the claim is deemed to have been withdrawn.[65] A court may grant leave to reinstate the claim if the claimant provides a full and satisfactory explanation for the delay in commencing the proceedings. If a claimant provides significantly new evidence in court proceedings, the claim must be referred back to the claims assessment process and the proceedings adjourned until it is complete.[66]

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

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

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

- damages for economic loss (past and future loss of earnings or of earning capacity) and loss of expectation of financial support are capped, with the maximum net weekly earnings that may be recovered currently being three times average weekly earnings;[67]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[68]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[69]

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61 *Motor Accidents Injuries Act* 2017, s 7.23.
62 *Motor Accidents Injuries Act* 2017, ss 4.11 and 4.13.
63 *Motor Accidents Injuries Act* 2017, s 6.31.
64 *Motor Accidents Injuries Act* 2017, s 6.32.
65 *Motor Accidents Injuries Act* 2017, s 6.33.
66 *Motor Accidents Injuries Act* 2017, s 6.34.
67 *Civil Liability Act* 2002, s 12, (approximately $3,617).
68 *Civil Liability Act* 2002, s 15. No damages may be awarded unless the gratuitous attendant care services were, or will be, provided for at least 6 hours per week and for a period of at least 6 consecutive months: s 15(3). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30), up to a maximum of 40 hours per week: ss 15(4), 15(5).
69 *Civil Liability Act* 2002, s 15B. No damages for loss of a person's capacity to provide services unless there is a reasonable expectation that the claimant would have provided those services to his or her dependants for at least 6 hours per week, and for a period of at least 6 consecutive months: s 15B(2)(c). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30): s 15B(4).

- damages for loss of employer superannuation contributions are limited to the relevant percentage of the damages payable for the deprivation and impairment of the plaintiff's earning capacity on which the entitlement to those contributions is based;[70]
- damages for non-economic loss can only be awarded if the severity of the non-economic loss is at least 15% of the most extreme case; and where the non-economic loss is equal to or greater than 15% of a most extreme case, damages are to be awarded in accordance with a table to a maximum award of $705,000;[71]
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[72]
- interest cannot be awarded on damages for non-economic loss, gratuitous attendant care services or loss of capacity to provide gratuitous domestic services to the plaintiff's dependants;[73] and
- exemplary, punitive or aggravated damages cannot be awarded.[74]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[75] Damages cannot be recovered for pure mental harm, arising from mental or nervous shock in connection with another person's death or injury, unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim.[76]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[77]

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

[6-1060] Claims by injured workers—general

In addition to the entitlement for workers' compensation outlined above, an injured worker is also entitled to pursue common law damages, as modified by the 1987 Act against the party whose negligence or other wrongful act or omission led to the injury.[78]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[79]

The worker's claim for loss of economic capacity is confined to the recovery of past lost earnings and future loss due to the deprivation or impairment of the worker's earning capacity.[80]

Future losses are currently calculated according to the 5% actuarial discount rate.[81]

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70 *Civil Liability Act* 2002, s 15C.
71 *Civil Liability Act* 2002, s 16; Civil Liability (Non-economic Loss) Order 2010, O 3.
72 *Civil Liability Act* 2002, s 14.
73 *Civil Liability Act* 2002, s 18. See also s 11A(3)—interest on damages cannot be awarded contrary to the provisions in Pt 2 of the Act, which includes s 18.
74 *Civil Liability Act* 2002, s 21.
75 *Civil Liability Act* 2002, s 29.
76 *Civil Liability Act* 2002, s 30.
77 *Civil Liability Act* 2002, s 31; and see also s 33 in relation to a similar requirement for the recovery of economic loss for consequential mental harm. The Act also provides that a defendant will only owe a duty of care to a plaintiff in regards to nervous shock if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken: s 32.
78 *Workers Compensation Act* 1987, s 151E.
79 *Workers Compensation Act* 1987, s 151H.
80 *Workers Compensation Act* 1987, s 151G.
81 *Workers Compensation Act* 1987, s 151J.

In awarding such damages, the court is required to disregard the amount (if any) by which the worker's net weekly earnings would have exceeded the amount that is the maximum amount of weekly statutory compensation payable in respect of total or partial incapacity, currently $2341.80.[82]

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

Interest on damages is not payable unless certain conditions are satisfied.[83]

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

- the worker ceases to be entitled to any further compensation under the 1987 Act in respect of the relevant injury including compensation that has not yet been paid;[84]
- any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is to be paid or credited to the person who paid the compensation;[85] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[86]

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

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

1. Damages in respect of:
   - past and future medical, hospital, rehabilitation and related expenses;
   - any paid and gratuitous attendant care services that are received by the plaintiff consequent upon the injury;[87]
   - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[88]
   - any loss of the plaintiff's earnings to the date of trial; and
   - any loss of future earning capacity.
2. Damages for non-economic loss—including pain and suffering, loss of amenities and loss of expectation of life.
3. Interest—on past losses to the time of judgment or settlement.[89]

Successfully completing such an action, either by settlement or by judgment, during the plaintiff's lifetime, extinguishes the possibility of common law claims being brought after death, including claims by that person's estate, or by his or her dependants.[90] It does not, however, bar dust diseases

82 *Workers Compensation Act* 1987, s 151I.
83 *Workers Compensation Act* 1987, s 151M.
84 *Workers Compensation Act* 1987, s 151A(1)(a).
85 *Workers Compensation Act* 1987, s 151A(1)(b). The position in relation to estate actions and dependency actions is considered later: para 4.48–4.51 and para 4.57–4.58.
86 *Workers Compensation Act* 1987, s 151A(1)(c).
87 *Civil Liability Act* 2002 (NSW) ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
88 *Civil Liability Act* 2002 (NSW) s 15B. These are also known as *Sullivan v Gordon* damages.
89 See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
90 See, eg, *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

victims or their dependants from claiming statutory dust diseases workers' compensation benefits, where the victim's disease was work related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,[91] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, and non-exclusive jurisdiction in proceedings for contribution between defendants, and questions arising under relevant policies of insurance.[92] It has jurisdiction over any injuries caused by a "dust-related condition", which is defined in the *Dust Disease Tribunal Act* 1989 (NSW) as meaning:

- a disease specified in Schedule 1, or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.[93]

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

- aluminosis;
- asbestosis;
- asbestos induced carcinoma;
- asbestos-related pleural diseases;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis; and
- talcosis.

Pneumoconiosis is any "disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis".[94] The DDT's jurisdiction, therefore, includes diseases caused by asbestos dust, as well as a range of other diseases and conditions caused by exposure to industrial dusts.

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

- the use, by leave, of historical and general medical evidence admitted in other cases;[95]

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91 *Workers Compensation Act* 1987, s 151A(1)(a). See above, para 1.54.

92 *Dust Diseases Tribunal Act* 1989 (NSW) s 10.

93 *Dust Diseases Tribunal Act* 1989 (NSW) s 3. For example occupational asthma caused by a dust capable of causing dust disease: *Manildra Flour Mills v Britt* [2007] NSWCA 23.

94 A R Gennaro, A H Nora, J J Nora, R W Stander and L Weiss (ed), *Blakiston's Gould Medical Dictionary*, 4th edn, McGraw-Hill, 1979, p 1068.

95 *Dust Diseases Tribunal Act* 1989 (NSW) s 25(3).

- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;[96]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[97]
- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;[98]
- the calculation of future losses by reference to a 3% actuarial discount table;[99]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[100]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[101] and
- s 13(6) of the *Dust Diseases Tribunal Act* 1989 (NSW) which provides:

  > Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.[102]

There are also two substantive law differences:

- general damages survive the death of the claimant and may be recovered by the person's legal personal representative; and[103]
- the ability to award provisional damages in relation to an established dust-related condition, reserving the right to claim, additional damages, if the claimant later develops another dust-related condition. This is an exception to the usual principle that damages are awarded on a "once and for all" basis.[104]

The recovery by a worker of compensation from one source may affect his or her ability to recover from another source. A recipient of benefits under the dust diseases workers' compensation scheme cannot be required to repay anything to the DDA if he or she also receives compensation benefits for the same injury from another source.[105] In this respect, the dust diseases workers' compensation scheme is unlike the general workers' compensation scheme where repayment can be required if, for example, the injured worker recovers common law damages for the same injury.[106] In addition, unlike the general workers' compensation scheme,[107] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

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96 *Dust Diseases Tribunal Act* 1989 (NSW) s 25A.

97 *Dust Diseases Tribunal Act* 1989 (NSW) s 25B.

98 *Dust Diseases Tribunal Act* 1989 (NSW) s 41.

99 No discount rate is provided for in any relevant legislation, therefore the common law rate of 3% applies: *Todorovic v Waller* (1981) 150 CLR 402.

100 *Dust Diseases Tribunal Act* 1989 (NSW) s 12A.

101 See *Civil Liability Act* 2002 (NSW) ss 15A and 15B. Although damages for loss of capacity to provide domestic services are available in both dust diseases cases and actions under the *Civil Liability Act*, there are some restrictions imposed on recovery of such damages in motor accidents claims: ss 15B(8), (9). Additionally, while damages for gratuitous domestic assistance are limited to recovery for 40 hours per week of care (s 15(4)), there is no equivalent maximum number of hours in dust diseases cases (see s 15A(2)).

102 *Dust Diseases Tribunal Act* 1989 (NSW) s 13(6). Although the occasion for its application will only arise in exceptional circumstances: *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 and *Browne v Cockatoo Dockyard Pty Ltd* (1999) 18 NSWCCR 618.

103 *Dust Diseases Tribunal Act* 1989 s 12B

104 *Dust Diseases Tribunal Act* 1989 (NSW) s 11A.

105 See *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).

106 *Workers Compensation Act* 1987, s 151A(1)(b).

107 See *Workers Compensation Act* 1987, s 151A(1)(a).

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[108]

If a worker has received workers' compensation benefits prior to judgment in a common law action, any weekly benefits that have been received are to be taken into account and deducted from the common law damages for loss of earning capacity or economic loss recovered by the injured person or his or her estate.[109] In addition, where a worker has an entitlement to statutory workers' compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[110]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[111]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[112] Such cases are likely to be determined according to the common law principles, unaffected by Pt 3 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), which has been repealed and only replaced for proceedings subject to the *Civil Liability Act* 2002 (NSW).[113]

Post-death claims

[6-1080] Estate actions

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

This type of action is based on the survival of causes of action legislation that was introduced in NSW by the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) (the "1944 Act").[114] Similar provisions exist in other common law jurisdictions. Prior to its introduction any cause of action that was vested in the deceased died with that person.[115]

In an estate action, the economic loss damages recoverable comprise:[116]

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

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108 *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8E.
109 *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.
110 See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.
111 *Dust Diseases Tribunal Act* 1989 (NSW) s 12D.
112 *Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.
113 *Civil Liability Act* 2002 (NSW) Pt 3. It is also noted that, as a consequence of *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97, such damages are not recoverable from the Asbestos Injuries Compensation Fund, which is established to fund the liabilities of former James Hardie subsidiaries (see para 2.106–2.107). This does not, however, preclude proceedings against employers or insurers or other co-defendants.
114 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(1).
115 The rule has been traced as far back as 1611: *Pinchon's Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860, although various statutory and common law exceptions were created in the intervening years. For the history of the common law with respect to fatal accidents and the survival of causes of action, see: P H Winfield, "Death as Affecting Liability in Tort" (1929) 29 *Columbia Law Review* 239. See also: England and Wales, Law Revision Committee, Interim Report (1934).
116 See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.
117 *Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.
118 *Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.

- funeral expenses.[119]

The damages recoverable by the estate, in an estate action, do not include any damages for the loss of the deceased's earning capacity past the date of his or her death, (that is, during the "lost years"),[120] nor do they include exemplary damages.[121]

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[122]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[123] including damages for the loss of the deceased's expectation of life, can be awarded, but only if proceedings for damages had been commenced by the injured person during his or her lifetime.[124] There is no restriction on the award of interest on damages for past economic loss. The entitlement to interest in such cases differs from that applicable to claims under the other compensation schemes.[125]

[6-1090] Dependency actions

The legal personal representative of a deceased person can also bring an action under the 1897 Act, on behalf of specified family members,[126] for compensation for the loss of support that they sustain, consequent upon the death of a person who died as the result of the wrongful act of another.[127] Only one such dependency action can be brought.[128]

The damages recoverable in such an action, for the benefit of any eligible claimant, are limited to the loss of that dependant, that arose from the loss of the expectation of the deceased's financial support,[129] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[130] Although the relevant provision does not explicitly limit the damages recoverable in this way,[131] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[132] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[133]

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

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court

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119 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(c).

120 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(ii).

121 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(i).

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

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

124 *Dust Diseases Tribunal Act* 1989 (NSW) s 12B.

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

126 *Compensation to Relatives Act* 1897 (NSW) s 4.

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

128 *Compensation to Relatives Act* 1897 (NSW) s 5.

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

130 *Compensation to Relatives Act* 1897 (NSW) s 3(2).

131 *Compensation to Relatives Act* 1897 (NSW) s 3(1).

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

133 *Compensation to Relatives Act* 1897 (NSW) s 4(1).

—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[134] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[135]

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

The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.[136]

Proceedings under the 1897 Act brought in the DDT are subject to the unmodified common law and, as a consequence, it has been accepted that damages for the dependant's future loss of support are calculated by reference to the 3% actuarial tables rather than the 5% tables that are applied in relation to claims by dependants under the other schemes.[137]

[The next page is 7001]

134 *Compensation to Relatives Act* 1897 (NSW) s 3(1).

135 *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

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

137 See *Civil Liability Act* 2002 (NSW) s 11A(1), 11A(2), 14; *Motor Accidents Compensation Act* 1999 (NSW) ss 127(1)(b), 127(1)(c); *Workers Compensation Act* 1987, ss 151E(1), 151E(3), 151J.

Costs

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

[8-0000] Scope

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

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

The applicable law is provided by:

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

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

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

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

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

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

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

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

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

It has been said that the "event" is not confined to the determination of the proceedings as a whole, or of particular causes of action, nor limited to issues in the technical pleading sense, but can extend to any disputed question of fact or law: *Reid Hewett & Co v Joseph* [1918] AC 717; *Williams v Stanley Jones & Co Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478; *Forster v Farquhar* [1893] 1 QB 564 at 569; *Hughes v Western Australian Cricket Association Inc* [1986] FCA 511; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. However, the prevailing approach is that the words "follow the event" generally refer to the event of the claim or counter claim, so that a successful party should have the whole costs of the proceeding, including the costs of an issue on which it has failed, unless in respect of that issue the successful party has "unfairly, improperly, or unnecessarily increased the costs": *Windsurfing International Inc v Petit* (1987) AIPC 90-441 at 37,861–37,862, although in an appropriate case, a costs order may be moulded to reflect the degree of success on distinct issues: *Lavender View v North Sydney Council (No 2)* [1999] NSWSC 775; *Uniline Australia Ltd (ACN 010 752 057) v Sbriggs Pty Ltd (ACN 007 415 518) (No 2)* [2009] FCA 920; *Leallee v the Commissioner of the NSW Department of Corrective Services* [2009] NSWSC 518; *Sahab Holdings Pty Ltd v Registrar-General [No 3]* [2010] NSWSC 403 at [36]; *Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed)* [2011] NSWSC 1425 at [54]–[60]; *Calvo v Ellimark Pty Ltd (No 2)* [2016] NSWCA 197 at [8]–[10]; *Kumaran v Employsure Pty Ltd (No 2)* [2022] NSWCA 247 at [12]–[14]. Thus, in most ordinary cases, the "real practical outcome" of a particular claim will provide sufficient guidance: *Windsurfing International Inc v Petit* at 37,861–37,862; *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [15].

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

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

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

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

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

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

Disentitling conduct

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

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

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

Late amendment

A successful party may be deprived of costs if its success is attributable to a ground raised only by a late amendment: *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137 (no costs awarded); *Faraday v Rappaport* [2007] NSWSC 253 at [25]–[30]; cf *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No 2)* [2018] NSWCA 266 at [40]–[49], [87]. Although it has been said that, as a general rule, where a plaintiff makes a late amendment which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the cost of the action down to the date

of amendment: *Beoco Ltd v Alfa Laval Co Ltd* at 154, citing *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 and *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA)); see also *Murrihy v Radio 2UE Sydney Pty Ltd* [2000] NSWSC 318. This "general rule" has emerged in the context that though the late amendment has resulted in some slight measure of success for the plaintiff, ultimately the true victor, having regard to the case as a whole, was the defendant; where that is not so, the plaintiff may still recover some, or even all, its costs: *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [17], [26], [27]; cf *Almond Investors Ltd v Kualitree Nursery Pty Ltd (No 2)* [2011] NSWCA 318 at [8].

Where the successful party is only nominally successful

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

Quantum and proportionality

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

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

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

It has been held that a party may apply under CPA and UCPR rr 12.7 and 13.4 to stay or to strike out the proceedings in their entirety, on the basis that the costs are out of all proportion to the object of resolving the issues between the parties, though such cases will be very rare: *Jameel v Dow Jones & Co Inc* [2005] QB 946 at [67]-[76]; *Bleyer v Google Inc* (2014) 88 NSWLR 670; *Vizovitis v Ryan* [2012] ACTSC 155 at [37], referring to *Jones v Sutton (No 2)*. This view is not without controversy

and has not been resolved at appellate level in Australia: see the later comments by McCallum JA in *Massarani v Kriz* [2020] NSWCA 252, referring to *Smith v Lucht* [2014] QDC 302; *Feldman v The Daily Beast Company LLC* [2017] NSWSC 831 at [15]–[18]; *Ghosh v NineMSN Pty Ltd* (2015) 90 NSWLR 595 at [44]; [55]; [56]; *Lazarus v Azize* [2015] ACTSC 344 at [23]; *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639 at [130]–[143]; *Watney v Kencian* [2017] QCA 116 at [61]; *GG Australia Pty Ltd v Sphere Projects Pty Ltd (No 2)* [2017] FCA 664 at [52]; *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612 at [5], [40]; *Armstrong v McIntosh (No 2)* [2019] WASC 379 at [115]; *Fox v Channel Seven Adelaide Pty Ltd (No 2)* [2020] SASC 180 at [11]-[21]; and *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126 at [40].

Public interest

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

Indulgences

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

Offers of compromise and Calderbank letters

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

The general rule may be displaced as a matter of discretion where the result is no more favourable to the successful party than an offer made by the unsuccessful party in a Calderbank letter:

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

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

Offers of contribution

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

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

Mixed success on multiple issues

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

separate issue that played a very minor part in the proceedings as a whole: *Waters v PC Henderson (Australia) Pty Ltd* [1994] NSWCA 338; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [107]; *Macourt v Clark (No 2)* [2012] NSWCA 411 at [7].

However, the court must strike a balance between permitting litigants to canvas all issues, while not rewarding them for unreasonable conduct or encouraging the agitation of unnecessary issues: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16. These days apportionment to reflect the relative success of the parties is becoming more commonplace. Unreasonable or improper conduct is not a necessary condition for moderating a costs order to reflect a party's failure on a particular issue: *Short v Crawley (No 40)* [2008] NSWSC 1302 at [32]. The court may depart from the general rule if the unsuccessful party succeeds on significant issues: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [31]–[36]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]; *Sydney Ferries v Morton (No 2)* [2010] NSWCA 238 at [10]–[12]; *Roads and Traffic Authority (NSW) v McGregor (No 2)* [2005] NSWCA 453 at [20]; *Cross v Queensland Newspapers Pty Ltd (No 2)* [2008] NSWCA 120 at [13]; *Tarabay v Leite* [2008] NSWCA 259 at [76]; *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)* [2022] NSWCA 258 at [11]–[12]. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [241]–[245], Kiefel and Keane JJ concluded that each side should bear its own costs on the basis that the plaintiff's limited success was largely "a Pyrrhic victory, given the rejection of substantial aspects of her case".

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

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

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

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

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

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

Giving effect to apportionment

Orders to the effect that party A pay party B's costs of specified issues (and that party B pay party A's costs of other issues) create complexities for assessors. It is therefore undesirable to have multiple costs orders defined by reference to issues arising out of the one set of proceedings. It is preferable to make a single order that covers all of the issues, on what has often been referred to as a "broad axe" basis: *In the matter of Commercial Indemnity Pty Limited* [2016] NSWSC 1125, that Party B pay a percentage of Party A's costs of the proceedings: see Precedent 8.6 at [8-0200]. This avoids visiting on assessors a requirement to allocate work and costs between issues. The nature and extent of the apportionment is a discretionary one, and the court may take an impressionistic approach to apportionment, "on a relatively broad brush basis", rather than seeking to identify and quantify issues with precision: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [19]; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272; *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [11]; *Bostik Australia Pty Ltd v Liddiard (No 2)* at [38]. The court should seek to make an order that is fair in all the circumstances, taking account of the extent to which issues are separable, and without aspiring to the false hope of mathematical precision: *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)*, above, at [9]. It has been said that the approach of analysing the percentage of costs between the issues by counting the proportion of paragraphs and pages devoted to each factual topic is "a highly artificial way of proceeding", giving "a false air of mathematical precision": *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011]

NSWCA 256 at [84]; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2)* [2019] NSWCA 173 at [32]. Nonetheless, such an analysis can sometimes provide useful assistance in apportionment, so long as its limitations are recognised.

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

Other cases for apportionment

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

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

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

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

Probate

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

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

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

Even where it is appropriate that the estate bears the costs, the estate does not automatically bankroll the legal costs of every party who wishes to be heard. This needs to be borne in mind by parties who desire to participate in the proceedings but whose interests are already adequately

protected — parties and their legal representatives must take reasonable steps to avoid duplicated or unnecessary legal representation: *Milillo v Konnecke* [2009] NSWCA 109 at [125]–[128]; *Re Dowling; sub nom NSW Trustee and Guardian v Crossley* [2013] NSWSC 1040. Additionally, orders may be made fixing (or "capping") the maximum costs, founded on the principle of proportionality: see [8-0160].

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

Family provision

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

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

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

De-facto property division

In proceedings in the Family Court, the starting point is that each party "shall bear his or her own costs", although costs orders may be made in an appropriate case: *Family Law Act* 1975, s 117. While the NSWCA previously considered that, in claims under the *Property (Relationships) Act*

1984, "the starting point should be that each party should bear its own costs" (*Kardos v Sarbutt (No 2)* [2006] NSWCA 206) this approach has now been rejected in favour of the general rule that costs should follow the event: *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 at [35]–[40]; *Baker v Towle* [2008] NSWCA 73 at [12], [82]. When an application for property adjustment is refused, the event will be clear and, upon a straightforward application of r 42.1, the defendant will have the costs of the application unless the court makes some other order; but where an order for adjustment is made, the costs order made will rarely, if ever, depend simply upon which party commenced proceedings, and the "event" will depend on the facts and circumstances, pleadings and issues, in each case: *Baker v Towle* at [20]–[25].

Care proceedings

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

Land and Environment Court

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

Defamation

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

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

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

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

Dismissal and discontinuance

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

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

Stay

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

Compromise

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

[8-0080] Where there are multiple parties

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

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

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

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

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

Bullock orders and Sanderson orders

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

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

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

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

Concurrent tortfeasors

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

Cross-claims

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

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

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

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

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

Generally

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

Self-represented lawyers

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

[8-0100] Representative, nominal and inactive parties

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

Tutors

Ordinarily, a tutor for a disabled party is personally liable for any costs order against that party; indeed, one of the reasons why a tutor is required is so that there is a person answerable for costs: *Yakmore v Handoush (No 2)* (2009) 76 NSWLR 148 at [45]; *Dal Pont* at 22.68. However, although one of the reasons for the appointment of a tutor for a disabled person is to have a person on the record that is personally liable for the costs of the litigation, that is not the sole function or purpose of the appointment of the tutor, which includes the protection of the person with the disability and of the processes of the court: *Smith v NRMA Insurance Ltd* [2016] NSWCA 250 at [29]–[36], citing

NSW Ministerial Insurance Corporation v Abuafoul (1999) 94 FCR 247 at [27]–[29], and *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 at [552]. An order protecting a tutor from personal liability for costs may be made as an incidental term of an order appointing a tutor under UCPR r 7.18(1)(b), or pursuant to the power conferred by UCPR r 2.1, or in the inherent power in the parens patriae jurisdiction. Under UCPR r 42.24, if the court appoints a solicitor to be the tutor of a person under legal incapacity in connection with any proceedings, the court may order that the costs incurred by the solicitor in performance of the duties of tutor be paid by the parties to the proceedings or any of them, or out of any fund in court in which the person under legal incapacity is interested. The court may make orders for the repayment or allowance of the costs as the case requires.

Executors, trustees and mortgagees

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

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

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

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

The rule relates only to costs incurred in the administration and distribution of the estate, as distinct from costs incurred by an executor in furtherance of a personal interest: *Drummond v Drummond* at [47]; *Miller v Cameron* at 578–579; *Re Jones* [1897] 2 Ch at 197–198; *Plimsoll v Drake (No 2)* (unrep, 8/6/95, SCT). Executors who pursue personal interests in litigation are "not fighting for the estate any more than if they were not executors at all": *Skrimshire v Melbourne Benevolent Asylum* (1894) 20 VLR 13 at 18. Thus an executor who prosecutes or defends proceedings in the capacity

of creditor or beneficiary of the estate rather than in the capacity as executor is not entitled to recoup the costs of the litigation from the estate simply because they are also an executor. A trustee who defends an action for their removal may be representing their own interests and not those of the trust estate: *Miller v Cameron* at 578–579, though this is not necessarily invariably so; likewise one who unsuccessfully demands a release before distributing the trust estate to the beneficiaries: *Plimsoll v Drake (No 2)*.

Liquidators

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

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

Submitting parties

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

Relators

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

Interveners

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

Interpleaders

All participants in interpleader proceedings may claim their costs from the fund, where they do no more than present evidence and reasonable arguments as to how that fund should be distributed.

Where their involvement goes further and amounts to raising issues that add to the costs of the litigation, on which they are unsuccessful, they may be deprived of costs on those issues, or may be ordered to pay costs: *Westpac Banking Corp v Morris* (unrep, 2/12/98, NSWSC).

[8-0110] Non-parties

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

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

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

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

Legal aid providers

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

[8-0120] Legal practitioners

Inherent power

The Supreme Court has inherent power to make costs orders against legal practitioners, derived from its supervisory jurisdiction: *Myers v Elman* [1940] AC 282; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [85]–[86]; *Re Felicity, FM v Secretary Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [18]–[20]. The object of the court's inherent power is primarily compensatory, so as to indemnify or compensate, and thus protect, the party or parties who have suffered: *Dal Pont* at 23.2; *Myers v Elman* at 289. While the principles that inform the exercise of

this inherent power should not be conflated with those relevant to the statutory powers of the court contained in CPA s 99 and *Legal Profession Uniform Law Application Act* 2014, Sch 2, to order a legal practitioner to pay a party's costs (*Whyked Pty Ltd v Yahoo 7 Pty Ltd* [2008] NSWSC 477 at [12]–[20]), similar circumstances are likely to be relevant in both cases. As to the continued existence of the Supreme Court's inherent power, see *Re Felicity; FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [18]–[20]; *King v Muriniti* (2018) 97 NSWLR 991.

Civil Procedure Act 2005, s 99

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

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

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

Section 99 is engaged only by egregious conduct; mere negligence, incompetence or misconduct is insufficient to satisfy the test in s 99: *Muriniti v Kalil* [2022] NSWCA 109 at [45], [82]. A three-stage approach applies: *first*, is the practitioner's conduct such as to satisfy the test; *secondly*, if so, did that conduct cause the applicant to incur unnecessary costs; and *thirdly*, if so, is it in all the circumstances just to order the legal practitioner to compensate the applicant for the whole or any part of the relevant costs: *Kelly v Jowett*, above, at [60]; *Muriniti v Kalil* at [45].

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

- commencing or conducting proceedings which are an abuse of process: *Young v R (No 11)* [2017] NSWLEC 34
- raising untenable defences, for the purpose of delay: *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56
- signing a certificate on a false affidavit of discovery: *Myers v Elman* [1940] AC 282 (a case involving the inherent power)
- repeatedly putting untenable submissions: *Buckingham Gate International v ANZ Bank Ltd* [2000] NSWSC 946 at [18]–[19]

- attempting to re-agitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* [2008] NSWCA 194 at [208]–[216]
- prosecuting an appeal which has no prospects of success: *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 at [17]
- commencing proceedings which had no prospects of success where the nature of the allegations were of the utmost gravity (fraudulent misrepresentation and conspiracy): *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180 at [120]–[122]
- acting in ignorance of the rules: *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SPA* (unrep, 9/6/89, HCA), and
- unpreparedness, resulting in a hearing date being vacated, or in time being wasted during the hearing: *Stafford v Taber* (unrep, 31/10/94, NSWCA).

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

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

It is usually appropriate to defer the question of any personal costs order until the conclusion of the trial in order to avoid the potential for creating a conflict that may be to the disadvantage of a party in the conduct of the proceedings: *Muriniti v Kalil*, above, at [46]–[48], referring to *Lemoto v Able Technical Pty Ltd*, above; *Redowood Pty Ltd v Goldstein Technology Pty Ltd* [2004] NSWSC 515 at [35] and *Saadat v Commonwealth of Australia (No 2)* [2019] SASC 75 at [24].

Legal Profession Uniform Law Application Act 2014, Sch 2

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

However, the requirement that the practitioner have a "reasonable belief" is a continuing one: see *Lemoto* at [127], so that if circumstances change as a result of which the belief becomes no longer

reasonable, then continuing to prosecute a claim may attract liability: *Eurobodalla Shire Council v Wells* [2006] NSWCA 5 at [31] (order made under the prior equivalent of this clause: s 348 of the *Legal Profession Act* 2004, where barrister and solicitor were found "reckless" in continuing to prosecute an appeal; see also *Nadarajapillai v Naderasa (No 2)* at [17].

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

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

In NSW, two bases for costs orders are now recognised. CPA s 98(1)(c) provides that the court may award costs on the ordinary basis or on the indemnity basis. The ordinary basis subsumes what was formerly the common fund basis, and the indemnity basis what was formerly the solicitor-client basis, so that, at least in NSW, there is no longer any distinction, as between parties, between costs on the solicitor/client basis and costs on the indemnity basis. Although in *Firth v Hale-Forbes (No 2)* [2013] FamCA 814 at [80]–[85] a distinction between the two was recognised, the terms are widely regarded as interchangeable: *Rapuano (t/as RAPS Electrical) v Karydis-Frisan* [2013] SASCFC 93 at [92]–[93]; *Secure Funding Pty Ltd v StarkSecure Funding Pty Ltd v Conway* [2013] NSWSC 1536 at [9]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [36]. The CPA and UCPR contain no reference to the common fund basis or the solicitor-client basis.

Ordinary basis

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

Indemnity basis

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

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

and not punitive: *Hamod v State of NSW* [2002] FCAFC 97. A formal warning of an intention to claim indemnity costs may enhance the prospects of obtaining one: *Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd* (1995) 36 NSWLR 242, citing *Insurers' Guarantee Fund NEM General Insurance Association Ltd (In Liq) v Baker* (unrep, 10/2/95, NSWCA). Such warnings should not be lightly made.

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

Hopeless cases

A party who commences, continues or defends proceedings which have no prospect of success, such as where the claim (or defence) is "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile, may be ordered to pay the other party's costs on the indemnity basis: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [4]; *Hillebrand v Penrith Council* [2000] NSWSC 1058 (limitation period obviously expired). It is not a necessary condition that the party responsible be impugned with a collateral or improper purpose: *J-Corp P/L v Australian Builders Labourers Federation Union of Workers (No 2)* [1993] FCA 70 at [303]. However, mere weakness of an arguable case is insufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 542.

Abuse of process

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

Unreasonable conduct or "relevant delinquency"

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

Fraud and misconduct

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

Offers of compromise and Calderbank letters

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

Arbitration or dispute resolution clauses

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

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

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

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

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

Security for costs

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

Preliminary costs

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

Interlocutory applications

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

When the trial is adjourned or aborted

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

Upon final judgment

In a straightforward case, the trial judge may deal with the question of costs in the substantive judgment. Such a course is desirable, where the prima facie costs order is fairly clear, because it may avoid the time and costs of a further hearing on the question of costs. Such an order does not preclude a party from seeking a special or different costs order (such as an indemnity order, based on an offer of compromise of which the court will not previously be aware): costs orders may be reconsidered on application made before (under UCPR r 36.16(1)) or within 14 days after (under r 36.16(3A)) the order is entered, and reconsideration may be appropriate if the order was made without the parties having had a proper opportunity to make relevant submissions before the order was made: *Harris v Schembri* (unrep, 7/11/95, NSWSC). A costs order may also be varied in an appropriate case under the "slip rule", on application under r 36.17: *Roads and Traffic Authority v Palmer (No 2)* [2005] NSWCA 140 at [25]. However, where there is room for argument about the costs order, or a party seeks an opportunity to be heard, it is prudent expressly to reserve liberty to apply, within a specified time, to set aside or vary the costs order.

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

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

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

It is implicit in an order that Party B pay Party A's costs that the quantum, unless agreed, be determined by assessment, and quite unnecessary to specify that that the costs be "as agreed or assessed". But because, absent agreement, the costs must be quantified by a costs assessor, it is

important that the costs the subject of the order, whether interlocutory or final, be described in clear and certain terms, in order to ensure that the parties and the costs assessor can easily ascertain the precise scope of the costs to be paid: *Hogan, In the Marriage of* (1986) 10 Fam LR 681 at 686.

Cost of the proceedings

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

Court-ordered mediations

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

[8-0150] Interlocutory costs orders

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

Particular interlocutory costs orders

Common interlocutory costs orders include:

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

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

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

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

That costs of the motion be costs in the proceedings

This order has the effect that the costs of the motion will be treated as costs of the substantive proceedings generally, and will form part of the costs dealt with by the general costs order: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorp (No 2)* [2007] NSWCA 142 at [18]. This is the default position if no special costs order is made (see "No costs order", below), and for that reason is strictly unnecessary, but is nonetheless commonly made for clarity and certainty. It may be appropriate where the motion does not give rise to an "event" distinct

from the proceedings as a whole, or was necessarily or reasonably brought or opposed to prepare the substantive proceedings for hearing, or where the true merits of the application may not be apparent unless seen in the context of the final result: *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664.

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

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

That costs of the motion be reserved to the trial judge

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

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

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

Time for assessment and payment of interlocutory costs orders

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

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

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

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

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

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

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

57, and may have regard to the checklist in s 58(2)(b): *Bevillesta Pty Ltd v D Tannous 2 Pty Ltd* [2010] NSWCA 277 at [37]–[39]; *Australian Securities and Investments Commission v Rich* [2003] NSWSC 297 at [85]; *Seven Network Ltd v News Ltd* [2005] FCA 1630 at [8].

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

Considerations that may tend against an "otherwise order" for costs to be payable forthwith include that the party is legally aided: *Richards v Kadian (No 2)* at [5], or that the final outcome is sufficiently uncertain that it is preferable to defer the question of costs to the trial judge, or to make costs of the interlocutory application costs in the cause: *Megna v Marshall* at [27]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1. Cases in which the court has declined to make a "forthwith" order include *Cameron v Ofria* [2007] NSWCA 37 at [12] (successful application to strike out cross claim, characterised as ordinary interlocutory application in the general course of proceedings); *Hargood v OHTL Public Co Ltd (No 2)* [2015] NSWSC 511 (failed application for stay and likely two years before conclusion of proceedings insufficient to depart from usual rule); *Hall v Swan* [2013] NSWSC 1758 at [11]–[15] (delay in service of expert reports); *Eastmark Holdings Pty Ltd v Kabraji (No 2)* [2012] NSWSC 1255 at [42]–[46] (several motions heard together, discretionary factors tending in both directions).

Failure to pay interlocutory costs orders

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

[8-0160] Quantification of costs

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

Capping of costs

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

Gross sum costs orders

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

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

Although courts were initially reluctant to make such orders, they have become increasingly common: *Poulos v Eberstaller (No 2)* [2014] NSWSC 235; *Chaina v Presbyterian Church (NSW) Property Trust (No 26)* [2014] NSWSC 1009 at [43]–[57]. At first they were utilised in "megalitigation" cases, where the assessment of costs would likely be protracted and expensive: *Idoport Pty Ltd v NAB Ltd* [2005] NSWSC 1273; see also *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640, but they are now made in a wide variety of circumstances, including where there has been contumelious conduct by a party (*Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99), or where the financial circumstances of the party ordered to pay costs are poor: *Hamod v State of NSW* at [813]–[820]. Such orders are now increasingly made where the subject matter of the litigation is a modest sum in comparison to the costs involved, or to avoid "satellite litigation" about costs: *O'Rourke v P & B Corporation Pty Ltd* [2008] WASC 36 at [5]; *Lambert v Jackson* [2011] FamCA 275 at [59] (lump sum costs orders made on an indemnity basis by reason of conduct of the litigation); *Vumbaca v Sultana (No 2)* [2013] NSWDC 195 at [7]; *Colquhoun v District Court of NSW* [2014] NSWCA 460 at [62] (appeal from Children's Court, in which unsuccessful party had contested every point, and the costs order to which the other parties were entitled should not be rendered nugatory by the prospect of disproportionate disputation by him); or even in litigation with no special features: *Poulos v Eberstaller (No 2)*.

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

A discount (typically in the order of 10–20% in the case of an indemnity order, and 30–35% in the case of a party/party order) is usually applied when calculating a gross sum costs order, for two main reasons: first, because on assessment, even on the indemnity basis, a successful party invariably recovers something less than its actual costs, typically 15% where the assessment is on an indemnity basis; and secondly, the necessarily broad-brush approach of the court to assessment on a lump sum basis — involving some risk that the sum includes costs that would not be recovered on assessment — coupled with the savings to the costs creditor in time and costs through avoiding

a detailed assessment, and the loss to the costs debtor of the opportunity to scrutinise and object to a detailed bill, has resulted in a practice of applying a discount on lump sum assessments: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119; *Idoport Pty Ltd v NAB, Idoport Pty Ltd v Donald Robert Argus* [2007] NSWSC 23 at [13]; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* at [38]; *In the matter of Aquaqueen International Pty Ltd* [2015] NSWSC 500 at [18]; *Hancock v Rinehart (lump sum costs)* at [56]–[57].

However, that does not mean that the court must apply a percentage discount to the sum sought by the successful party, and the court "must be astute not to cause an injustice to the successful party" by applying "an arbitrary 'fail safe' discount on the costs estimate submitted to the court". If the court can be confident that there is little risk that the sum includes costs that might be disallowed on assessment, the case for a discount is seriously undermined, and where a gross sum is assessed on an indemnity basis, and there is no evidence of unreasonableness, it may be inappropriate to apply any discount, although one may nevertheless be appropriate if there is evidence that the successful party errs on the side of excessive use of legal services: *Beach Petroleum* at 164–165; *Norfeld v Jones (No 2)* [2014] NSWSC 199 at [7]–[10]; *Harvey v Barton (No 4)* [2015] NSWSC 809 at [48] ; *Hancock v Rinehart (Lump sum costs)* at [57]–[59]; *In the matter of Beverage Freight Services Pty Ltd* [2020] NSWSC 797 at [24], [36].

CARC Guideline

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

[8-0170] Regulated costs

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

Costs on default judgment and the enforcement of judgments

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

Claims for personal injury damages

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

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

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

Claims for work injury damages

The *Workplace Injury Management and Workers Compensation Act* 1998 ("the WIM Act"), s 346, applies to costs (including disbursements) payable by a party in or in relation to a claim for work injury damages, including court proceedings for work injury damages, and authorises regulations making provision for or with respect to the awarding of costs to which it applies. The regulations may provide for the awarding of costs on a party/party basis, on a practitioner and client basis, or on any other basis. A party is not entitled to an award of costs to which the section applies, and a court may not award such costs, except as prescribed by the regulations or by the rules of the court concerned. In the event of any inconsistency between the provisions of the regulations under this section and rules of court, the provisions of the regulations prevail to the extent of the inconsistency. For the purpose of s 346, the relevant regulation is *Workers Compensation Regulation* 2016 ("the Regulation"), Pt 17. "Work injury damages" are defined in s 250 as damages recoverable from a worker's employer in respect of:

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

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

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

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

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

Claims under the Motor Accidents Compensation Act 1999

Costs in respect of claims covered by the *Motor Accidents Compensation Act* 1999, for accidents that occur after 5 October 1999, are regulated by Ch 6 (ss 148–153) of that Act: *Najjarine v Hakanson* [2009] NSWCA 187. Section 152(2) provides that the rules of court relating to offers of compromise apply to any such offer made in those proceedings. This extends to *Calderbank* offers: *Arnott v Choy (No 2)* [2010] NSWCA 336 at [9]–[14]. Otherwise, subject to the rules of court, the costs of such proceedings are to follow the event and are payable on a party/party basis: s 152(3). However, the

provisions of Ch 6 regulate costs in court claims brought under the MAC Act in a way that does not otherwise permit for the operation of the rules of court: *San v Rumble (No 2)* [2007] NSWCA 259 at [15].

[8-0180] Interest on costs

For actions commenced before 24 November 2015, an application can be made under CPA s 101(4) for interest on costs: *Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99 at [39]–[45]; see also *Short v Crawley (No 45)* [2013] NSWSC 1541; *Alawadi v Widad Kamel Farhan trading as The Australian Arabic Panorama Newspaper (No 3)* [2016] NSWDC 204. Although it has been said that some positive basis for the application should be established (*Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd (No 2)* (2013) 84 NSWLR 436 at [38]; *McKeith v Royal Bank of Scotland Group Plc; Royal Bank of Scotland Group Plc v James (No 2)* [2016] NSWCA 260 at [55]), and interest on costs has been refused where it was not sought at trial and there has been delay (*T&T Investments Australia Pty Ltd v CGU Insurance Ltd (No 2)* [2016] NSWCA 372) or for insufficiency of evidence (*Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd (No 2)* at [59]–[60]), it is not necessary to demonstrate circumstances out of the ordinary to warrant such an order: *Drummond and Rosen Pty Ltd v Easey (No 2)* [2009] NSWCA 331 at [4]. The better view is that interest on costs should now be seen, like interest on a judgment, as no more than appropriate compensation for the time value of money, for the period while a party is out of pocket: *Drummond and Rosen Pty Ltd v Easey (No 2)* at [4]; *Grace v Grace (No 9)* [2014] NSWSC 1239 at [57]–[72]; *Richtoll Pty Ltd v WW Lawyers (in Liq) Pty Ltd (No 3)* [2016] NSWSC 1010 at [12]–[17]. Such orders, which have become increasingly commonplace, have often adopted the complex formula set out in *Lahoud v Lahoud* [2006] NSWSC 126 which required the attribution of payments between the client and the solicitor to particular parts of the party/party costs.

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

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

[8-0190] Appeals

Leave to appeal is required for appeals to the Court of Appeal on a question of costs alone: *Supreme Court Act* 1970, s 101(2)(c). For leave to be granted something more than arguable error is necessary; there must be "an issue of principle, a question of public importance or a reasonably clear injustice

going beyond something that is merely arguable”: *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235 at [46]; see, eg, *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]–[38]; *The Age Company Ltd v Liu* (2013) 82 NSWLR 268 at [13]; and *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [28].

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

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

Applications for payment from the Suitors’ Fund Act 1951

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

[8-0200] Precedent costs orders

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

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

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

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

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

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

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

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

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

Precedent 8.9 — Forthwith: *“... such costs to be payable forthwith”.*

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

Legislation

- CPA, ss 3, 5(1), 56–60, 98, 99, 101
- *Children and Young Persons (Care and Protection) Act* 1998, s 88
- *Civil Liability Act* 2002, s 35A
- *Defamation Act* 2005 (NSW) s 40
- *Family Law Act* 1975 (Cth) s 117(2)
- *Legal Profession Act* 2004 (rep)
- Legal Profession Uniform General Rules 2015
- *Legal Profession Uniform Law Application Act* 2014 Sch 2, ss 59, 61
- *Legal Profession Uniform Law Application Regulation* 2015
- *Motor Accidents Compensation Act* 1999, Ch 6
- *Property (Relationships) Act* 1984
- *Succession Act* 2006, s 99
- *Suitors Fund Act* 1951
- Workers Compensation Regulation 2016, Pt 17
- *Workplace Injury Management and Workers Compensation Act* 1998, ss 112, 250, 318B, 346

Rules

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

Further references

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

- Justice Hamilton, "Containment of Costs: Litigation and Arbitration" (1 June 2007)
- Costs Assessors Review Committee, "Guideline for Costs Payable", Supreme Court of New South Wales website

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Enforcement of foreign judgments

[9-0700] Introduction

Foreign judgments, that is judgments pronounced by a judicial tribunal other than a New South Wales tribunal, are recognised and enforced by New South Wales courts subject to certain specific requirements.

The requirements for enforcement at common law are conveniently set out in Chs 9 and 11 of *Nygh's Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney.

It is not proposed to deal with the common law position in this section as, for practical purposes, the field is now covered by two legislative provisions. The statutory regime applies where a country has been designated as a jurisdiction of substantial reciprocity under the Regulations to the *Foreign Judgments Act* 1991 (Cth). For example, decisions of Chinese courts may be enforceable in Australia under the common law procedure for the enforcement of foreign judgments: see *Bao v Qu; Tian (No 2)* (2020) 102 NSWLR 435 at [23]–[30]. Certain exceptions are referred to below at [9-0770].

Since 10 April 1993 any judgment given in Australia including in the external territories, before or after that date, must be enforced under Pt 6 of the *Service and Execution of Process Act* 1992 (Cth).

Judgments given outside Australia must be enforced under the *Foreign Judgments Act* 1991 (Cth) if they fall within the scope of that Act: s 10.

Certain New Zealand judgments can only be enforced in accordance with the provisions of the *Trans-Tasman Proceedings Act* 2010 (Cth) as to which see "Trans-Tasman proceedings" at [5-3580]–[5-3650].

[9-0710] The Service and Execution of Process Act 1992 (Cth)

The Act extends to territories including external territories: ss 5, 7.

Upon lodgment of a sealed copy of a judgment, or a fax in the appropriate court of another State the proper officer of that court must register the judgment: s 105(1).

Subject to what follows, the judgment has the same force and effect as if the judgment had been made by the court in which it is registered: s 105(2)(a).

It may, subject to ss 106 and 108, give rise to the same proceedings by way of enforcement as if made in that court: s 105(2)(b).

Section 106 provides that the court may, on application, order that proceedings for enforcement not be commenced until a specified time or be stayed for a specified period: s 106(1). Such an order must be subject to conditions that, within a period specified in the order, there be an appropriate application for relief and that the application be prosecuted in an expeditious manner: s 106(2)(a). Appropriate relief is an application to set aside, vary or appeal against the judgment made to a court with jurisdiction in the State where the judgment was given: s 106(3). The court may also impose other conditions including provision of security: s 106(2)(b).

This section supports the view, considered the better one, that the court has no jurisdiction to vary the original judgment: see *Bell v Bell* (1954) 73 WN (NSW) 7.

Section 108 provides that interest is payable as in the State of the judgment, and that the judgment creditor must satisfy the court in the enforcement proceedings as to the appropriate amount.

If the copy of the judgment is lodged by fax, a sealed copy is to be lodged within 7 days after the fax is lodged: s 105(3). If that is not done, a proceeding to enforce the judgment is not to be commenced or continued without the leave of the court until the sealed copy is lodged: s 105(4).

A judgment is capable of being enforced only if, and to the extent that, at the time when the proceeding for enforcement is taken, the judgment is capable of being enforced in or by the original court or another court in that State: s 105(5).

The appropriate court means, if the original court were a Supreme Court, the Supreme Court, otherwise the court by which relief as given by the judgment could have been given. If there is more than one such court, the one of more limited jurisdiction is the appropriate court. If there is no such court, the Supreme Court is the appropriate court: s 105.

Costs of enforcement are provided for in s 107.

Section 109 provides that the court must not, merely because of the operation of the rule of private international law, refuse to permit proceedings by way of enforcement to be taken or continued.

[9-0720] Procedure — Supreme Court

An application under s 105(4) is required to be commenced by Summons: SCR Pt 71A r 2. The summons need not be served unless the court otherwise orders: Pt 71A r 4.

An affidavit must be filed, sworn not more than 14 days before proceedings for the enforcement of a registered judgment are taken, stating that the judgment is capable of being enforced and the extent to which the judgment is capable of being enforced in or by the original court or another court in that State: Pt 71A r 6.

The court may notify the Sheriff of any change in the rate of interest: Pt 71A r 6(2).

Costs and expenses under s 107(1) shall be assessed by the court. This may be done without service of the relevant affidavit, in the absence of the public and without attendance by the plaintiff: Pt 71A r 7. The supporting affidavit must contain particulars of the costs and expenses claimed and state the basis upon which they are claimed: Pt 71A r 7(2).

[9-0730] Procedure — District and Local Courts

In proceedings for the enforcement of a registered judgment the court will require evidence that the judgment is capable of being enforced and of the extent to which it is capable of being enforced.

Evidence may also be required on cost and interest issues.

[9-0740] Foreign Judgments Act 1991 (Cth)

For a fuller treatment see *Conflict of Laws*, above, Ch 10.

This legislation does not apply to the enforcement of interstate judgments. However, a duly registered judgment under the Act may be registered in the Supreme Court of another State or Territory under Pt 6 of the *Service and Execution of Process Act* 1992 (Cth).

The legislation applies to the superior courts of specified countries: s 5(1). If the superior courts are specified as such they are taken to be superior courts, however, failure to specify a particular court does not imply that the court is not a superior court: s 5(2). The legislation also applies to specified inferior courts of those countries: s 5(3).

For a list of the specified countries and courts, see *Foreign Judgments Regulations* 1992, as amended.

The judgment to be enforced must be an enforceable money judgment that is final and conclusive and was given in a superior court of a country in relation to which the legislation applies or an inferior court to which it applies: s 5(4).

A judgment is taken to be final and conclusive even though an appeal may be pending against it or it may still be subject to appeal: s 5(5).

The legislation provides for extension by regulation to prescribed non-money judgments of specified countries, however, no such regulation has been made.

Judgments for taxes, fines and penalties are excluded except in relation to certain New Zealand and Papua New Guinea tax matters. See *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* (2014) 85 NSWLR 404.

For the registration of a foreign judgment against a foreign State, or a separate entity of a foreign State, see the *Foreign States Immunities Act* 1985 (Cth), s 11. For a detailed discussion of the application of the *Foreign States Immunities Act* 1985 (Cth) to proceedings under the *Foreign Judgments Act* 1991 (Cth), see *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.

[9-0750] Procedure

A plaintiff who has obtained a judgment of the relevant kind may apply to the Supreme Court for registration of the judgment: s 6(1). The application must be made within 6 years after the date of the judgment or the determination of any appeal: s 6(1).

Conflict of Laws at p 201 states that this period may be extended under s 6(5), however it is arguable that s 6(5) applies to an application under s 6(4), as to which see below, and not to s 6(1).

Subject to the Act and proof of matters prescribed by Rules of Court the Supreme Court is to order the judgment to be registered: s 6(3).

The Act provides that the judgment is not to be registered if, at the date of the application, it has been wholly satisfied, or it could not be enforced in the country of the original court: s 6(6).

UCPR r 53.3 sets out the evidence required in support of an application for registration. The application is made by summons joining the judgment creditor as plaintiff and the judgment debtor as defendant: r 53.2. Unless the court otherwise orders the summons need not be served: r 53.2(3).

When making the order for registration the court must specify the period in which an application may be made to set the registration aside: s 6(4). That period may be extended: s 6(5).

The registered judgment may be enforced and carries interest as if the judgment had originally been given and entered in the Supreme Court on the date of registration: s 6(7).

Rule 53.6(1) provides that a notice of the registration must be served on the judgment debtor. Service must be personal except where the judgment debtor has entered an appearance, is in default of appearance or the court otherwise orders. The notice of registration must inform the judgment debtor of his right to apply to set aside the registration or seek a stay of the judgment: r 53.6(3).

Once registered and subject to allowing time for an application to set aside to be made and determined, the judgment may be enforced as a judgment of the court: r 53.8. Before any step is taken for enforcement, an affidavit of service of the notice of registration must be filed or the court otherwise satisfied of service: r 53.8(2).

An application to set aside should be made by notice of motion. Section 7(2)(a)(i)–(xi) provides that the court is obliged to set the registration aside if it is satisfied:

(i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or

(iii) that the judgment was registered in contravention of this Act; or

(iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or

(vi) that the judgment was obtained by fraud; or

(vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or

(viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or

(ix) that the judgment has been discharged; or

(x) that the judgment has been wholly satisfied; or

(xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; …

Registration is only required to be set aside under s 7(2)(a)(v) of the *Foreign Judgments Act* if insufficient notice was given so as to have prevented the judgment debtor from having an opportunity to defend the matter: *Nyunt v First Property Holdings Pte Ltd* [2022] NSWCA 249 at [101]; [154].

The court may set the registration aside if it is satisfied that the matter in dispute had been the subject of a final and conclusive judgment by a court having jurisdiction in the matter before the judgment was given: s 7(2)(b). If a matter has been litigated through to finality in one jurisdiction, that *may* preclude litigation in another forum (even one that has been contractually, albeit non-exclusively, chosen by the parties), but that will typically be because of the operation of doctrines of res judicata, issue estoppel and/or abuse of process: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [36]; *Nyunt v First Property Holdings Pte Ltd*, above, at [87]–[88]; [154].

As to the question of jurisdiction, reference should be made to the criteria set out in s 7(3)–(5). The focus of s 7(3)(a)(iii), which provides that a court will be taken to have jurisdiction where the judgment debtor had agreed, in respect of the subject matter of the proceedings, to submit to the court's jurisdiction, is on what the judgment debtor had agreed to prior to the commencement of the foreign proceedings, and not on any conduct of the judgment creditor: *Nyunt v First Property Holdings Pte Ltd*, above, at [73]; [154].

[9-0760] Stay of enforcement of registered judgment

If the court is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, the court may order a stay: s 8(1). If the appeal has not been made, the court must specify a time for it to be made: s 8(1). A condition of pursuing the appeal in an expeditious manner is imposed (s 8(3)), and other conditions may be imposed: s 8(4).

[9-0770] Exceptions

Non-money judgments are not, presently, covered by the legislative scheme, and must be enforced at common law. See *Conflict of Laws*, above. Also see s 104 of the *Family Law Act* 1975 (Cth).

Legislation

- *Family Law Act* 1975 (Cth) s 104
- *Foreign Judgments Act* 1991 (Cth) ss 5, 6, 7, 8, 10
- *Foreign Judgments Regulations* (Cth) 1992
- *Foreign States Immunities Act 1985*, s 11

- *Service and Execution of Process Act* 1992 (Cth) ss 5, 7, Pt 6
- *Trans-Tasman Proceedings Act* 2010 (Cth)

Rules

- SCR Pt 71A
- UCPR Pt 53

References

- A Bell, “Private international law in practice across the divisions: some recent developments and case law” (2020) 14 *TJR* 229
- M Davies et al, *Nygh’s Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney
- D Butler, “Enforcement of foreign judgments: does an issue estoppel arise from a foreign court’s determination of its own jurisdiction?” (2019) 93 *ALJ* 558.

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Contempt generally

Nature of contempt

[10-0300] Civil and criminal contempt

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

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

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

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

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

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

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

[10-0305] Sentencing principles for contempt

See *Thunder Studios Inc (California) v Kazal (No 2)* [2017] FCA 202 at [4]–[5] and *Seven Network (Operations) Ltd v Dowling (No 2)* [2021] NSWSC 1106 at [2]–[12] for the principles and rationale for sentencing for contempt.

Sentencing principles summarised by the court in *Commissioner for Fair Trading v Rixon (No 5)* [2022] NSWSC 146 include:

- Despite the non-application of the *Crimes (Sentencing Procedure) Act*, alternatives to full-time imprisonment are available as part of the power to punish an individual for contempt: at [24].
- The underlying rationale of every exercise of the contempt power is the necessity to "uphold and protect the effective administration of justice": at [25].
- It is not however clear that, in the absence of a legislative basis, there is a foundation for allowing a discount based solely on the utilitarian value of a plea of guilty given the potential discriminatory effect. It can be accepted that, while these proceedings are not criminal in nature, the same policy considerations that apply with respect to pleas of guilty to criminal offences apply: at [59].

See also *Sentencing Bench Book* at [20-155] and N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29 February 2020, Canberra.

Contempt by publication

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

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

[10-0320] Test for contempt

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

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

[10-0330] Intention

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

[10-0340] Relevant considerations

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

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

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

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

[10-0350] Influencing the tribunal of fact

The most common and obvious form of media contempt is influencing the tribunal of fact. There will generally not be a danger of this in civil proceedings, where no jury will usually be present. It is essentially established that a publication or broadcast will not be regarded as presenting a substantial risk of prejudice by influencing a judge: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation*, above, at 58.

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

[10-0360] Influencing witnesses

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

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

[10-0370] Influencing parties

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

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

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

[10-0390] Public interest in publication

No contempt will be established unless it can be demonstrated that the risk of prejudice to the administration of justice, is not outweighed by the public interest in freedom of discussion on matters

of public concern: *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249; *Hinch* per Mason CJ at 27, Wilson J at 43 and Deane J at 51; *Attorney General v X* (2000) 49 NSWLR 653.

[10-0400] Contempt by prejudgment

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

[10-0410] Scandalising contempt

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

Misconduct in relation to parties, witnesses, etc

[10-0420] Misconduct in relation to pending proceedings

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

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

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

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

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

> Time and again the courts have said that there can be no contempt unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. Cases of interference with the administration of justice as a continuing process are no doubt an exception to this rule. Their rationale is different from

> publications which interfere with particular proceedings. They rest on the need to protect the courts and the whole administration of justice from conduct which seeks to undermine the authority of the courts and their capacity to function.

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

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

[10-0430] Reprisals

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

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

[10-0440] Intention

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

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

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

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

[10-0450] Statutory offences

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

Breach of orders or undertakings

[10-0460] Validity of orders

An order made by an inferior tribunal is invalid if made without jurisdiction. It is regarded as a nullity and breach of it will therefore not constitute a contempt: *Attorney General v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [27]. The

situation is otherwise in respect of the order of a superior court of record, which is taken to be valid until set aside: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620; see also *Papas v Grave* [2013] NSWCA 308 and *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506.

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

[10-0470] Construction of orders

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

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

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

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

[10-0480] Breach of orders and undertakings

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

Civil contempt cannot be brought for a breach of a judgment debt (as opposed to an order to pay money) where there was no operative judicial act which gave rise to the judgment debt: *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* (2019) 106 NSWLR 479 at [184]–[187]. In this case, the judgment against the respondent was entered pursuant to the operation of s 25(1) of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) and was not preceded by a decision of a court.

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

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

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

Breach of suppression orders

There are several distinct categories of contempt of court under the common law; breach of suppression orders is one: *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 46; *R v The Herald*

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

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

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

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

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

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

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

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

Refusal to attend on subpoena/give evidence

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

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

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

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

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

[10-0520] Duress

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

[10-0530] Prevarication

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

Jurisdiction and procedure

[10-0540] Supreme Court and Dust Diseases Tribunal

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

Proceedings for contempt in the face or hearing of the Supreme Court, or for breach of orders or undertakings, are assigned to the division of the court (or the Court of Appeal, as the case may be) in which the contempt occurred: SCA ss 48(2), 53(3). Contempt proceedings in respect of contempts of the Supreme Court, or of any other court, are otherwise assigned to the Common Law Division: SCA s 53(4).

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

[10-0550] District Court and Local Courts

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

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

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

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

Legislation

- *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 25(1)
- *Civil Procedure Act* 2005 (NSW), 3(1), 4(1), Sch 1
- *Crimes Act* 1900, Pt 7 Div 3
- DCA ss 199, 203
- *Dust Diseases Tribunal Act* 1989, s 26
- *Evidence Act* 1995, s 194
- LCA s 24(1), (4)
- *Mental Health (Forensic Provisions) Act* 1990 (rep)
- *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020
- SCA ss 48(2), 53(3), 101(5), 101(6)

Rules

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

Further reading

- N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29 February 2020, Canberra

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