Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 52

May 2023

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Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

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[2-0000] Case management

Cheng v Motor Yacht Sales Australia Pty Ltd t/as the Boutique Boat Company (2022) 108 NSWLR 342 has been added at **[2-0010] Overview** and **[2-0020] General principles** to demonstrate application of s 60 of the *Civil Procedure Ac*t 2005. The case *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 has also been added at **[2-0020]**.

[2-2600] Stay of pending proceedings

At **[2-2600] The power** the case *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 has been added for its summary of the principles governing permanent stays of proceedings. *Stokes v Toyne* [2023] NSWCA 59, which affirmed *Moubarak*, has also been added.

Pinpoint citations have been added for *Oceanic Sun Line Special Shopping Co Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; and *Garsec v His Majesty The Sultan of Brunei* [2008] NSWCA 211 at **[2-2620] The test for forum non conveniens**.

At **[2-2680] Abuse of process** the case *CBRE (V) Pty Ltd v Trilogy Funds Management Ltd* (2021) 107 NSWLR 202 has been added to highlight that a permanent stay of proceedings on the grounds of abuse of process should only be ordered in exceptional circumstances.

[2-3900] Limitations

The references at **[2-3900] Introduction** have been updated to reflect the newest edition of *The Laws of Australia*, as has the table at **[2-3970] Table of limitation provisions in NSW**.

At **[2-3900]** the case *In the matter of Auzhair Supplies Pty Ltd (in Liq)* [2013] NSWSC 1 has been replaced with the Court of Appeal judgment: *Gerace v Aushair Supplies Pty Ltd* [2014] NSWCA 181.

[2-4100] Freezing orders

The case *Bennett v NSW* [2022] NSWSC 1406 has been added at **[2-4130] Danger that a judgment may go unsatisfied** as an example. At **[2-4200] Duration of the order** the case *Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd* (1991) 22 NSWLR 730 has been added.

[2-4600] Persons under legal incapacity

The case *Perera v Alpha Westmead Private Hospital (t/as Westmead Private Hospital)* [2022] NSWSC 571 has been added for its summary of authorities at **[2-4600] Definition**, and at **[2-4700] Compromise** for its analysis on incapacity under s 76 of the *Civil Procedure Act* 2005. The case *Mao v AMP Superannuation Ltd* [2017] NSWSC 987 has also been added at **[2-4700]**.

[2-5900] Security for costs

Decisions have been added to discussion of the principles for security for costs including *Ward v Westpac Banking Corporation Ltd* [2023] NSWCA 11; *Treloar Constructions Pty Ltd v McMillan* [2016] NSWCA 302; *Levy v Bablis* [2012] NSWCA 128; *Republic of Kazakhstan v Istil Group Inc*

[2005] EWCA Civ 1468; *Misthold Pty Ltd v NSW Historic Sites and Railway Heritage Company Pty Ltd* [2022] NSWSC 42; *T & H Pty Ltd v Nguyen* [2022] NSWCA 180; *SSPeetham Pty Ltd as trustee for the CHB CDI Trust v Marcos Accountants Pty Ltd* [2020] NSWSC 378; *Michael Wilson & Partners Ltd v Emmott (No 2)* [2022] NSWCA 48; *Euromark Ltd v Smash Enterprises Pty Ltd (No 2)* [2021] VSC 393; and *Boz One Pty Ltd v McLellan* [2015] VSCA 145.

Also added is a "traps for young players" section (see **[2-5930] General principles relevant to the exercise of the discretion**) on one of the most common security for costs legal issues, namely a small company that does not have recent tax or accounting records and there is a challenge to the admissibility of the records on this basis. Included are the decisions most commonly referred to: *Strategic Financial and Project Services Pty Ltd v Bank of China Ltd* [2009] FCA 604 and *A40 Construction and Maintenance Group Pty Ltd v Smith (No 2)* [2022] VSC 72.

[4-1100] Tendency and coincidence

At **[4-1140] The tendency rule – s 97** reference to s 55(1) of the *Mental Health (Criminal Procedure) Act* 1990 (now repealed) has been updated to s 94(1) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

[5-1000] The Special Statutory Compensation List

Changes have been made to a few sections, most notably at **[5-1030] Police Regulation (Superannuation) Act 1906** in which the discussion of provisions of the Act has been updated and the cases *Day v SAS Trustee Corp* [2021] NSWCA 71; *Day v SAS Trustee Corp* [2020] NSWDC 381; and *Pascoe v SAS Trustee Corp* [2022] NSWCA 244 have been added.

The case *Death v Workers Compensation (Dust Diseases) Authority (No 1)* [2020] NSWDC 103 has been added to **[5-1070] Workers' Compensation (Dust Diseases) Act 1942**.

[5-4000] Proceedings for defamation in NSW

A number of updates and recent cases have been provided throughout the chapter, at **[5-4005] The legislative framework**; **[5-4006] Defamation Amendment Act 2020**; **[5-4010] The pleadings**; **[5-4020] Applications to amend or to strike out pleadings and other pre-trial issues**; **[5-4030] Applications to amend or to strike out imputations**; **[5-4040] Other interlocutory applications**; **[5-4060] Conduct of the trial (judge sitting alone)**; **[5-4070] Additional matters for conduct of the trial before a jury**; **[5-4090] Damages**; and **[5-4095] Aggravated compensatory damages**.

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

Repealed s 67 of the *Workers Compensation Act* 1987 has been deleted from **[6-1010] General workers** and s 128 of the *Motor Accidents Compensation Act* 1999 has been renumbered to s 141B at **[6-1040] Claims subject to the Motor Accidents Compensation Act 1999**.

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 1 April 2023.

[7-0000] Damages

A new section has been added at **[7-0125] Illegality as a limiting principle**. *State Rail Authority of NSW v Wiegold* (1991) 25 NSWLR 500 has been added which held that a defendant should not be held responsible for the losses a plaintiff sustains that result from a rational and voluntary decision to engage in criminal activity. The following cases are also referred to: *March v Stramare*

Pty Ltd (1991) 171 CLR 506; *Anderson v Hotel Capital Trading Pty Ltd* [2005] NSWCA 78; *Holt v Manufacturers' Mutual Insurance Ltd* [2001] QSC 230; *Bailey v Nominal Defendant* [2004] QCA 344; *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; *Tomasevic v State of Victoria* [2020] VSC 415; *Grey v Simpson* (Court of Appeal, 3 April 1987, unrep); and *Trajkovski v Ken's Painting & Decorating Services Pty Ltd* [2002] NSWSC 568.

[8-0000] Costs

The case *Constantinidis v Prentice (No 2)* [2023] NSWSC 160 has been added at **[8-0160] Quantification of costs** in relation to gross sum costs orders.

[10-0300] Contempt generally

The cases *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 and *Commonwealth Bank of Australia v Salvato (No 4)* [2013] NSWSC 321 have been added at **[10-0480] Breach of orders and undertakings**.

Judicial Commission of New South Wales

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Update 52

May 2023

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Judicial Commission of New South Wales

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FILING INSTRUCTIONS

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Case management

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

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

[2-0010] Overview

Last reviewed: May 2023

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); see *Cheng v Motor Yacht Sales Australia Pty Ltd t/as the Boutique Boat Company* (2022) 108 NSWLR 342 at [20].

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

Last reviewed: May 2023

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.

Resolving the issues between the parties must also be done in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute as provided for by s 60 CPA. This is in accordance with policy considerations that the entitlement of the parties to justice is not unconditional, but is dependent upon the resources of the court made available by the government and the appropriate allocation of resources by the parties, which may depend upon their individual assessments of the importance of the issues in dispute: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [37]. In *Cheng v Motor Yacht Sales Australia Pty Ltd t/as the Boutique Boat Company* (2022) 108 NSWLR 342, leave to appeal was refused as the general criteria for leave to appeal were not met and the size of the claim was found to be wholly disproportionate to the costs of the proceedings: at [15]–[20], [32].

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.

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Stay of pending proceedings

[2-2600] The power

Last reviewed: May 2023

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].

For a summary of the principles governing permanent stays of proceedings, see *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [67]–[95] (affirmed in *Stokes v Toyne* [2023] NSWCA 59 at [10]; [137]; [149]; [176]).

[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

Last reviewed: May 2023

The test is whether the court is a "clearly inappropriate forum": *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247–248; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (affirming Deane J's test in *Oceanic Sun Line Special Shipping Co Inc v Fay* at 564–565); *Garsec v His Majesty The Sultan of Brunei* [2008] NSWCA 211 at [145].

English authorities, such as *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (not followed in *Oceanic Sun Line Special Shipping Co Inc v Fay*) 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) 109 NSWLR 39.

[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

Last reviewed: May 2023

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 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.

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.

A permanent stay of proceedings on the grounds of abuse of process should only be ordered in exceptional circumstances and will ordinarily require the applicant for a stay to establish that the continuation of the proceedings would be vexatious or oppressive in the sense that it would be seriously and unfairly burdensome, prejudicial and damaging: *CBRE (V) Pty Ltd v Trilogy Funds Management Ltd* (2021) 107 NSWLR 202 at [10].

[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.

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Limitations

[2-3900] Introduction

Last reviewed: May 2023

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

For a table providing the limitation period for various causes of action under the legislation of the various States and Territories, see *Thomson Reuters*, "Table of Limitation of Actions" at [5.10.10] in *The Laws of Australia* (a Thomson Reuters publication hosted on Westlaw).

For the law relating to limitations, as at the years of publication, see P Handford, *Limitation of Actions: The Laws of Australia*, 2022, 5th edn, Thomson Reuters, Australia.

As to the application of limitation provisions to equitable claims, see *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181 at [70]–[76].

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

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

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

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

[2-3920] Provisions applicable to all three categories

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2-3930] Motor Accidents Compensation Act 1999

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

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

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

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

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

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

[2-3935] Motor Accident Injuries Act 2017

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

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

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

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

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

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

[2-3940] Workers Compensation Act 1987

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

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

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

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

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

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

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

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

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

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

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

[2-3960] Pleading the defence

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

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

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

Whether to decide a limitation defence separately

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

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

Whether to decide an application to extend the limitation period separately

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

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

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

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

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

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

In *Prince Alfred College Inc v ADC* [2016] HCA 37 the High Court observed at [9]:

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

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

[2-3965] Cross references to related topics

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

[2-3970] Table of limitation provisions in NSW

Last reviewed: May 2023

Adapted with permission from P Handford, *Limitation of Actions: The Laws of Australia*, 2022, 5th edn, Thomson Reuters, Australia.

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

References in square brackets are references to the paragraphs from *Limitation of Actions: The Laws of Australia* (a Thomson Reuters publication hosted on Westlaw) in which the limitation provisions in question are discussed.

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

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
CONTRACT AND QUASI-CONTRACT		
Contract (except actions founded on a deed)	6 years: s 14(1)(a) See [5.10.580]	
Actions for seamen's wages	6 years: s 22(1), s 14(1)(a) See [5.10.660]	
Actions on a specialty or deed	12 years: s 16 See [5.10.670]	
Quasi-contract	6 years: s 14(1)(a) See [5.10.680]	
Action arising by virtue of frustration of contract	6 years from date of frustration: s 14A See [5.10.680]	
Actions for an account	6 years: s 15 See [5.10.2070]	
TORT		
Tort (other than specific cases set out below)	6 years: s 14(1)(b) See [5.10.700]	
Trespass	6 years: s 14(1)(b) (general tort limitation period) See [5.10.700], [5.10.720]	
Second or subsequent conversion	6 years from accrual of original cause of action: s 21 See [5.10.730]	
Actions for breach of statutory duty	6 years: s 14(1)(b) See [5.10.700]	
Defamation: Causes of action accruing before 1 January 2006	1 year from publication: s 14B(3) (now repealed) See [5.10.830]	3 years from publication, if unreasonable for P to have commenced action within 1 year from publication: s 56A (as in force prior to amendment) See [5.10.830]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Defamation: Causes of action accruing on or after 1 January 2006	1 year from publication: s 14B (subject to transitional provisions in Sch 5 Pt 2 cl 7(2)). See [5.10.841]–[5.10.842]	3 years from publication, if unreasonable for P to have commenced action within limitation period: s 56A(2) See [5.10.841]–[5.10.842]
Contribution and indemnity between joint tortfeasors	2 years from date action accrues to tortfeasor, or 4 years from expiry of limitation period for principal cause of action, whichever period expires first: s 26(1) See [5.10.2120]	
PERSONAL INJURY		
Personal injury: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1050]	1 year after material facts of decisive character within P's means of knowledge: s 58(2) See [5.10.1050] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, Schedule 5 Pt 1 cl 4 See [5.10.1080]
Personal injury: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A See [5.10.1060]	An additional 5 years, if just and reasonable: s 60C See [5.10.1070] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, Schedule 5 Pt 1 cl 4 See [5.10.1080]
Personal injury: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.1090]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A See [5.10.1100] There is a special provision for minors: s 62D See [5.10.2430]
Dust-related conditions	No limitation period: *Dust Diseases Tribunal Act* 1989 s 12A See [5.10.1110]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Child abuse	No limitation period where death or personal injury results from abuse of a child: s 6A (has retrospective effect)	
Road accidents	See [5.10.1050]–[5.10.1060]	
Work accidents	See [5.10.1050]–[5.10.1060]	
Wrongful death actions: Causes of action accruing before 1 September 1990	6 years from death: s 19(1)(a) See [5.10.1370]	Where material facts of decisive character not within deceased's means of knowledge more than 1 year prior to death, court can disregard limitation period: s 60(2) See [5.10.1400] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4
Wrongful death actions: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years from death: s 19(1)(b) See [5.10.1370]	5 years, if just and reasonable: s 60D(2) See [5.10.1400] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60H(2) See [5.10.1400]
Wrongful death actions: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C(1) See [5.10.1370] But no limitation period for child abuse actions: s 6A(5)(a) See [5.10.1370]	12-year period can be extended for maximum of 3 years from date of discoverability, but 3-year period cannot be extended: s 62A(2) See [5.10.1400]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.2210]	1 year after material facts of decisive character within P's means of knowledge: s 59(2) See [5.10.2220]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A(2) See [5.10.2210]	Up to 5 years if just and reasonable: s 60C(2) See [5.10.2220]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.2210]	12-year period can be extended for maximum of 3 years from date of discoverability, but 3-year period cannot be extended: s 62A(2) See [5.10.2220]
Cause of action in tort surviving against estate of deceased person	Period same as if deceased had survived See [5.10.2210]	
PROPERTY DAMAGE AND ECONOMIC LOSS		
Action for negligence for property damage or economic loss	6 years: s 14(1)(b) (general tort limitation period) See [5.10.700] See also [5.10.790]	
Action in respect of defective building work	10 years from completion: *Environmental Planning and Assessment Act* 1979 s 6.20(1) See [5.10.790]	
RELATED ACTIONS		
Actions on a judgment	12 years from date judgment became enforceable: s 17(1) See [5.10.2170]	
Actions to enforce an arbitral award (where agreement to arbitrate not under seal)	6 years: s 20(2)(b) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.2180]	
Actions to enforce an arbitral award (where agreement to arbitrate made under seal)	12 years: s 20(2)(a) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.2180]	
Actions to enforce a recognisance	6 years: s 14(1)(c) See [5.10.2190]	
Actions to recover a penalty or forfeiture or other sum recoverable by virtue of an enactment	2 years: s 18(1) See [5.10.2200]	
Actions to recover sum recoverable by virtue of an enactment (other than penalty or forfeiture or sum by way of penalty or forfeiture)	6 years: s 14(1)(d) See [5.10.2200]	
Actions to recover arrears of income	6 years: s 24(1) See [5.10.2150]	
LAND		
Actions to recover land	12 years: s 27(2) See [5.10.1560]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Action to recover land by holder of future interest to recover land	12 years: s 27(2) Action accrues when P becomes entitled to immediate possession, if no person in possession under interest claimed: s 31 See [5.10.1640]	
Actions by tenant entail	Entailed interests abolished See [5.10.1650]	
Actions by the Crown to recover land	30 years: s 27(1) See [5.10.1680]	
Action to recover land brought by person other than Crown where right first accrued to Crown	At any time before expiration of Crown limitation period, or 12 years from date when right of action accrued to person other than Crown, whichever period first expires: s 27(4) See [5.10.1680]	
Actions to recover arrears of rent, or damages in respect of arrears	6 years: s 24(1) See [5.10.1720]	
MORTGAGES		
Actions by mortgagor to redeem (land and personalty)	12 years from date mortgagee last went into possession, or last received payment of principal or interest: s 41 See [5.10.1740]	
Actions by mortgagee to recover possession (land and personalty)	12 years: s 42(1)(b) See [5.10.1750]	
Actions by mortgagee to foreclose (land and personalty)	12 years: s 42(1)(c) See [5.10.1760]	
Actions by mortgagee to recover principal money (land and personalty)	12 years: s 42(1)(a) See [5.10.1770]	
Actions by mortgagee to recover interest	6 years from accrual (or date prior mortgagee discontinues possession) or when limitation period for action to recover principal expires, whichever period first expires: s 43(1) See [5.10.1780]	
TRUSTS		
Actions by a beneficiary against a trustee to recover trust property, or for breach of trust	6 years: s 48(a) See [5.10.1790]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions in respect of fraud or fraudulent breach of trust, and actions to recover trust property converted by a trustee	12 years from date of discoverability, or expiration of any other applicable limitation period under *Limitation Act*, whichever is later: s 47(1) See [5.10.1810]	
DECEASED ESTATES		
Actions claiming the personal estate of the deceased, under will or on intestacy	6 years: s 48 (breach of trust limitation period) See [5.10.1820]	
Actions to recover arrears of interest in respect of legacy, or damages in respect of arrears	6 years: s 24(1) See [5.10.1820]	
ADMIRALTY ACTIONS		
Maritime claims generally	Limitation period that would have been applicable if proceeding brought otherwise than under *Admiralty Act* 1988 (Cth), or 3 years from when cause of action arose: *Admiralty Act* 1988 (Cth) s 37(1) See [5.10.2080]	May be extended where court otherwise has no power to extend limitation period in respect of maritime claim, but has power to extend limitation period in respect of claim of same kind: *Admiralty Act* 1988 (Cth) s 37(3) See [5.10.2080]
Actions to enforce claim or lien against ship or shipowner in respect of damage to another ship, its cargo or freight, any property on board, or loss of life or personal injury suffered by anyone on board	2 years from date of damage: s 22(2) See [5.10.2090]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.2090]
Actions to enforce claim or lien in respect of salvage services	2 years from date services rendered: s 22(3) See [5.10.2090]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.2090]
MISCELLANEOUS		
Arbitrations	After expiration of limitation period fixed by *Limitation Act* for cause of action in respect of same matter: s 70(2) See [5.10.2110]	In stated circumstances, court can order that time between commencement of arbitration and making of order should not count in reckoning of limitation period: s 73 [5.10.2110]
Actions to recover tax	12 months after tax paid: *Recovery of Imposts Act* 1963 s 2(1)(b) See [5.10.2240]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
ULTIMATE BAR		
Ultimate bar	30 years from date limitation period runs (in all cases except wrongful death or personal injury where the court has extended the limitation period): s 51(1) See [5.10.2350]	

Legislation

- *Admiralty Act* 1988 (Cth) s 37
- *Choice of Law (Limitation Periods) Act* 1993 s 6
- *Dust Diseases Tribunal Act* 1989 s 12A
- *Environmental Planning and Assessment Act* 1979 s 6.20
- *Limitation Act* 1969 (NSW) ss 6A, 14, 14A, 14B, 15, 16, 17, 18, 18A, 19, 20, 21, 22, 24, 26, 27, 41, 42, 43, 47, 48, 50A–50F, 51, 52, 57–60, 60A–60D, 60E, 60F–60H, 60G, 60I, 63, 68A, 70, 73
- *Motor Accidents Compensation Act* 1999 s 109(1), (3), (5)
- *Motor Accident Injuries Act* 2017 s 6.32(1)–(5)
- *Recovery of Imposts Act* 1963 s 2(1)(b)
- *Trans-Tasman Proceedings Act* 2010 (Cth)
- *Workers Compensation Act* 1987 s 151D(2), (3)

Rules

- UCPR r 14.14(2), (3)

Further References

- P Handford, *Limitation of Actions: The Laws of Australia*, 2022, 5th edn, Thomson Reuters, Australia

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Freezing orders

Acknowledgement: the following material has been prepared by the Honourable Justice P Biscoe of the Land and Environment Court of NSW and updated by his Honour Judge M Dicker SC of the District Court of NSW.

Portions of this chapter are adapted with permission from Chapters 3–6 of P Biscoe, Freezing and Search Orders: Mareva and Anton Piller Orders, 2nd edn, LexisNexis Butterworths, Australia, 2008.

[2-4100] Introduction

Freezing orders are governed by detailed rules introduced in June 2006 and by a Supreme Court practice note dated 16 June 2010:

Freezing orders: UCPR Pt 25 Div 2 (rr 25.10–25.17)
Practice Note SC Gen 14 (PN 14) (see *Ritchie's* [55,129, Volume 3])

The practice note includes an example form of ex parte orders which are complex. They should not be significantly varied without good reason.

In the absence of court specific practice notes it would be appropriate for the procedure set out in Practice Note 14 to be followed.

An object of the rules, practice notes and forms is to strike a fair balance between the legitimate objects of these drastic orders and the reasonable protection of respondents and third parties. The models for them were drafted by a harmonisation committee of judges appointed by the Council of Chief Justices of Australia and New Zealand. They have been adopted in similar form in all Australian jurisdictions.

[2-4110] Freezing orders

The court is empowered to make a freezing order, with or without notice to the respondent, to prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied: r 25.11. This jurisdiction is concerned with money claims, as distinct from proprietary claims where the principles governing interlocutory injunctions are different. If the court has no jurisdiction to give a relevant money judgment, it has no power to make a freezing order under this rule: *Newcastle City Council v Caverstock Group Pty Ltd* [2008] NSWCA 249 at [45]–[46].

A freezing order is normally obtained ex parte without notice to the respondent, before service of the originating process, because notice or service may prompt the feared dissipation or dealing with assets. However a freezing order made ex parte is an exceptional remedy and one that should not be granted lightly: *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141 at [57].

Freezing orders are also known as Mareva orders or asset preservation orders. The title "freezing order" follows the title used in the English rules. The original title "Mareva order" derived from the seminal English Court of Appeal case of *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213. The title "asset preservation order" was suggested in *Cardile v LED Builders Pty Ltd* [1999] 198 CLR 380 at [25].

An applicant for a freezing order should:

- prove that judgment has been given in its favour or that it has a good arguable case on an accrued or prospective cause of action: r 25.14(1),
- prove that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the judgment debtor, prospective judgment debtor or another person might abscond, or the assets of the judgment debtor, prospective judgment debtor or another person might be removed from wherever they are, or might be disposed of, dealt with or diminished in value: r 25.14(4),

- where an order is sought against a third party, prove that there is a danger that its judgment or prospective judgment will be wholly or partly unsatisfied because (a) the third party holds or is using, or is exercising a power of disposition over assets of the judgment debtor or prospective judgment debtor; or (b) the third party is in possession of, or in a position of control or influence concerning, assets of the judgment debtor or prospective judgment debtor; or (c) there is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, a process whereby the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment: r 25.14(5),
- address discretionary considerations,
- address the form of the order, including the value of the frozen assets; exclusion of dealings with the assets for living, legal and business expenses and pre-order contractual obligations; the duration of the order; and liberty to apply,
- provide an undertaking as to damages or indicate why no undertaking as to damages is proffered,
- provide any other appropriate undertakings, and
- on an ex parte application, make full disclosure of all material facts.

[2-4120] Strength of case

The threshold condition is that the applicant has a judgment or a good arguable case on an accrued or prospective cause of action. A good arguable cause is "one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes would have a better than 50 per cent chance of success": *Ninemia Maritime Corp v Trave GmbH & Co KG ("The Niedersachsen")* [1984] 1 All ER 398 at 404 per Mustill J. It is a less stringent test than requiring proof on the balance of probabilities: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 per Gleeson CJ; *Frigo v Culhaci* [1998] NSWCA 88.

There are stronger reasons for assisting an applicant after judgment than before judgment: *Babanaft International Co SA v Bassatne* [1989] 2 WLR 232 at 243–244, 254.

> Where the applicant has not yet obtained judgment in its favour the strength of the applicant's case is relevant in two distinct respects — (1) the applicant must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the "threshold", (2) Even where the applicant shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion: per Mustill J in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen")* [1983] 2 Lloyd's Rep 600 at 603.

[2-4130] Danger that a judgment may go unsatisfied

Last reviewed: May 2023

The heart and soul of the freezing order jurisdiction is that there is evidence on which a judge could conclude, consistent with principle, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied for a reason referred to in r 25.14(4) or (5): *Severstal Export GmbH v Bhushan Steel Ltd*, above, at [60]; cf *Patterson v BTR Engineering (Aust) Ltd*, above, at 321–322 per Gleeson CJ.

The existence of the danger may be a matter of inference. The type of evidence from which the court can infer the danger was addressed in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at 671–672: there must be facts from which "a prudent, sensible commercial man, can properly infer a danger of default". A prima facie case of fraudulent misappropriation of assets or serious wrongdoing readily supports the inference that the respondent would not preserve its assets:

Patterson, above, at 321–322 per Gleeson CJ, approved by the NSW Court of Appeal in *Frigo v Culhaci*, above. Mere assertions that the defendant is likely to put assets beyond the plaintiff's reach will not be enough: *Patterson*, above, at 325 per Gleeson CJ. In *Bennett v NSW* [2022] NSWSC 1406 for example, the plaintiff's notice of motion seeking a freezing order was unsuccessful as the judge was not persuaded there were substantial reasons for making the order. The plaintiff failed to demonstrate not only that there had been steps taken to dispose of the property, but also failed to demonstrate that there was any real risk of this occurring: at [23], [33].

[2-4140] The form of order

The form of the order is vital if it is to achieve its permissible object, whilst protecting the respondent and third parties from oppression and prejudice so far as is possible, consistent with the attainment of that object. These considerations make the form of the order complex. The example ex parte order included in PN 14 provides an excellent model.

It has been held that a post-judgment freezing order made by the District Court may be made for such period as is appropriate for a judgment creditor to move promptly to utilise the provisions with respect to writs of execution previously in the *District Court Act* 1973 (see now UCPR Pt 39). Accordingly, such an order should not be made "until further order or payment of the verdict": *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [52]–[54].

[2-4150] Value of assets subject to the restraint

The value of the assets restrained should usually not exceed the maximum amount of the claimant's likely claim including interest and costs: PN 14 [11]. Legally permissible set-offs may be taken into account.

[2-4160] Living, legal and business expenses are excluded

The order should exclude dealings by the respondent with its assets for legitimate purposes; in particular, payment of ordinary living expenses, reasonable legal expenses and business expenses bona fide and properly incurred and dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made: PN 14 [12]. However, where a freezing order does not relate to the whole of the respondent's assets, at an inter partes hearing the respondent may have an evidentiary onus of showing that such expenses cannot be met from unfrozen assets.

[2-4170] Sample orders

(the following is sourced from PN 14 example form at [10])

Exceptions to this order

This order does not prohibit you from:

(a) paying [up to $..... a week/day on] [your ordinary] living expenses;

(b) paying [$.....on] [your reasonable] legal expenses;

(c) dealing with or disposing of any of your assets in the ordinary and proper course of your business, including paying business expenses bona fide and properly incurred; and

(d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a

contract entered into before this order was made, provided that before doing so you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.

Freezing orders should be drafted to remove any ambiguity: *ASIC v One Tech Media Ltd (No 3)* [2018] FCA 1071.

[2-4180] Liberty to apply

Provision should be made for liberty to apply to the court on short notice to vary or discharge the order. An application by a respondent to discharge or vary a freezing or search order should be treated by the court as urgent: PN 14 [10] and example form [3].

[2-4190] Sample orders

(the following is sourced from PN 14 example form at [3])

The Court orders

Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.

[2-4200] Duration of the order

Last reviewed: May 2023

An ex parte order should only be for a very short duration, usually no more than a few days, when the application should be made returnable before the court: PN 14 [9]; also see *Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd* (1991) 22 NSWLR 730 at 731.

[2-4210] Undertaking as to damages

The applicant is normally required to give the usual undertaking as to damages: PN 14 at [16]: *Frigo v Culhaci*, above; *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 311. An undertaking as to damages is normally an incident of an interlocutory order of this nature because in its absence if the proceedings fail, the respondent will be left without remedy. The undertaking as to damages in the PN 14 example form Sch A [1] provides:

[2-4220] Sample orders

Undertakings given to the Court by the applicant

The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

[2-4230] Other undertakings

Other undertakings by an applicant may be attached to a freezing order to prevent the order from causing injustice or being used oppressively. Such undertakings appear in the PN 14 example form Sch A [2]–[8].

[2-4240] Full disclosure on ex parte application

On an ex parte application, the applicant must make full and frank disclosure of all material facts to the court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia: PN 14 [19]. Failure to meet the duty of disclosure provides grounds for subsequently dissolving the order without a hearing on the merits, and may also provide grounds for not continuing an order originally obtained ex parte: *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681–682; *Town and Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543; *Hayden v Teplitzky* (1997) 74 FCR 7; *Garrard t/as Arthur Anderson & Co v Email Furniture Ltd* (1993) 32 NSWLR 662 (CA) at 676; *Paramount Lawyers Pty Ltd v Haffar (No 2)* [2016] NSWSC 906 at [119].

[2-4250] Defence of the application or dissolution or variation of the order

A respondent to an ex parte order who does not wish to submit to the order should oppose its continuance or apply to the judge to discharge it, and should not appeal to the Court of Appeal without first going before the court at first instance for reconsideration of the ex parte order: *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721; *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185 at [26].

As stated in PN 14 [15], the rules of court confirm that certain restrictions expressed in *Siskina, Owners of the Cargo on board the v Distos Compania Naviera S A (The Siskina*) [1979] AC 210 do not apply in this jurisdiction. First, the court may make a freezing order before a cause of action has accrued (a "prospective" cause of action): r 25.14(1)(b). Second, the court may make a free-standing freezing order in aid of foreign proceedings in certain circumstances: see *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141; [2013] NSWCA 102. Third, where there are assets in Australia, service out of Australia is permitted under a new long arm service rule: r 25.16.

[2-4260] Ancillary orders

Rules 25.12 and 25.13 deal with ancillary orders including orders ancillary to a "prospective" freezing order. Ackner LJ said in *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA) at 940 that the court has "power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose".

The purpose of an ancillary order, like the purpose of the freezing order itself, is to prevent the frustration of a court's process in relation to matters coming within its jurisdiction. Orders ancillary to a freezing order include the following:

- a disclosure of assets order
- an order for the cross-examination of a respondent about his or her assets disclosure
- an order requiring the delivery of specified assets
- an order that a respondent direct its bank to disclose information to the applicant
- an order that a respondent restore or pay money to a designated account or into court
- an order restraining the respondent from leaving the jurisdiction for a period

- an order appointing a receiver to the respondent's assets
- an order for the transfer of assets from one foreign jurisdiction to another
- a Norwich order (*Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133), or
- a search order.

The most common form of order is that the respondent disclose the nature, location and details of its assets: PN 14[8]. The reasons why an assets disclosure order is important to the efficacy of a freezing order were stated in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1587 at [20], quoting P Biscoe, *Mareva and Anton Piller Orders: Freezing and Search Orders*, LexisNexis Butterworths, Australia, 2005:

> … [F]irst, disclosure of the assets upon which the freezing order operates makes it more difficult for a respondent surreptitiously to disobey the freezing order. Secondly, disclosure identifies third parties such as banks who have custody of the assets and enables notice of the order to be given to them so as to bind them to the order, for third parties will be guilty of contempt of court if they knowingly assist a respondent to breach the order. Thirdly, disclosure may enable the freezing order to be framed by reference to specific assets rather than as a maximum sum order, thereby minimising oppression to the respondent, and unnecessary exposure of the applicant to risk under its undertaking as to damages. Fourthly, disclosure assists an applicant to make a rational decision whether to continue its undertaking as to damages.

[2-4270] Cross-examination

It has been said that the touchstone for determining whether leave should be given to cross-examine a deponent on an assets disclosure affidavit is if it would render the freezing order more efficacious and that a relevant consideration is whether there has been failure to disclose assets completely or promptly: *Universal Music Pty Ltd v Sharman License Holdings*, above, at [28]. This has been quoted with approval: *Hathway (Liquidator) Re Tightrope Retail Pty Ltd (in Liq) v Tripolitis* [2015] FCA 1003.

[2-4280] Third parties

The expression "third parties" is used here in the sense of persons against whom no final substantive relief is claimed. A freezing order may be made against or served on a third party who holds or controls a respondent's assets beneficially owned by a respondent, such as a bank or warehouse. A freezing order may be made against a third party who might be liable to disgorge property or otherwise contribute to the assets of a substantive respondent.

If a substantive respondent disobeys a freezing order, its efficacy is dependent upon compliance by third parties. Unlike a money judgment, the effect of a freezing order is not confined to the parties but extends to a third party with notice of the order or against whom a freezing order is also made.

A third party is affected by a freezing order in two cases:

(a) the order is made against the third party, or

(b) although the order is not made against the third party, notice of the order is given to the third party.

In the first case the third party is bound by the order. In the second case the third party is not bound by the order but will be guilty of contempt of court, for which it may be penalised by committal, sequestration or fine, if it does anything to assist its breach because it would thereby be interfering with or obstructing the administration of justice.

The leading Australian case on freezing orders against third parties is *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. The guiding principles for determining whether to make a freezing order against a third party are found in the joint judgment at [54], [57]. In *Cardile,* the third parties were not joined as parties to the proceedings. The *Cardile* principles are reflected in r 25.14(5) and PN 14.

Third parties affected by a freezing order are entitled to protection through the applicant's undertaking as to damages and as to their costs incurred in complying with orders: r 25.17. Provisions for their protection have been developed in the example form of order.

Where a third party asserts that property under its control is its property, the court may order a trial of the preliminary issue of ownership.

[2-4290] Transnational freezing orders

A freezing order is transnational if it relates to (a) foreign assets where the order is to support enforcement of a domestic judgment or prospective judgment even before the commencement of substantive proceedings (commonly called a worldwide order); or (b) domestic assets where the order is to support enforcement of a foreign judgment or prospective judgment even before the commencement of substantive foreign proceedings: see *Severstal Export GmbH v Bhushan Steel Ltd*, above; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1. The transnational freezing order is significant because of transnational business activity, the multinational corporation and the ease with which persons and assets can move or be moved between nations.

In *PT Bayan Resources*, above, the High Court considered a challenge by a respondent to a freezing order. The issue was whether the freezing order made in relation to a prospective foreign judgment was within the inherent power of the Western Australian Supreme Court. The court held it was. It was accepted that the prospective judgment of the foreign court, if ordered, would be registerable in Australia under the *Foreign Judgments Act* 1991 (Cth).

The plurality in the High Court stated as follows at [43] and [46] in relation to the doctrinal basis of the inherent power of State superior courts in Australia:

> [43] … It is well established by decisions of this Court that the inherent power of the Supreme Court of a State includes the power to make such orders as that Court may determine to be appropriate "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction". And it has been noted more than once in this Court that a freezing order is "the paradigm example of an order to prevent the frustration of a court's process".
>
> …
>
> [46] … Even where a court makes a freezing order in circumstances in which a substantive proceeding in that court has commenced or is imminent, the process which the order is designed to protect is "a prospective enforcement process". That description is drawn from the explanation of the nature of a freezing order given by Lord Nicholls of Birkenhead in *Mercedes Benz AG v Leiduck*. That passage was cited with approval by five members of this Court in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* in a passage which (subject to presently immaterial qualifications) was itself adopted as a correct statement of principle by four members of this Court in *Cardile v LED Builders Pty Ltd*. Lord Nicholls explained:
>
> > Although normally granted in the proceedings in which the judgment is being sought, [a freezing order] is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained.

The High Court held the State Supreme Court had inherent power to make the order as the making of the order was "to protect a process of registration and enforcement in the Supreme Court which is

in prospect of being invoked": at [50]. An application to a State Supreme Court for a freezing order in relation to a prospective judgment of a foreign court, which when made would be registrable by order of the Supreme Court under the *Foreign Judgments Act* or an application for registration of a foreign judgment under the *Foreign Judgments Act* was held to be a proceeding in a matter within the federal jurisdiction of the Supreme Court: *PT Bayan Resources*, above, at [51]–[55]; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 90 ALJR 228; [2015] HCA 43 at [185].

Where transnational elements are present in an application it is necessary to address three questions. First, whether the court has personal jurisdiction over the respondent. Second, if so, whether there is jurisdiction to make a freezing order. Third, if so, whether there are difficulties of conflict of laws, comity, enforceability or other relevant matters which affect the discretion whether to make the order or the form of the order.

In relation to the first question, an important long arm service rule provides: "An application for a freezing order or an ancillary order may be served on a person who is outside Australia (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are within the jurisdiction of the court": r 25.16.

In relation to the second question, jurisdiction to make a freezing order is explained in r 25.14 which deals with specific circumstances, and in r 25.15 which makes clear that nothing in Div 2 diminishes the court's implied, inherent or statutory jurisdiction. The court has freezing order jurisdiction in the case of a judgment of another court — which may be a foreign court — if there is "sufficient prospect" that the judgment will be registered in or enforced by the court: r 25.14(2). The court also has freezing order jurisdiction where the applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in the court or in another court — which may include a foreign court — if there is sufficient prospect that the other court will give judgment in favour of the applicant and sufficient prospect that the judgment will be registered in or enforced by the court: r 25.14(1)(b) and (3).

Even prior to introduction of the current rules, it had been held that the court has implied or inherent jurisdiction to make an order in aid of the enforcement of a foreign judgment, whether or not that judgment had yet been obtained: *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742, per Campbell J; *Celtic Resources Holdings PLC v Arduina Holding BV* (2006) 32 WAR 276, per Hasluck J.

The making of a freezing order in respect of foreign assets is a serious step which ordinarily requires an undertaking by the applicant not to enforce it without the permission of the court. Such an undertaking appears in the example form in PN 14 Sch A [7].

Provisions for worldwide freezing orders in the example form make it clear that they impose no liability on third parties, such as banks, outside Australia (except third parties who are directors, officers, employees and agents of the respondent to the application) and are not subject to the jurisdiction of the court: PN 14, example form [16].

The English Court of Appeal laid down the "*Dadourian* guidelines" for the exercise of the court's discretion to grant permission to enforce a transnational freezing order abroad in *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at 2502 [25]:

> *Guideline 1*: The principle applying to the grant of permission to enforce a WFO [worldwide freezing order] abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.
>
> *Guideline 2*: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

These principles were followed in *Luo v Zhai (No 3)* [2015] FCA 5 at [12].

Rules

- UCPR rr 25.10–25.17

Further references

- P Biscoe, *Freezing and Search Orders: Mareva and Anton Piller Orders*, 2nd edn, LexisNexis Butterworths, Australia, 2008

Practice Note

- Practice Note SC Gen 14 (16 June 2010 version).

[The next page is 1765]

Persons under legal incapacity

[2-4600] Definition

Last reviewed: May 2023

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

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

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

For a discussion of the definition of a person under a legal incapacity and how a challenge to a claimed state of such incapacity should be made, see *Doulaveras v Daher* [2009] NSWCA 58 at [76]–[159]. For a useful summary of authorities, see also *Perera v Alpha Westmead Private Hospital (t/as Westmead Private Hospital)* [2022] NSWSC 571 at [39]–[47].

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

[2-4610] Commencing proceedings

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

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

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

One purpose of the appointment of a tutor is to provide a person answerable to the defendant for the costs of the litigation: *NSW Insurance Ministerial Corp v Abualfoul* (1999) 94 FCR 247 at [28].

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

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

[2-4620] Defending proceedings

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

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

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

[2-4630] Tutors/Guardians ad litem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2-4660] The end of legal incapacity

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

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

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

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

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

The tutor for a plaintiff is liable to pay the costs of a successful defendant. That defendant may enforce a costs order directly against a tutor where the plaintiff is legally incapacitated: *Poy v Darcey* (1898) 15 WN (NSW) 161; *Radford v Cavanagh* [1899] 15 WN (NSW) 226; *NSW Insurance Ministerial Corp v Abualfoul* (1999) 94 FCR 247.

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

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

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

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

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

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

[2-4700] Compromise

Last reviewed: May 2023

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

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

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

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

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

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

The commencement of proceedings using a tutor does not itself establish incapacity for the purposes of s 76. The matter needs to be determined at the time of the proposed settlement and not at some earlier point in time: *Mao v AMP Superannuation Ltd* [2017] NSWSC 987 at [143]; *Perera v Alpha Westmead Private Hospital (t/as Westmead Private Hospital)* [2022] NSWSC 571 at [58], [91]–[92].

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

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

[2-4710] NSW Trustee and Guardian Act 2009

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

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

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

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

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

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

[2-4720] Directions to tutor

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

[2-4730] Money recovered

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

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

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

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

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

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

[2-4740] Sample orders

Removal of tutor

I order:

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

Appointment of tutor and addition of party

I order:

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

Approval of settlement

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

By consent, I make the following orders:

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

   OR

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

Notes

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

Legislation

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

Rules

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

[The next page is 1825]

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

Last reviewed: May 2023

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] NSWSC 664 at [34]; *Ward v Westpac Banking Corporation Ltd* [2023] NSWCA 11.

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] FCA 1279 at [12].

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

Last reviewed: May 2023

The relevant factors are set out by Beazley ACJ in *Treloar Constructions Pty Ltd v McMillan* [2016] NSWCA 302 at [9]–[15] (see also *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] NSWSC 664 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]. The issue of the admissibility of unaudited financial statements, in the context of security for costs applications, has arisen in a number of cases including *Strategic Financial and Project Services Pty Ltd v Bank of China Limited* [2009] FCA 604 at [35]; nevertheless, in the case of a small company not required to have audited financial statements, such evidence may be permitted: *A40 Construction and Maintenance Group Pty Ltd v Smith (No 2)* [2022] VSC 72 at [26]–[31].

Where 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) 488 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] FCA 575 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] FCA 1279 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] FCA 43. 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] NSWSC 664 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] NSWSC 664 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

Last reviewed: May 2023

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. There is no express power in the UCPR for the setting aside or varying of security for costs orders, but the general power of the court to set aside or vary orders may be relied upon: *Levy v Bablis* [2012] NSWCA 128; *Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468; [2006] 1 WLR 596.

Where an order for security for costs has been made and an order for further security is sought, the moving party must establish a material change in circumstances: *Misthold Pty Ltd v NSW Historic Sites and Railway Heritage Company Pty Ltd* [2022] NSWSC 42; *T & H Pty Ltd v Nguyen* [2022] NSWCA 180. Overlooked or underestimated costs may be insufficient to establish a material change: *SSPeetham Pty Ltd as trustee for the CHB CDI Trust v Marcos Accountants Pty Ltd* [2020] NSWSC 378 at [19].

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).

[2-5997] Applications for release of security

Last reviewed: May 2023

Either party may seek release of security at any stage of the proceedings (including on appeal: *Michael Wilson & Partners Ltd v Emmott (No 2)* [2022] NSWCA 48). Such applications are generally made on the basis of asserted success (or partial success) in the litigation the subject of the security orders; the unsuccessful party may respond by seeking a stay of the release: *Euromark Ltd v Smash Enterprises Pty Ltd (No 2)* [2021] VSC 393. It is not necessary for the application to be deferred pending the assessment of costs where the evidence suggests that the amount of costs is likely to exceed the security: *Boz One Pty Ltd v McLellan* [2015] VSCA 145.

For an example, see the form of orders in *Michael Wilson & Partners Ltd v Emmott (No 2)*, as set out in the reasons of Brereton JA.

[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, accessed 24/4/23
- 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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Tendency and coincidence

Evidence Act 1995, Pt 3.6 (ss 94–101); *Criminal Procedure Act* 1986, s 161A

[4-1100] General

Relevant definitions The term "tendency evidence" is defined in the Dictionary to the *Evidence Act*. The definition does so by reference to the evidence to which s 97(1) refers — evidence "that a party seeks to have adduced for the purpose referred to" in s 97(1), which is to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind. The "tendency rule" is defined by the Dictionary as that contained in s 97(1).

The term "coincidence evidence" is similarly defined in the Dictionary by reference to the evidence to which the "coincidence rule" in s 98(1) refers — evidence "that a party seeks to have adduced for the purpose referred to" in s 98(1), which is to prove that, because of the improbability of two or more substantially and relevantly similar events occurring in substantially similar circumstances coincidentally, a person did a particular act or had a particular state of mind. The "coincidence rule" is defined by the Dictionary as that contained in s 98(1).

Both tendency evidence (previously called propensity evidence) and coincidence evidence (previously called similar fact evidence) may be described as evidence that:

- a person has acted in a particular way on another or other occasions, or
- that person has or had a particular state of mind on another or other occasions,

from which evidence, a party seeks to have the tribunal of fact draw an inference this person also acted in that way or had that state of mind on the occasion in issue in the litigation. If that is the use to which the evidence is sought to be put, it is caught by, respectively, the tendency rule (see s 97 at [4-1140]) or the coincidence rule (see s 98 at [4-1150]).

Another definition in the Dictionary that is relevant to both the tendency rule and the coincidence rule, is that of "probative value" which, using the language of s 55 (Relevant evidence), means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Relevance of common law Because the tendency and coincidence rules are intended to cover the field previously occupied by the common law relating to propensity and similar fact evidence, it was at first thought to be permissible to turn for guidance to the common law decisions when applying Pt 3.6 of the *Evidence Act*; see, for example, *R v Martin* [2000] NSWCCA 332 at [59]. However, it has now been conclusively held that the statutory provisions in Pt 3.6 relating to these issues were intended to cover the relevant field to the exclusion of the common law principles previously applicable: *R v Ellis* (2003) 58 NSWLR 700 at [74]–[84] (a bench of five judges). When revoking the previous grant of special leave to appeal in that case, the High Court expressly agreed with the construction of the *Evidence Act* adopted by the Court of Criminal Appeal: *Ellis v The Queen* [2004] HCATrans 488 (a bench of seven judges). This case is discussed in relation to s 101 at [4-1180]. This view has now been confirmed in *IMM v The Queen* (2016) 257 CLR 300.

Issues in relation to tendency evidence arising under Pt 3.6

When evidence is tendered by the Crown in criminal proceedings as demonstrating a tendency by the accused, the following issues arise:

(i) Is the evidence *relevant* to proof of that tendency — that is, if accepted, could it rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings (s 55)?

(ii) If so, is the evidence adduced to prove that the accused has or had a tendency to act in a particular way or to have a particular state of mind (s 97)?

(iii) If so, has reasonable notice been given of the intention to adduce that evidence (s 97(1)(a)); and, if so, does the evidence, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value (s 97(1)(b))?

(iv) If so, does that probative value of the evidence substantially outweigh any prejudicial effect the evidence may have on the accused (s 101(2)); *R v MM* [2004] NSWCCA 364 at [59]?; the application for special leave to appeal refused by the High Court was not directed to this issue: [2005] HCATrans 240.

[4-1110] Application — s 94

Part 3.6 is not concerned with evidence that relates only to the credibility of a witness. That issue is dealt with in Pt 3.7 (Credibility). Nor does it apply to evidence of the character, reputation or conduct of a person, or a tendency that person has or had, where that character, reputation, conduct or tendency is itself a fact in issue in the proceedings.

Whether facts relevant to a fact in issue (such as in a circumstantial evidence case) are themselves facts in issue was left undetermined by the High Court in *Cornwell v The Queen* (2007) 231 CLR 260 at [80].

Examples where such evidence is itself a fact in issue A person's character may be raised as an issue in a criminal trial as demonstrating that he or she was unlikely to have committed the offence charged; this is dealt with under Pt 3.8 (Character). A person's reputation is a fact in issue in an action for defamation; such evidence is not the same as character evidence to which s 110 applies, and Pt 3.2 (Hearsay) may be relevant to it. Conduct or tendency may be a fact in issue in a criminal trial where it is relied on by the Crown to establish that the accused had deliberately, rather than accidentally, harmed the complainant: see, for example, *R v Joiner* (2002) 133 A Crim R 90 (special leave to appeal refused: *Joiner v The Queen* [2003] HCATrans 278). In that case, three females with whom the accused had previously lived gave evidence of his violent reaction towards them in situations where there was either no or little provocation, and this evidence was permitted in order to establish that the injuries causing the death of the fourth female with whom he had lived were inflicted by him deliberately rather than in an accident as he had claimed. The criticism in *R v Ellis*, above, of the reliance of the judgment in *Joiner* on the pre-*Evidence Act* decision of *Pfennig v The Queen* (1995) 182 CLR 461 does not affect the relevance of s 94 to the facts of that case.

Note that s 94(2) provides that Pt 3.6 (Tendency and Coincidence) does not apply to proceedings relating to bail or sentencing.

Section 94 was amended by the *Evidence Amendment (Tendency and Coincidence) Act* 2020 (NSW) (which affects hearings which commenced from 1 July 2020) to insert new subs (4) and (5), following recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. Section 94(4) provides that any principle or rule of the common law or equity preventing or restricting the admissibility of tendency or coincidence evidence is not relevant when applying Pt 3.6.

Note, the amendments have currently been enacted in NSW only, although the Council of Attorneys-General has agreed to implement a Model Bill to amend the ss 97 and 101 tests. The Second Reading Speech makes clear that the provisions apply to a hearing that has commenced on or after that date. The reforms do not apply to or affect criminal proceedings that have already begun (Second Reading Speech, Legislative Assembly, *Debates*, p 1911).

New s 94(4) is consistent with the approach taken by the High Court in *The Queen v Denis Bauer (a pseudonym)* (2018) 266 CLR 56 at [70]. In a single judgment, the court said, "[a]t common law, there is a need for separate judicial consideration of the risk of contamination, concoction or collusion, and a requirement that evidence be excluded if there is a reasonable possibility of it being affected by contamination, concoction or collusion. That requirement exists because of the common

law rule of exclusion that, because tendency evidence is inadmissible unless there is no reasonable view of it consistent with innocence, tendency evidence is not admissible if there is a realistic possibility of it being affected by contamination, concoction or collusion. Under the *Evidence Act* the position is different. The replacement of the *Hoch* test (*Hoch v The Queen* (1998) 165 CLR 292) with the less demanding s 97 criteria of significant probative value means that the common law rule of exclusion has no application. Under the *Evidence Act*, provided evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence."

Section 94(5) of the Act provides that in determining the probative value of tendency or coincidence evidence, the court must not have regard to the possibility the evidence may be the result of collusion, concoction or contamination. Previously, *The Queen v Bauer* at [69]–[70] had exempted from an exclusion of consideration of credibility and reliability a risk of contamination, concoction or collusion that is so great it would not be open to the jury rationally to accept the evidence. In the Second Reading Speech (Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1917), the Attorney General included: "Proposed section 94(5) … closes that small gap left open by the courts …"

[4-1120] Use of evidence for other purposes — s 95

Whether evidence of tendency is relevant for another purpose depends on whether or not proof of the tendency of the person in question to act in a particular way or to have a particular state of mind is a necessary link in the reasoning making the evidence relevant to a fact in issue. If it is such a necessary link, the tendency evidence is tendered for a tendency purpose, and the evidence is caught by the tendency rule in s 97: *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 at [65]–[67]. In that case, it was held that evidence of a system (of making particular representations), in the absence of evidence to the contrary, readily supports an inference that the system was implemented in the particular case, and therefore made it more likely that the fact in issue (the making of the representation) occurred, independently of the party's tendency to act in that way; it was therefore admissible to prove that fact in issue. See also *R v Cittadini* (2008) 189 A Crim R 492 (discussed under s 97) and *ACCC v 4WD Systems Pty Ltd* [2003] FCA 850 at [49].

It would appear that the same test would be applicable in relation to coincidence evidence.

HML v The Queen In *HML v The Queen* (2008) 235 CLR 334, an appeal from Western Australia where the common law applies and not the *Uniform Evidence Act*, the High Court gave extensive, but unfortunately not always authoritative, consideration to:

- the admissibility of other conduct of the accused of a tendency or coincidence type,
- the use to which such evidence might be put, and
- the burden of proof in relation to that evidence.

These are all issues arising under s 95 (as distinct from under s 101).

Relevance At common law, where the transaction of which the crime charged in the proceedings formed an integral part could not be truly understood without other evidence that may well serve to explain it, that other evidence is admissible for that purpose: *O'Leary v The King* (1946) 73 CLR 566, at 577–578. That common law principle has not been abolished by the *Evidence Act*; indeed, it is maintained by s 9(1) of that Act: *Adam v R* (1999) 106 A Crim R 510 at [25]. (This was Richard Adam, the brother of the appellant Gilbert Adam in *Adam v The Queen* (2001) 207 CLR 96; the charges arose out of the same incident.)

Such evidence "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding" (s 55): *R v Adam*, above, at [26]. It is not

tendency evidence within Pt 3.6, as it would be tendered for non-tendency purpose: ibid at [27]. Such evidence, together with other evidence of conduct sufficiently proximate to the time of the crime charged as to permit an inference to be drawn that the defendant had the same continuing state of mind at that time, would be admissible, as it is not evidence of conduct by the defendant "in the past" (*Makin v Attorney-General (NSW)* [1894] AC 57 (PC) at 65), nor is it evidence of "disposition" or "propensity" or "inclination" (*Markby v The Queen* (1978) 140 CLR 108 at 116): *R v Adam* at [28]–[30]. If, however, such evidence is tendered for a tendency purpose or involves tendency reasoning, its use will be caught by s 97: *R v Mostyn* (2004) 145 A Crim R 304 at [116]–[118]. See also **Context evidence**, below.

In *HML v The Queen*, in which three appeals arising from sexual assault cases were heard together, it was held that other sexual conduct by the accused was admissible for the following non-tendency or coincidence purposes:

(a) to explain a statement or event that would otherwise appear curious or unlikely (at [6], [495], [505]),

(b) as affecting the plausibility of other evidence or to assess the credibility and coherence of the complainant's evidence (at [6], [155]–[156]),

(c) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]),

(d) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]),

(e) as providing a context, helpful or even necessary, for understanding the evidence (at [6], [494]),

(f) to overcome a false impression that the event was an isolated one, that the offence happened "out of the blue", or to explain why the complainant submitted, or why the accused was confident that she would submit or why she did not show distress or resentment or complain promptly, or to answer inferences against the complainant that might otherwise have been drawn by the jury (at [9], [390]–[391], [394], [431] (where the acts are closely and inextricably mixed up with the history of the offence), [500], [513]),

(g) to ensure that the jury are not required to decide issues in a vacuum (at [428], [498]),

(h) as negativing issues raised such as accident or mistake (at [430]), and

(i) as part of the res gestae (at [24], [495]–[497]).

More recently, the NSW Court of Criminal Appeal revisited the circumstances in which tendency (and coincidence) evidence will be admissible in a criminal trial: *Saoud v R* (2014) 87 NSWLR 481. It also considered the extent to which "similarities" in conduct will be relevant to the analysis required by the statutory process in s 97 and the nature of the test for exclusions in s 101.

Similarly, other examples of "non-tendency" evidence to which character, reputation, conduct or tendency may be relevant, and of "non-coincidence" evidence, are usefully given by S Odgers, *Uniform Evidence Law* (13th edn) at [EA.97.240] They are:

- evidence showing opportunity (and thereby rebutting an alibi, if such issue is raised)
- evidence of system (where the system was put into place to produce a particular outcome)
- evidence of other similar crimes identifying the defendant with the crime charged, and
- evidence of "relationship" (where the evidence is not relied on for a tendency inference).

See [4-1125] **Context evidence** below.

Effect of s 95 Odgers also makes the important point, at [EA.95.60], that the effect of s 95 is to take the opposite approach to that taken in Pt 3.2 in relation to hearsay evidence, where s 60 provides that evidence of a previous representation admitted for a non-hearsay purpose may establish the truth of that representation. The effect of s 95 is that:

- if the evidence suggests a particular tendency on the part of the defendant or of the party against whom it is tendered to act in a particular way or to have a particular state of mind, or if it suggests such matters by way of coincidence reasoning, and
- if it is admitted into evidence to establish some other relevant issue,

that evidence must not be used by the tribunal of fact to establish that tendency or to adopt coincidence reasoning. An example relating to the defendant's state of mind is *R v Adam* at [20]–[30], discussed in relation to the hearsay rule (s 59) in Pt 3.2.

Direction to be given Where tendency evidence has been admitted for a purpose other than to establish tendency, the judge should give a direction to the jury identifying the specific issue to which it is said to be relevant and to warn the jury, in stringent terms, that it is not to be used by them as demonstrating that the defendant is the sort of person who, having acted in the way (or had the state of mind) demonstrated in this evidence, acted in the same way (or had the same state of mind) as alleged against him in the instant case. Such a direction should be given as soon as the evidence has been given and again in the summing-up: *R v Beserick* (1993) 30 NSWLR 510 at 516; *R v Greenham* [1999] NSWCCA 8 at [28]–[29]; *R v ATM* [2000] NSWCCA 475 at [76]–[77]; *R v Chan* (2002) 131 A Crim R 66 at [50]. A judge hearing a civil case without a jury must also make it clear the use to which such evidence is being put in that case: *Redpath v Hadid* (2004) 41 MVR 382 at [43], [65]–[70].

The failure to give such a direction has led to a conviction being set aside even where the direction had not been sought at the trial, where there was a real risk that the jury would have used the evidence for the impermissible purpose: *R v Cornelissen* [2004] NSWCCA 449 at [72]–[74].

Evidence of a lie told by the accused to the police in relation to an issue quite discrete from the issues in a sexual assault case was held to have been wrongly left by the trial judge as supporting the Crown case that the accused had deceived the complainant into accepting his invitation to join him: *R v Skaf* [2004] NSWCCA 37 (reported on other issues at (2004) 60 NSWLR 86) at [159]–[164]).

State of mind In *R v Walters* [2002] NSWCCA 291, a case involving multiple charges of defrauding the Commonwealth of group tax payable by a number of companies of which the accused was the principal, and in which the issue of the accused's intention was common to each charge, the trial judge commented that the accused's accumulating knowledge and experience over the time to which the charges related made it logically more difficult for him to say that he did not understand what the situation was. It was argued on appeal that separate trials should have been ordered to avoid any tendency reasoning as to the accused's state of mind, but it was held (at [48]–[50]) that the evidence in relation to the early counts was highly relevant and highly probative of the intention of the accused in relation to the later counts, and that a trial in which the Crown was deprived of the opportunity to rely on that evidence would have been unfair to the prosecution (on behalf of the community). Special leave to appeal was refused: *Walters v The Queen* [2002] HCATrans S277.

[4-1125] Context evidence

In sexual assault cases, evidence of the accused's sexual interest or attraction for the complainant (previously described as "guilty passion", a term derived from *R v Beserick* (1993) 30 NSWLR 510, for the complainant) may be admitted: *R v AN* (2000) 117 A Crim R 176 at [36]–[53]] ff. The *Evidence Act* does not specifically deal with evidence of this nature. Odgers observes that it will be necessary to identify with "some precision" what the tendering party proposes to establish by the evidence to avoid the application of s 97 (Odgers, 13th edn, [EA.97.60]).

The prosecution may lead evidence of the relationship between the complainant and the accused for the non-tendency purpose of placing the evidence of the specific act charged into its true and realistic context — in order to assist the jury to appreciate the full significance of what would appear to be an isolated act occurring without any apparent reason and to establish a sexual relationship that makes the complainant's evidence of that specific act charged more likely to be true. In such a case, a direction must make it clear that such evidence may only be taken into account if the jury is satisfied that the conduct to which that evidence refers did take place, and that it may be put to that limited use only; it must not be used as establishing tendency: *R v Hagerty* (2004) 145 A Crim R 138 at [23]; *Qualtieri v R*, above, at [73]–[81], [123]; *Rodden v R* (2008) 182 A Crim R 227 at [123]–[125]; *RG v R* [2010] NSWCCA 173 at [38].

See also *Johnson v The Queen* (2018) 92 ALJR 1018 at [2], decided under s 34P, *Evidence Act* 1929, SA, which permits the admission of "discreditable conduct evidence" where its probative value outweighs its prejudicial effect on the accused. For non-Evidence Act cases, see *BRS v The Queen* (1997) 191 CLR 275 at 293–295, 301–302, 308, 326–328 and *Gipp v The Queen* (1998) 194 CLR 106 at [10], [77], [81], [142], [174] ff, which similarly require such directions to be given in relation to propensity and similar fact evidence — the common law concepts which tendency and coincidence evidence have replaced.

What was originally called "relationship" evidence should now be called "context evidence" in sexual assault cases: *Qualtieri v R* (2006) 171 A Crim R 463 at [80]–[81], [112]–[113], [124]; *DJV v R* (2008) 200 A Crim R 206 at [3].

The judge should avoid using the term "uncharged acts" in relation to evidence of this nature for whatever purpose it is being admitted: *HML v The Queen* (2008) 235 CLR 334 at [1], [129], [251], [399], [492]; *KSC v R* [2012] NSWCCA 179 at [64].

[4-1130] Failure to act — s 96

The tendency rule, which is the subject of s 97, refers to a person's tendency "to act in a particular way, or to have a particular state of mind". Similarly, the coincidence rule, which is the subject of s 98, refers to proof that a person "did a particular act or had a particular state of mind". That is the context in which s 96 should be considered. It provides:

> A reference in this Part to doing an act includes a reference to failing to do that act.

Section 96 does not, however, refer to the negative of having a particular state of mind, yet the presence or absence of foresight of the consequences of a person's conduct (that is, the absence of a particular state of mind) may be relevant to prove that person committed an offence, and tendency or coincidence evidence could become relevant to that issue.

Anderson et al, *The New Law of Evidence*, 2009, LexisNexis Butterworths, Australia, notes the omission of any reference in the section to a negative state of mind, but draws no conclusions from that omission. Odgers, in *Uniform Evidence Law* (13th edn at [EA.96.60]), asserts that, despite the limited language of the section, "it is also intended that evidence of the absence of a particular state of mind … will be subject to this Part". Section 96 is not the subject of any discussion in either of the reports of the Australian Law Reform Commission on Evidence (*ALRC 26* and *ALRC 38*). There does not appear to have been any judicial consideration given to its terms.

Pt 3.6 covers the field The Court of Criminal Appeal (a bench of five judges) has held that Pt 3.6 prescribes a regime for tendency and coincidence evidence which lays down a set of principles to cover the field to the exclusion of common law principles previously applicable, and that s 101(2) (which provides further restrictions on tendency and coincidence evidence in criminal cases by precluding such evidence where its probative value does not substantially outweigh any prejudicial effect it may have) must be interpreted according to its terms: *R v Ellis* (2003) 58 NSWLR 700 at [72], [83]–[84], [90], [95]; the High Court has expressly agreed with that construction: *Ellis v The Queen* [2004] HCATrans 488.

Section 96 (which falls within the same Part of the *Evidence Act* as s 101), if similarly strictly interpreted only in accordance with its terms, would appear to leave an inexplicable omission in the otherwise clear intention for Pt 3.6 to cover the field. It is suggested that, until a binding decision is given in relation to s 96, some weight should be accorded to the participation of Mr Odgers in the Australian Law Reform Commission Evidence Reference (as a Senior Law Reform Officer) over almost the whole of the period the reference was before it, and to his view that, in its context, s 96 should be interpreted as including the absence of a particular state of mind.

[4-1140] The tendency rule — s 97

Last reviewed: May 2023

Tendency evidence is tendered to prove (by inference) that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in that particular way (or had that particular state of mind): *R v Cittadini* (2008) 189 A Crim R 492 at [23], following *Gardiner v R* (2006) 162 A Crim R 233 at [124].

In *Cittadini*, it was held (at [26]–[35]) that, where the case of a party is that an injury occurred because of an inadequate and negligent supervision and quality control in the construction of an object, proof that the other party failed to institute an adequate and safe system of supervision and quality control in operation in relation to defects in the construction of that object other than the defect that caused the injury is admissible to ground an inference that such an inadequate and negligent system of supervision and quality control existed also in relation to the defect that did cause the injury. Such a case does not involve tendency reasoning, and the evidence in relation to the other defects is admissible for a use other than to prove a tendency to supervise or exercise quality control inadequately or negligently. The distinction is that such evidence is adduced in order to establish, by inference, the *fact* of the inadequate and negligent system, and not the *tendency* to have such a system.

Similarly, evidence that customers in a nightclub tended to take glasses on to the dance floor establishes a frequent, if not constant, danger created by the presence of the glass on the dance floor which should have alerted the owner of the nightclub to the need to consider whether precautions should have been taken to prevent injury to customers, and it is not tendency evidence: *Caftor Pty Ltd t/as Mooseheads Bar & Cafe v Kook* (2007) Aust Torts Reports 81-914 at [38].

Bauer v The Queen: admissibility of uncharged acts as tendency evidence

In *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at [48] the High Court determined that a complainant's evidence of an accused's acts of sexual misconduct not charged on the indictment in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant, whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* (*IMM v The Queen* (2016) 257 CLR 300: see below under "significant probative value") or exhibit a special, particular or unusual feature of the kind described in *Hughes* (*Hughes v The Queen* (2017) 263 CLR 338).

The juridical basis of cross-admissibility of evidence of charged acts and uncharged acts in cases where the conduct is not too far separated in time and the conduct is of a similar nature, rests on the "very high probative value" of that kind of evidence resulting from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, s/he will seek to gratify his or her sexual attraction by engaging in sexual acts of various kinds with that person: at [50]–[51], [60]; *HML v The Queen* (2008) 235 CLR 334 at [109]. The fact the evidence of uncharged acts is given by a complainant does

not, of itself, mean it lacks significant probative value. Once the evidence is admitted, and assuming it is accepted, it adds a further element to the process of reasoning to guilt and so, therefore, may be seen as significantly probative of the accused's guilt of the offences: *Bauer* at [51].

The plurality's reasoning in *IMM* was limited to the case under consideration. *IMM* should not be regarded as implying any departure from the majority opinions expressed in *HML* as to the high probative value which is ordinarily to be attributed to a complainant's evidence of uncharged sexual acts for the purposes of s 97: at [52], [55].

The majority's conclusion in *Hughes*, that particular features of offending imbued the subject tendency evidence with significant probative value, reflected the process of probability reasoning applying to cases involving multiple sexual offences and multiple complainants. The reference in *IMM* to "special features" of an alleged uncharged act with respect to a single complainant is a different process of reasoning: at [57]. In cases involving multiple complainants, where the question is whether evidence of a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that there must ordinarily be some feature of, or about, the offending linking the two together. If there is some common feature, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true: at [58]. By contrast, in a single complainant sexual offences case, there is ordinarily no need for a particular feature of the offending to render evidence of one offence significantly probative of the other: at [60].

The High Court set out at [86] the following directions which should ordinarily be given to a jury in a single complainant sexual offences case where the Crown is permitted to adduce evidence of "uncharged acts" as evidence the accused had a sexual interest in the complainant and a tendency to act upon it:

- The trial judge should direct the jury that the Crown argues the evidence establishes the accused had a sexual interest in the complainant and a tendency to act upon it which the Crown contends makes it more likely the accused committed the charged offence/s.
- If the Crown also relies on the evidence as putting the charged offence/s in context in some other identified fashion or respects, the jury should be further directed that the Crown contends the evidence also serves to put the charged offence/s in context and identify the manner or respects in which the Crown contends it does so.
- The trial judge should stress the evidence of uncharged acts has been admitted for those purposes and, if the jury are persuaded by it, that it is open to them to use the evidence in those ways but no other.
- However, the trial judge should further stress that it is not enough to convict the accused that the jury may be satisfied of the commission of the uncharged acts or that they establish the accused had a sexual interest in the complainant on which the accused had acted in the past; it remains that the jury cannot find the accused guilty of any charged offence unless upon their consideration of all the evidence relevant to the charge they are satisfied of the accused's guilt of that offence beyond reasonable doubt.

Trial judges should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt: *Bauer* at [86]. Contrary to the practice in NSW, trial judges in NSW should no longer follow *DJV v The Queen* (2008) 200 A Crim R 206 at [30]; *FDP v R* (2008) 74 NSWLR 645 at [38] and *DJS v R* [2010] NSWCCA 200 at [54]–[55].

Notice and significant probative value Where, however, evidence of the character, reputation or conduct of a person, or of a tendency that person has or had (whether or not because of that person's

character) is adduced in order to prove those matters, it is not admissible if (a) reasonable notice of an intention to adduce it has not been given, or (b) the court thinks that such evidence would not (either alone or having regard to other evidence adduced or to be adduced by the party by whom this evidence is tendered) have significant probative value. The section applies to both civil and criminal proceedings.

The three Law Reform Commissions, in their Reports (*ALRC 102*, NSWLR *112*), gave consideration to the suggestions that s 97 goes either too far or not far enough in allowing this type of evidence, and acknowledged that such evidence can be highly prejudicial and productive of the very grave risk of wrongful conviction (par 11.15 et seq). They emphasised that the admission of such evidence was not simply to prove the relevant tendency; the admissibility of such evidence in all proceedings is allowed only where it satisfies s 97(1)(b) — that the judge is satisfied that the evidence, either by itself or having regard to other evidence, has significant probative value. In criminal proceedings, the judge must also be satisfied that the probative value of the evidence substantially outweighs any prejudicial effect on the defendant: s 101. Moreover, all such evidence is subject to the discretionary and mandatory exclusions in Pt 3.11 (ss 135–139).

This emphasis has been effected by expressing those requirements as a condition of admissibility to be satisfied by the party tendering the evidence rather than as a basis for its exclusion. Section 135 is discussed later: see [4-1180].

Notice is not required where the evidence is adduced to explain or contradict tendency evidence adduced by another party (s 97(2)(b)), but the evidence must still have significant probative value in accordance with s 97(1)(b): *Bective Station Pty Ltd v AWB (Australia) Ltd* [2006] FCA 1596 at [85].

"if the court thinks" (s 97(1)(b)) There appears to have been no judicial consideration given to the degree of persuasion nominated by s 97(1)(b) — the evidence is not admissible unless the court "thinks" that the evidence "will" have significant probative value.

There is clearly a difference between "substantial" and "significant", an issue discussed at **Significant probative value**, below. Odgers (13th edn [EA.55.390]) suggests that the onus of persuasion in relation to the probative value of the evidence remains on the party tendering it to persuade the court that "reasonable notice" has been given and the evidence has "significant probative value". What is not so clear is the extent of the burden of that persuasion.

The open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions: *Hughes v The Queen* (2017) 263 CLR 338 at [42].

The phrase "if the court thinks" (or similar phrases) when used in relation to the exercise of a power may be found in a variety of settings. The Court of Criminal Appeal may, if it thinks fit, award such compensation as appears just to an appellant where the execution of its order quashing a conviction has been postponed on the Crown's application and where the Crown has failed to prosecute a further appeal diligently: *Criminal Appeal Act* 1912, ss 24–25. The tribunal may allow a forensic patient to be absent from a mental health facility, correctional centre, detention centre or other place for a period and subject to any terms and conditions that the tribunal thinks fit: *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, s 94(1). The High Court may, at any stage in proceedings before it, make such amendment "as it thinks necessary" to correct any defect or error in the proceeding: *Judiciary Act* 1903 (Cth), s 77J(1). Any court before which proceedings are brought for the administration of a company's affairs may make such order "as it thinks appropriate" as to how Pt 5.3A of the *Corporations Act* 2001 (Cth) is to operate in relation to that particular company: s 447A. In each of those settings, the particular phrase appears to mean that the power may be exercised if the relevant court (or the Director-General) "considers it to be appropriate to do so".

In its setting in s 97, however, the verb "thinks" is not used in relation to the exercise of a power; it is used in relation to the burden of persuasion for the admissibility of evidence. An accepted synonym for the verb "to think" is "to be of the opinion that", but that phrase, too, does not indicate

the burden of persuasion required. It is suggested that, until some binding decision is given in relation to the matter, s 97(1)(b) should be interpreted as requiring the judge to form the opinion that, on the balance of probabilities (in accordance with s 142), the evidence has significant probative value.

Significant probative value This is not defined in Pt 1 of the Dictionary, although "probative value" is defined as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". The evidence must be of such a nature that it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent — that is, more than is required by s 55 to establish relevance — *Hughes v The Queen* (2017) 263 CLR 33 at [16]; *McPhillamy v The Queen* (2018) HCA 52 at [27]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 at [72]–[73].

What is involved is, first, an assessment by the trial judge as to whether the evidence has the capacity rationally to affect the probability of the existence of the fact in issue (s 55) and, second, an assessment by the trial judge of the probative value that the jury might ascribe to the evidence (s 97). At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility: *IMM v The Queen* (2016) 257 CLR 300 at [51]. The evidence will usually be tendered before the full picture can be seen. If that assessment is that the jury might ascribe to the evidence a significance of more than mere relevance although something less than substantial relevance, the tendency evidence is admissible, and that assessment will depend on the nature of the fact in issue to which it is relevant and the significance (or importance) which that evidence may have in establishing that fact: *R v Fletcher* (2005) 156 A Crim R 308 at [33] (Special leave to appeal refused: *Fletcher v The Queen* [2006] HCATrans 127); *R v Zhang* (2005) 158 A Crim R 504 at [139] (Special leave to appeal refused: [2006] HCATrans 423; although the interpretation given to the section by the Court of Criminal Appeal was not necessarily endorsed). The evidence must be of importance or of consequence: *R v Martin* [2000] NSWCCA 332 at [67]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd*, above, at [73]–[74]. Where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: *Hughes v The Queen* at [40].

When determining the **probative value of evidence** under s 97(1)(b), no account should be taken of issues of credibility or reliability, except where those issues are such that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of a fact in issue: *R v Shamouil* (2006) 66 NSWLR 228 at [51]–[65]; *Lodhi v R* (2007) 179 A Crim R 470 at [174].

In *Hughes v R* (2015) 93 NSWLR 474, the CCA reiterated emphatically the approach to be taken in assessing whether tendency evidence should be admitted. Importantly, it reinforced that the NSW approach to the assessment of "probative value" remains fundamentally opposed to that taken in Victoria: see *Dupas v R* (2012) 218 A Crim R 507; see also *Velkoski v R* [2014] 45 VR 680.

The difference of opinion between the two jurisdictions was resolved by a majority of the High Court in *IMM v The Queen* (2016) 257 CLR 300. The view of the NSW Court of Criminal Appeal (NSWCCA) has prevailed. Questions of credibility are, generally speaking, matters for the jury not the judge. See further discussion at [4-1630] "Exclusion of prejudicial evidence in criminal proceedings — s 137".

In *Hughes v The Queen* (2017) 263 CLR 338 the majority of the High Court approved the NSWCCA's decision not to follow the Victorian Court of Appeal's statements in *Velkoski v R*, above. The Victorian Court had stated at [3]:

> that tendency evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct.

The plurality in the High Court rejected this approach. First, it was not warranted by the language of s 97(1)(b). Secondly, it was redolent of the restoration of common law principles which had been

abandoned in Pt 3.6. Thirdly, it did not match the language of the section which required a focus on whether the evidence displayed the defendant acting in a particular way, or having a particular state of mind. The test was, as stated in *R v Ford* (2010) 201 A Crim R 451 at [125], affirmed in *Hughes* at [40], whether the evidence, either by itself or together with other evidence adduced or to be adduced:

> should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

Where the tendency evidence relates to sexual misconduct with a person other than the complainant, it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending linking the two together: *McPhillamy v The Queen* at [31]; *Hughes v The Queen* at [64]; *The Queen v Bauer (a pseudonym)* at [58].

In a criminal trial, s 101(2) imposes a further restriction on admissibility. Since 1 July 2020, the test in s 101(2) is whether the probative value of the evidence outweighs the danger of unfair prejudice — the word "substantially" was removed.

Evidence that does not qualify for admissibility to establish that a person has acted in a particular way or had a particular state of mind in relation to the offence charged under the tendency rule may still qualify for admissibility for that purpose under the coincidence rule: *R v WRC* (2002) 130 A Crim R 89 at [33].

Odgers, *Uniform Evidence Law* (13th edn at [EA.97.120]) has suggested that the assessment of the strength of the tendency inference will normally turn on such factors as:

- the nature of the proceedings, ie civil or criminal: *Hughes v The Queen* (2017) 263 CLR 338 at [16]
- the issue to which the evidence is relevant: *Hughes v The Queen* at [42]
- the number of occasions of particular conduct relied on: *RHB v The Queen* [2011] VSCA 295 at [20]
- the time gap or gaps between them: *McPhillamy v The Queen* at [30]–[32]; *R v Watkins* [2005] NSWCCA 164 at [36]
- the degree of similarity between the conduct on the various occasions: *R v Fletcher* at [58]
- the degree of similarity of the circumstances in which the conduct took place, particularly if it is possible to establish a pattern of behaviour, or even a modus operandi, in those circumstances: *R v Milton* [2004] NSWCCA 195 at [31]; *R v Fletcher* at [57], [67]–[68]
- whether the tendency evidence is disputed: *AE v R* [2008] NSWCCA 52 at [44]; *Ibrahim v Pham* [2004] NSWSC 650 at [31] (it is suggested that this factor played little part in that decision), and
- whether the evidence is adduced to explain or contradict tendency evidence adduced by another party, because the probative value of such evidence may be greater where it is used for that purpose than when it is considered in isolation.

No authority is cited for the last suggested factor. It should be noted that the degree of similarity referred to in points 5 and 6 need not reach the level required for coincidence evidence: *KJR v R* (2007) 173 A Crim R 226 at [51]–[54].

As well as an assessment of the strength of the tendency inference, the extent to which the tendency makes more likely the elements of the offence charged must also be assessed. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant: *Hughes v The Queen* at [64]. In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: *Hughes v The Queen* at [41].

General The evidence need not demonstrate a tendency to commit a particular crime; the tendency rule applies in relation to evidence showing a tendency "to act or think in a particular way" — for example, to use violence with a person in order to achieve what is wanted: *R v Li* [2003] NSWCCA 407 at [11].

Other bases on which judges have determined that tendency evidence has significant probative value include a pattern of behaviour, even a modus operandi, in the behaviour of the accused in establishing a relationship with the complainants, or the similarity in the particular surrounding circumstances in which the offences occurred, rather than the specific sexual behaviour in which the accused engaged with each of them: *R v Milton* at [31]; *R v Harker* [2004] NSWCCA 427 at [51]; *R v Fletcher* at [67]; *R v Smith* (2008) 190 A Crim R 8 at [13]–[19]. However, for evidence to be admissible as tendency under s 97(1)(b) it is not necessary that it exhibits an "underlying unity", "a modus operandi" or a "pattern of conduct": *Hughes v The Queen* at [34] approving the approach in *R v Ford* (2009) 201 A Crim R 451, *R v PWD* (2010) 205 A Crim R 75, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

An example of tendency evidence held to be admissible, notwithstanding that it involved a very long time frame is *R v Cakovski* (2004) 149 A Crim R 21, discussed in [4-1610] Discretions to exclude evidence (s 135), under "Unfair prejudice".

BC v R [2015] NSWCCA 327 is another decision which shows the reach of tendency evidence. The applicant (seeking relief under *Criminal Appeal Act* s 5F) was charged with 20 counts of sexual assault involving four complainants. These were alleged to have been committed over many years, the applicant being between 11 and 13 years old at the beginning of the assaults and being 28 at the last of them. The applicant sought separate trials. This was opposed by the Crown on the basis that the totality of the evidence was admissible on each count because of its intention to rely on the tendency rule. The trial judge refused to sever the counts in the indictment and refused separate trials. The majority (Beech-Jones J and Simpson JA) dismissed the application.

Beech-Jones J held that in some cases it is not improper, and thus not prejudicial, for a jury to reason that if the accused is a particular "sort of person" (namely a person who has demonstrated the asserted tendency), then he is more likely to have committed the alleged offence. At [81] his Honour held:

> To the contrary, that is the very reasoning that the tendency evidence supports and is the very basis upon which it is admitted.

The risk that the jury would be "emotionally affected" can be accommodated by suitable directions.

Adams J did not agree. He held that the behaviour of the applicant when he was 11 could not throw any light on his behaviour as an adult. Second, he held that the jury's reaction to the totality of the evidence would be so extreme that directions would not eliminate the prejudice.

See also *Aravena v R* (2015) 91 NSWLR 258, where the NSWCCA observed that it was not necessary that the conduct occur on a number of occasions for evidence to be admitted as tendency evidence. Even a single incident, in a particular case, may be significant.

The processes by which the tender of tendency evidence is to be determined have been described as follows:

- tendency evidence is not to be admitted if the court thinks that evidence would not, either by itself, or having regard to other evidence already adduced or anticipated, have significant probative value
- probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the *Evidence Act*)
- the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact — in a jury trial, for the jury

- the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete, and
- the task of the judge in determining whether to admit evidence tendered as tendency evidence is therefore essentially an evaluative and predictive one.

The judge is required, first, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; and second (if that determination is affirmative) to evaluate, in the light of any evidence already adduced and evidence that is anticipated, the likelihood that the jury would assign the evidence significant probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s 97 mandates that the evidence is not to be admitted: *R v Fletcher* at [32]–[35] (Special leave to appeal refused; *Fletcher v The Queen* [2006] HCATrans 127); *R v Zhang* (2005) 158 A Crim R 504 at [139] (Special leave to appeal refused: [2006] HCATrans 423).

In *McPhillamy v The Queen* (2018) 92 ALJR 1045, the High Court held that the tendency evidence did not meet the threshold requirement of s 97(1)(b). While proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, it was not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual assault cases its probative value. The tendency evidence in this case was confined to evidence of events in 1985: at [27]. In the absence of evidence the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade before the alleged offending against A, the inference that at the dates of the offences against B and C he possessed the tendency is weak: at [27], [30]; *R v Cox* [2007] EWCA Crim 3365 distinguished

An illustration of the need for care to be taken in the use of tendency evidence in civil proceedings is the decision of the NSW Court of Appeal in *White v Johnston* (2015) NSWLR 779. The respondent, who succeeded at first instance, had sued for damages for assault and battery against a dentist. Her case was that there had been no therapeutic purpose in the performance of the work with the consequence that her consent to the dental procedures had been invalidly given. An important part of her case was the tender of evidence showing that the appellant had fraudulently obtained payments from health authorities for services never rendered. This evidence was admitted by the primary judge on the basis that it was relevant to an unpleaded case that the appellant had a tendency to perform work that was unnecessary, and to make claims for services not rendered. The Court of Appeal held that the evidence of previous malpractice had been wrongly admitted. This was because it lacked significant probative value for the different purpose of establishing that none of the work carried out on the appellant had a therapeutic purpose. The tendency evidence showed that the respondent had in the past charged for work he had not done. Here, he had done a significant amount of work, but the issue was whether it was for a therapeutic purpose. The evidence did not address this issue in a significant way. The appeal was allowed and sent back for retrial (confined to the issues of negligence).

Circumstantial evidence In *Jacara v Perpetual Trustees WA Ltd* (2000) 106 FCR 51, it was suggested (at [56]–[57]) that, although there is no requirement that circumstantial evidence tendered to establish any particular fact comply with s 97, where such evidence is tendered so as to enable a conclusion to be drawn that a person had a tendency to act or to think in a particular way, s 97 will apply.

[4-1145] Admissibility of tendency evidence in proceedings involving child sexual offences — s 97A

Royal Commission recommendations: Substantial amendments were made to Pt 3.6 of the *Evidence Act* in response to the recommendations of the Royal Commission into

Institutional Responses to Child Sexual Abuse, *Criminal Justice Report,* 2017, and in particular recommendations 44 to 51. The amendments are intended to facilitate greater admissibility of tendency and coincidence evidence, particularly in criminal proceedings for child sexual offences. The amendments create two classes of defendants with different regimes: one for criminal proceedings for non-child sex offences (s 97), and the other for those charged with child sex offences (s 97A).

Section 97A: This creates a presumption in favour of the admissibility of tendency evidence about a sexual interest in children that the defendant has or had, or has or had acted on, in proceedings in which the commission of a *child sexual offence* (defined in s 97A(6)) is in issue. The court may rule against the presumption "if it is satisfied that there are sufficient grounds to do so": s 97A(4), but a wide range of matters are deemed to be irrelevant to that consideration by s 97A(5).

"Sufficient grounds": This phrase in s 97A(4) is not defined, but the Second Reading Speech says that "sufficient grounds" should be considered in light of the objective of the amendments to facilitate greater admissibility in child sexual offence cases (NSW, Legislative Assembly, *Debates*, 4 February 2020, p 1915). As to "exceptional circumstances" found in s 97A(5), the Second Reading Speech says these are meant to be a "high bar", but the expression was inserted in recognition that there may be rare circumstances.

Subsections 97A(5)(a)–(g) were included in the Royal Commission's recommendations. The Second Reading Speech refers to these matters as "myths and misconceptions", which are directed to raising judicial awareness of the findings of the Royal Commission.

[4-1148] Tendency and coincidence directions in criminal trials — s 161A Criminal Procedure Act 1986

Section 161A, *Criminal Procedure Act* 1986 provides that a jury must not be directed that evidence adduced as tendency or coincidence evidence needs to be proved beyond reasonable doubt (s 161A(1)). However the judge may direct on the standard of proof where there is a significant possibility the jury will rely upon the evidence as essential to its reasoning in reaching a finding of guilt (s 161A(3)). Further, if the evidence is also adduced as an element or essential fact of a charge, a jury may be directed the evidence needs to be proved beyond reasonable doubt.

Section 161A commenced 1 March 2021. The section was enacted to respond to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice Report* (Pts III–VI, pp 409 and ff). The enactment of s 161A complements amendments to the *Evidence Act* 1995 described above: the amendments to s 94 and insertion of s 97A.

See further P Mizzi and RA Hulme, "Reforming the admissibility of tendency and coincidence evidence in criminal trials" (2020) 32 *JOB* 113 and *Criminal Trial Courts Bench Book* at [4-200].

[4-1150] The coincidence rule — s 98

This rule relates to evidence of two or more substantially and relevantly similar events occurring in substantially similar circumstances. Such evidence is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind, unless:

- reasonable notice of an intention to adduce it has been given (unless the court has dispensed with the notice requirement or if it is adduced to explain or contradict coincidence evidence adduced by another party), and
- the court thinks that the evidence will, either alone or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

The section applies to both civil and criminal proceedings.

The amendments made by the *Evidence Amendment Act* to s 98 were to remove the previous dual requirements that the "related acts" must be substantially and relevantly similar *and* that the circumstances in which they occurred are substantially similar, and to make them admissible if one or the other condition is fulfilled. The intention of the Law Reform Commissions was that s 98 will apply where the party tendering the evidence argues that it is relevant to the issues in the case on the basis of improbability reasoning and where that reasoning turns on the similarities between the events or in the circumstances surrounding those events, or both (*ALRC 102*, *NSWLRC 112*, par 11.25).

In relation to criminal proceedings, new subs 1A, inserted by the *Evidence Amendment (Tendency and Coincidence) Act* 2020, clarifies the position, ("to avoid doubt"), that s 98(1) applies to the evidence of two or more witnesses claiming to be victims of offences committed by the defendant to prove, on the basis of similarities in the acts or circumstances, that the defendant did an act in issue in the proceeding. The basis for the perceived lack of clarity surrounding this issue is not clear from the explanatory material or the Second Reading Speech (at p 1917), where the Attorney-General said that this is consistent with the current position in NSW.

If reasonable notice of the intention to adduce the evidence has been given in civil proceedings, and if the court thinks that the evidence does have significant probative value, the evidence is admissible and it may be used to establish the relevant similarities of the conduct or state of mind involved, subject to its discretionary exclusion pursuant to s 135. In criminal proceedings, before such evidence may be used for that purpose, the court must also be satisfied that the probative value of the coincidence evidence substantially outweighs any prejudicial effect it may have on the defendant: s 101. That section is discussed later: see [4-1180].

The assessment as to whether the two or more events were substantially similar and whether they occurred in substantially similar circumstances is to be made by the judge, and it is essentially an evaluative and predictive one; the first issue is whether the evidence is relevant (s 55): *R v Zhang* (2005) 158 A Crim R 504 at [139]–[140] (Special leave to appeal refused: [2006] HCATrans 423; although the interpretation given to the section was not necessarily endorsed); *Stevens v R* [2007] NSWCCA 252 at [46]–[50].

In *R v Zhang*, the appellant had been convicted of attempting to import prohibited drugs found in packets purporting to contain food and addressed to her foodstuff importing business, and of possession of prohibited drugs in a package inside a bag in her apartment which she claimed she had been asked to mind. The only issue in the trial was whether she was aware that the packets attempted to be imported and the package inside her apartment contained prohibited drugs. The Crown sought to establish that fact by the improbability of the coincidental presence, on two occasions and close in time, of large quantities of prohibited drugs without her knowledge. The Crown had argued that the appellant's knowledge that the container on one occasion contained prohibited drugs strengthened its case that she knew that the container on the other occasion also contained prohibited drugs.

As the evidence relating to each occasion was admissible in any event to prove the charge relating to that occasion, this was coincidence reasoning rather than coincidence evidence (see [137]). The issues for the trial judge to consider were whether:

- the two events and the circumstances in which they occurred had the relevant similarities required by s 98, and
- in relation to each event, the evidence as to the appellant's state of mind in relation to that event had significant probative value in establishing her state of mind in relation to the other event and that the jury would assign significant probative value to that evidence (at [145]).

The issue for the jury was, in the end, whether the Crown had eliminated the reasonable possibility that the drugs had come into the appellant's possession without her knowledge (at [151]). In a dissenting judgment, Basten JA held (at [63]) that, whereas knowledge by the appellant of the

prohibited drugs inside the bag in her apartment may have given rise to a powerful inference that she was knowingly involved in the importation, the reverse did not apply, and that in any case the events were not related within the meaning of s 98 (at [64]).

"unless the court thinks" It is suggested that — for the reasons given under the identical sub-heading under **The tendency rule** (s 97) — that, until some binding decision is given in relation to the matter, s 98(1)(b) should be interpreted as requiring the judge to form the opinion that, on the balance of probabilities (in accordance with s 142), the evidence has significant probative value.

In an application for there to be separate trials of charges involving the coincidence rule, only the trial judge can make rulings as to the admissibility of coincidence evidence, so that an application heard before a joint trial by a judge who is not to be the trial judge, and who cannot rule on the admissibility of that evidence, can proceed only on the admissibility of the coincidence evidence in a separate trial; if the assessment is that such evidence would render that trial unfair, then separate trials should be ordered: *R v Nassif* [2004] NSWCCA 433 at [36]–[41].

Significant probative value The judge must assess whether the evidence has the capacity rationally to affect the probability of the existence of the fact in issue (s 55). If the assessment is that the jury might ascribe to the evidence a significance of more than mere relevance, although something less than substantial relevance, the coincidence evidence is admissible. This is discussed under the identical subheading under [4-1140] (The tendency rule).

Such matters as the striking similarities, underlying unity, system or pattern may guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value: *R v Fletcher* (2005) 156 A Crim R 308 at [33], [60] (Special leave to appeal refused: *Fletcher v The Queen* [2006] HCATrans 127). Those phrases are taken from the common law case of *Hoch v The Queen* (1989) 165 CLR 292 at 294–295. See also *Harriman v The Queen* (1989) 167 CLR 590 at 600, 609.

The issue Although each of a number of similar features involved in more than one event might be explained away as not being uncommon, the issue must be whether the combination of all those similar features in each event is sufficiently striking as to give them significant probative value: *R v Mason* (2003) 140 A Crim R 274 at [40].

Examples In *R v Milenkovic* (2005) 158 A Crim R 4, the accused was charged with the armed robbery of a Westpac Bank, and the Crown sought to tender evidence that he was shortly afterwards involved in another armed robbery of a Westpac Bank in which the men involved were similarly wearing dark clothing including hoods or balaclavas, armed with a shotgun and carrying sledgehammers and driving in a stolen motor vehicle. In the second armed robbery, DNA attributed to the accused was found on a wrench in the vehicle stolen for the second armed robbery. In each robbery, the men had a changeover vehicle waiting for them that was owned by the father of one of the other men involved. The trial judge had dismissed the similarities as being "really stock in trade" of armed robbers, but made no reference to the fact that the same vehicle was to be used as a changeover vehicle. The Court of Criminal Appeal dismissed the Crown appeal against the rejection of this evidence (at [21]–[23]) on the basis that, although the common changeover vehicle gave the fact that the accused had been involved in the second armed robbery "some" probative value, it did not give that evidence "significant" probative value.

In *Boniface v SMEC Holdings Ltd* [2006] NSWCA 351, Hodgson JA held (at [12]) that, in a civil case, the requirement of "significant probative value" probably did not change the general law that conclusions of fact based on similarities of events be reached by way of reasonable inference and not mere speculation. There is no support for that conclusion in the other judgments of the Court of Appeal; nor is there any record of a decision that has adopted the interpretation given. Mere speculation would not establish that the evidence was relevant in accordance with s 55, which requires the evidence to be capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of the fact in issue. That would appear to require the evidence to give

rise to a reasonable inference in order to be relevant. Significant probative value requires more than mere relevance although something less than substantial relevance. See the discussion at [4-1140] (the tendency rule).

In *R v Zhang* (2005) 158 A Crim R 504 it was held by majority (at [145]–[148]) that the evidence relating to each event in question was capable of supporting the significant probative value of the evidence relating to the other event, although it was conceded that such evidence was peripheral where the remaining issue was the accused's knowledge that the substance in each case was a narcotic. The dissenting judgment pointed out (at [70]) that such a direction in relation to significant probative value would only be appropriate where the jury was not in doubt in relation to the evidence relating to both events. (It is unclear whether this was one of the interpretations which was not necessarily endorsed by the refusal of special leave to appeal by the High Court.)

Determination of the issue In *R v Zhang* (2005) 158 A Crim R 504, the processes by which the tender of coincidence evidence is to be determined have been described (at [139]–[140]) as follows:

(1) coincidence evidence is not to be admitted unless the trial judge is satisfied that:

   (a) the two or more events (the subject of the tendered evidence) are substantially and relevantly similar and that the circumstances in which they are alleged to have occurred are substantially similar, and

   (b) the evidence would, either by itself, or having regard to other evidence already adduced or anticipated, have significant probative value,

   Note: that (a) must be read as "relevantly similar or that the circumstances" in relation to cases to which the *Evidence Amendment Act* applies.

(2) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the *Evidence Act*),

(3) the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact — in a jury trial, for the jury,

(4) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete, and

(5) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one.

The judge is required, first, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; and secondly (if that determination is affirmative) to evaluate, in the light of any evidence already adduced and evidence that is anticipated, the likelihood that the jury would assign the evidence significant probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s 98 mandates that the evidence is not to be admitted.

A determination under s 98 is essentially evaluative and predictive, and requires an assessment on which reasonable minds may differ: *Zhang* at [141]; *Samadi v R* (2008) 192 A Crim R 251 at [68].

In *DSJ v R* (2012) 215 A Crim R 349, a five-judge bench of the Court of Appeal has recently considered a challenge to the formulation of the approach stated by Simpson, J relating to the admissibility of coincidence evidence. (In *Zhang v R* [2011] NSWCCA 233, Simpson J and Buddin J had been in agreement as to the correct approach. Basten JA did not agree.) There were two principal questions of challenge. First, whether Simpson J's approach in *Zhang*, above, had abrogated the proper function of the trial judge. Second, whether the exercise required by s 98 required the trial judge to assess the respective probabilities arising from any alternative theories available in the evidence and the likely evidence to be adduced. A corollary of this second question was the

proposition that the trial judge, in determining to allow the coincidence evidence and in ordering a joint trial, disregarded the possibility of an alternate explanation for the evidence, consistent with innocence.

The facts were briefly these: the two accused had been charged with insider trading offences under the *Corporations Act* 2001 (Cth). Essentially DSJ was alleged to be an insider. He had procured NS, his co-accused, to apply for and dispose of shares or securities by passing insider information to him. Shares and securities were purchased and sold over a relatively long period of time. According to the Crown case, there was a powerful inference to suggest that there was a deliberate scheme or arrangement in place between the two men. The trial judge, in a pre-trial ruling, held that the coincidence evidence was admissible pursuant to s 98(1)(b), ie it had significant probative value; and that there should be a joint trial of the majority of counts in the indictment.

The court held—Whealy JA with Bathurst CJ, Allsop P, McClellan CJ at CL and McCallum J in agreement that:

1. The formulation of the process by Simpson J was, subject to qualifications, correct. There was no justification or warrant for overruling *Zhang*: Whealy JA at [66].
2. It is the function of the trial judge to evaluate the capacity of the coincidence evidence, together with other evidence to be tendered by the prosecution, to reach the level of "significant probative value". By contrast, it is the function of the jury, upon the completion of all the evidence, to evaluate the actual weight of the co-incidence evidence and indeed the evidence as a whole.
3. In performing the task under s 98, the trial judge may have regard to an alternative innocent explanation arising on the evidence. In such a circumstance, the trial judge will ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the otherwise significant capacity of the Crown evidence, if accepted, to establish the fact or facts in issue: Whealy JA at [78]–[82].

Examples of the practical application of these principles are to be found in *Bangaru v R* [2012] NSWCCA 204 (tendency evidence) and *R v Gale* (2012) 217 A Crim R 487 (co-incidence evidence).

In *R v Matonwal* (2016) 94 NSWLR 1, two men (the respondents) had been arrested during the commission of an armed robbery at a service station. At their trial, the Crown sought to introduce tendency and coincidence evidence in relation to a series of other armed robberies in the Sydney region. The coincidence evidence was based on features of the robberies relating to the weapons used, the clothing worn, and description of the offenders, escape vehicle and general modus operandi. It was argued that these features were sufficiently similar such that it was improbable that robberies with those features were committed by persons other than the respondents. The trial judge refused to admit the evidence as either tendency or coincidence evidence on the basis that each of the features pointed to were "common features of robberies of that type". The Court of Criminal Appeal agreed that the tendency evidence was insufficient but held that the trial judge was in error in rejecting the majority of the evidence as sufficient coincidence evidence. The court held that it is necessary to give consideration to evidence sought to be tendered as coincidence evidence as a whole, rather than giving separate consideration to each particular circumstance relied upon. Secondly, the task is to be performed having regard to all the evidence sought to be relied upon by the party seeking to tender coincidence evidence.

[4-1160] Requirements for notices — s 99

The *Evidence Regulation* 2020 (NSW), clauses 5 and 6, requires a s 97 notice in relation to tendency evidence and a s 98 notice in relation to coincidence evidence:

(1) in relation to tendency evidence:

(a) to state the substance of the evidence intended to be adduced,

(b) to provide particulars of:

(i) the date, time, place and circumstances at which the conduct occurred, and

(ii) the names of each person who saw, heard or otherwise perceived the conduct, and

(iii) in a civil proceeding — the address of each named person (so far as they are known to the notifying party)

(2) in relation to coincidence evidence:

(a) to state the substance of the evidence of the occurrence of two or more events intended to be adduced, and

(b) to provide particulars of:

(i) the date, time, place and circumstances at which the conduct occurred, and

(ii) the names and addresses of each person who saw, heard or otherwise perceived each of those events, and

(iii) in a civil proceeding — the address of each named person (so far as they are known to the notifying party)

The notice required by the section must identify each event which is to be the subject of evidence, and the person whose conduct or state of mind will be the subject of that evidence, and it must state whether the evidence is tendered to prove that that person did a particular act (identifying that act) or had a particular state of mind (identifying that state of mind): *R v Zhang* [2005] NNSWCCA 437 at [131]. The notice may comply with those obligations by reference to other readily identifiable documents: *R v AB* [2001] NSWCCA 496 at [15].

A general reference to the "brief of evidence and evidence at committal" is not sufficient notice, and the absence of complaint at the trial is not itself evidence of a waiver of the requirements unless it is demonstrated that the accused had been apprised of his rights and had been advised by his legal representative to waive those rights, and that the accused understood the consequences of consenting to the evidence being given without notice; the provisions of the regulation are mandatory, and failure to comply with its terms renders the evidence inadmissible: *R v AN* [2000] 1NSWCCA 372 at [60]–[62]; *R v Zhang* at [49].

There may be no unfairness created where appropriate particulars have been given by way of a tendency notice rather than a coincidence notice: *R v Teys* (2001) 119 A Crim R 398 at [66].

[4-1170] Court may dispense with notice requirements — s 100

Section 192 (Leave, permission or direction may be given on terms) identifies a number of factors to be taken into account in an application under s 99, without limiting such matters: *R v Harker* [2004] NSWCCA 427 at [34]. Other important matters relevant to the making of a direction are the probative value of the evidence and the prejudice caused by the failure to give notice: at [35]. Such prejudice is limited to that caused by the failure to give notice, such as not being in a position to meet the evidence; prejudice caused to the defendant by the admission of such evidence is irrelevant to s 100: at [41], [44]–[47]. The length of time that had elapsed since the events with which the evidence is concerned is not prejudice caused by the failure of the Crown to give a s 100 notice, as it would have arisen in any event: at [44].

Affidavits served during the proceedings are relevant in considering whether the other party had been put on notice of the tendency evidence on which reliance was to be placed and thus whether the lack of a formal notice should be waived in accordance with s 192 of the *Evidence Act*: *Cantarella Bros Pty Ltd v Andreasen* [2005] NSWSC 579 at [19]; *Toben v Jones* (2003) 129 FCR 515 at [168].

A direction that either the tendency rule or the coincidence rule not apply to particular evidence would be made where the other party does not claim prejudice: *R v Davidson* [2000] NSWSC 197

at [2]. A refusal to make a direction pursuant to s 100 is a "decision … on the admissibility of evidence", and thus within the scope of s 5F(3A) of the *Criminal Appeal Act* 1912: *R v Harker*, above, at [30]–[32].

A direction has been given where cross-examination of a Crown witness on behalf of the accused was based on material served on the accused by the Crown: *R v Christos Podaras* [2009] NSWDC 276.

A direction given pursuant to s 100 does not mean that the evidence is admissible, as s 101 (Further restrictions on tendency evidence and coincidence evidence adduced by prosecution) remains to be considered: *R v Harker* at [35], [46].

[4-1180] Further restrictions on tendency evidence and coincidence evidence adduced by prosecution — s 101

Terminology Prior to the 2020 amendments made by the *Evidence Amendment (Tendency and Coincidence) Act*, s 101(2) was expressed in unusual terms, in that it states that tendency or coincidence evidence about the defendant "that is adduced by the prosecution cannot be *used* against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant" (emphasis added). The word "adduced" does not mean "admitted"; in its context, it means "tendered": *R v Zhang* (2005) 158 A Crim R 504 at [38]–[39], [125].

The new s 101(2) appears to reduce the heavy burden on the prosecution in the former s 101(2): see *Taylor v R* [2020] NSWCCA 355 at [122]. The amendment replaces the words "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant" with "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant". The Second Reading Speech (p 1916) says that this removes the requirement for the probative value to "substantially" outweigh the prejudicial effect, and is intended to "address the asymmetry in the assessment of whether evidence with significant probative value should be admissible under the current test, which is disproportionately weighted toward the exclusion of such evidence".

The amendment appears to increase the minimum consideration of prejudice from "any prejudicial effect" to "the danger of unfair prejudice". The intention is to align the language of s 101 with s 137 (which also uses "danger of unfair prejudice") in circumstances in which the High Court has held that the expressions of "prejudicial effect" and "unfair prejudice" convey essentially the same idea: see *The Queen v Dennis Bauer (a pseudonym)* at [73]. There the High Court said "despite textual differences between the expressions "prejudicial effect" in s 101, "unfairly prejudicial" in s 135 and "unfair prejudice" in s 137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way. Nonetheless it may be that the change from "any" to "danger of" will be thought to increase the demonstrable prejudice necessary to outweigh the probative value.

Both the tendency rule in s 97 and the coincidence rule in s 98 states that such evidence "is not admissible to prove" either the tendency or the coincidence, whereas s 95 (Use of evidence for other purposes) excludes a particular use of evidence already admitted. In *R v Nassif* [2004] NSWCCA 433, it was held (at [47]) that unproductive debate concerning the non-exclusionary terminology of s 101 should be put to one side, and that it should be construed as a rule with respect to admissibility. See also *R v Fletcher* (2005) 156 A Crim R 308 at [46]–[48], discussed more fully under **Appellate approach** below.

Interpretation In *R v Ellis* (2003) 58 NSWLR 700 at [74]–[84], [90]–[95], the Court of Criminal Appeal (a bench of five judges) held conclusively that the statutory provisions and the common law relating to the issues arising under Pt 3.6 (in which s 101 is found) are not necessarily the same and that s 101 must be interpreted strictly in accordance with its terms. When revoking the previous

grant of special leave to appeal in that case, the High Court expressly agreed with the construction of the *Evidence Act* adopted by the Court of Criminal Appeal: *Ellis v The Queen* [2004] HCATrans 488 (a bench of seven judges).

In particular, the Court of Criminal Appeal held that the common law requirement — that, before this type of circumstantial evidence could be admitted, there must be no rational explanation for the evidence other than the guilt of the accused (*Pfennig v The Queen* (1995) 182 CLR 461 at 482–483) — leaves nothing to be weighed under s 101, whereas the statutory requirement that the probative value of the evidence substantially outweighs any prejudicial effect on the accused permits evidence to be admitted in the appropriate case despite that prejudicial effect. It was nevertheless said that there may be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighed its prejudicial effect unless the "no rational explanation" test was satisfied.

Previous decisions such as *R v Colby* [1999] NSWCCA 261 at [92], [97]; *R v OGD (No 2)* (2000) 50 NSWLR 433 at [77] should now be regarded as having been overruled in relation to this particular issue, but they remain of assistance in relation to the continuing relevance of the possibility of concoction: see **Possibility of concoction** below.

In *HML v The Queen* (2008) 235 CLR 334, Heydon J held (at [228], fn 227) that *Pfennig v The Queen*, above, "does not apply" under the *Evidence Act*.

The judicial process Where tendency evidence is tendered, the judicial process involves:

(1) identifying the fact in issue to which the tendency evidence is said to be relevant;

(2) determining whether the tendency evidence is capable rationally of affecting the assessment (by the tribunal of fact) of the probability that the fact in issue exists (that is, that the evidence has probative value in that assessment);

(3) if the tendency evidence has probative value in that assessment, determining whether that probative value is capable of being perceived by the tribunal of fact as "significant" (in the sense that it has something more than mere relevance but something less than a "substantial" degree of relevance); and

(4) (in a criminal case) if the evidence is capable of being perceived by the tribunal of fact in that way, determining whether the probative value of the evidence substantially outweighs any prejudicial effect it will have on the defendant: *Gardiner v R* (2006) 162 A Crim R 233 at [119]–[125].

After the application of ss 97 and 101 to tendency evidence, there is no room for the operation of either ss 135 or 137: *R v Ngatikaura* (2006) 161 A Crim R 329 at [70]–[71], [74] (although Rothman J, having agreed with Simpson J, goes on to tread a slightly different path to that followed by Simpson J; Beazley J dissented only on the basis that the evidence was not tendency evidence). Subsequent decisions, such as *R v Ford* (2010) 201 A Crim R 451 at [59], have made it clear (in accordance with the view expressed by Simpson J in *Ngatikaura*) that, once evidence has passed the test imposed by s 101(2), it was not possible to think of circumstances in which the evidence could be rejected pursuant to s 137.

Significance should not be given to minor variations of the language used in s 101 ("the probative value of the evidence substantially outweighs any prejudicial effect it may have") on the one hand and "unfairly prejudicial to a party" in s 135 and "the danger of unfair prejudice to the defendant" in s 137 on the other hand; what is to be compared in the case of all three sections is "probative value" and "prejudicial effect", and prejudicial effect will generally be unfair if it outweighs probative value: *R v Chan* (2002) 131 A Crim R 66 at [49].

Possibility of concoction The ruling in *Pfennig v The Queen* was based on what was said in *Hoch v The Queen* (1988) 165 CLR 292 at 296, where that proposition was itself based on the acceptance

that the possibility of concoction (not a probability or real chance of concoction) between different witnesses of "similar fact" evidence served to render that evidence inadmissible. The test was stated (at 297) as "the admissibility of similar fact evidence … depends on that evidence having the quality [of probative value] that is not reasonably explicable on the basis of concoction".

Although *Pfennig* is not applicable to s 101, the possibility of joint concoction has been held to be nevertheless still relevant to the assessment of the probative value of the evidence: *AE v R* [2008] NSWCCA 52 at [44]. There is no discussion in that case as to how it remains relevant, but no suggestion is made that the "no rational view" reasoning remains appropriate. In *R v Harker* [2004] NSWCCA 427 at [50]–[51], the absence of any opportunity for the complainant and the proposed witness to give propensity evidence of concocting their versions of events together was taken into account in the assessment of the probative value of the evidence to be given by the proposed witness, without reference to the "no rational view" reasoning.

The possibility of concoction has also been considered relevant in three Tasmanian decisions based on that State's *Evidence Act* 2001 (in which s 101(2) is expressed in the same terms as in the NSW statute), where the views expressed in *R v Ellis* concerning the "no rational view" were accepted. In *Tasmania v S* [2004] TASSC 84, Underwood J said (at [8]) that the potential untruthfulness of tendency evidence is relevant to the probative force of tendency evidence, and he followed the pre-*Ellis* case of *R v Colby*, above, to state (at [11]) that, where there is a reasonable possibility of concoction, then the prejudicial effect will "ordinarily" outweigh the probative value of the tendency or coincidence evidence. In *Tasmania v B* [2006] TASSC 110, Crawford J considered (at [43]) whether there was a "real chance of concoction or contamination between the two complainants" in determining whether the probative value of the evidence of each of them substantially outweighed the prejudicial effect of their evidence of similar facts. The same judge also applied that test in *Tasmania v Y* (2007) 178 A Crim R 481 at [40].

Objective improbability The reasoning in *Hoch v The Queen*, above, (at 294–295, 305) as to the criterion of the admissibility of "similar fact" evidence has also continued to be applied to the application of s 101 as to the consideration of the strength of the probative force of both tendency evidence and coincidence evidence by reference to its revelation of striking similarities, unusual features, underlying unity, system or pattern such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution: *R v Fletcher* (2005) 156 A Crim R 308 at 338 [59]–[60]. It was held that the evidence was admissible to prove a pattern of behaviour of sexual misconduct with adolescent males to whom access had been gained by the accused (a parish priest) as a result of their position as altar boys, whose families the appellant had befriended, and the similar conversations of a sexual nature which had led up to the sexual acts that then took place. See also *R v Milton* [2004] NSWCCA 195 at [31].

The circumstance that, on one interpretation of the evidence, there exists an alternative and innocent explanation of the accused's conduct does not require its rejection if there is also an interpretation of the evidence that potentially has probative value as tendency evidence: *Rodden v R* (2008) 182 A Crim R 227 at [36]–[37]. However, if the only probative value of the evidence is to invite the reasoning that, as the accused has done this before, he has probably done it on this occasion also, the evidence does not pass the test stated in s 101(2): *R v Li* [2003] NSWCCA 407 at [13].

Motive Evidence of previous similar sexual conduct towards the complainant by the accused may be admissible not as tendency evidence but as showing that the accused had an ordinary human motive to do something as a result of sexual attraction towards the complainant; however, although not admitted as tendency evidence (and therefore unrestricted by s 97), it is not practical to maintain that distinction in the case of the sexual interest of an adult in a child, because (a) the existence of that interest can be considered itself to manifest a tendency to have a particular state of mind, (b) the uncharged acts will generally ipso facto have manifested a tendency to act on that interest, and (c) the very powerful effect of tendency reasoning would be very likely to swamp any effect of motive reasoning: *ES v R (No 1)* [2010] NSWCCA 197 at [38]–[39].

If evidence of uncharged acts is to be used in such cases in any way other than context evidence, the requirements for tendency evidence need to be satisfied: *Qualtieri v R* (2006) 171 A Crim R 463 at [74]–[81]; *DJV v R* (2008) 200 A Crim R 206 at [28]–[31]; *ES v R (No 1)* at [40].

No discretion However, the decision as to admissibility, once the weighing exercise has been performed, is not an exercise of a judicial discretion; and if the probative value of the evidence to be adduced does not substantially outweigh any prejudicial effect it may have on the defendant, there is no residual discretion and the evidence must be rejected. Section 137 (Exclusion of prejudicial evidence in criminal proceedings) plays no part in considering the admissibility of evidence pursuant to s 97 (tendency rule) and s 98 (coincidence rule) because it has no work to do once s 101 has been applied: *R v Blick* (2000) 111 A Crim R 326 at [19]–[20]; *R v Ellis* (2003) 58 NSWLR 700 at [95]; *R v Harker* [2004] NSWCCA 427 at [46]; *R v Nassif* [2004] NSWCCA 433 at [59]–[60]; *R v GAC* (2007) 178 A Crim R 408 at [70]–[78]; *R v Clarkson* (2007) 171 A Crim R 1 at [194]–[196].

General When ruling that tendency or coincidence evidence is admissible, it is necessary to refer specifically to s 101 and to identify both the issue to which the proposed evidence is relevant and the nature of the prejudicial effect of that evidence being considered: *Gardiner v R* (2006) 162 A Crim R 233 at [56]–[62], [125]–[132].

In determining the issue raised by s 101, it is not sufficient to repeat the words of the section without explaining how the evidence is so prejudicial — what its risk is to a fair trial for the defendant — that it ought to be rejected as part of a balancing exercise between the competing statutory considerations: *R v Harker*, above, at [58]; *R v RN* [2005] NSWCCA 413 at [11]–[12].

Where the similarities amongst the various incidents charged are striking, and the probative value of their similarity substantially outweighs the possibility of prejudice, a direction that the jury is not entitled to reason that the number of counts meant that the accused must be guilty may be sufficient to overcome any unfair prejudice created: *Samadi v R* (2008) 192 A Crim R 251 at [100]–[102].

Once tendency evidence relating to the conduct charged passes through the tests for admissibility under both ss 97 and 101, it becomes available as evidence that the offence charged was committed: *Galvin v R* (2006) 161 A Crim R 449 at [19].

Appellate approach Both *R v Milton* [2004] NSWCCA 195 at [31] and *R v Fletcher* (2005) 156 A Crim R 308 at [56] stress that the decision of the trial judge must be on the material produced, either by a voir dire examination or witness statements, prior to its admission into evidence, so that the issues in an appeal following a conviction must be first as to whether it was open to the trial judge to conclude that s 101 had been satisfied in relation to the admission of the evidence as disclosed to the judge, and secondly, in the event that there has been no such error, on the basis that the evidence, in the form and context in which it was in fact later given, has demonstrated a miscarriage of justice. *R v Fletcher* was followed on this point in *R v Zhang* (2005) 158 A Crim R 504 at [45].

In a dissenting judgment in *R v Zhang*, Basten JA (at [45]) held that an appeal against a trial judge's ruling pursuant to s 101 should be evaluated by way of rehearing. This view was preferred by the Tasmanian Court of Criminal Appeal in *L v Tasmania* (2006) Tas R 381 at [49]–[51], [86]. Special leave to appeal was refused in *Zhang v The Queen* [2006] HCATrans 423; although the interpretation given to Pt 3.6 by the majority was not necessarily endorsed. The High Court, in refusing special leave to appeal in *R v Fletcher* on the basis that the evidence was correctly admitted and there had been no miscarriage of justice, said that it would otherwise have referred the matter to the Full Court to consider "an interesting question of standing": *Fletcher v The Queen* HCATrans 127 (10 March 2006). It remains unclear whether that Delphic statement was directed to the issues raised in this or in the previous paragraph.

In *R v GAC*, above, Giles JA (at [77]–[78]) commented that "(t)he last word may not have been written" on this issue, when recording that the Crown had accepted in that appeal that the principles stated in *House v The King* (1936) 55 CLR 499 at 504–505 applied, as had been held in *R v Fletcher* (at [48]) and *R v Zhang* (at [45]).

Legislation

- *Criminal Appeal Act* 1912, ss 24–25
- *Corporations Act* 2001 (Cth), Pt 5.3A
- *Evidence Act* 1995, ss 55, 59, Pt 3.6 (ss 94–101), Pt 3.7
- *Evidence Regulation* 2020, cll 5, 6
- *Judiciary Act* 1903 (Cth), s 77J(1)
- *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, s 94(1)

Further references

- *ALRC Report 26*, Vol 1, 1985, Australian Government Publishing Service, Canberra
- *ALRC Report 38*, Australian Government Publishing Service, Canberra
- R Weinstein et al, *Uniform Evidence in Australia*, 3rd ed, LexisNexis, 2020
- S Odgers, *Uniform Evidence Law*, 15th edn, Thomson Reuters, 2020
- P Mizzi and RA Hulme, "Reforming the admissibility of tendency and coincidence evidence in criminal trials" (2020) 32 *JOB* 113
- JD Heydon, *Cross on Evidence*, 12th ed, LexisNexis, 2020
- A Ligertwood and G Edmond, *Australian Evidence*, 6th ed, LexisNexis, 2017
- R Howie and P Johnson, *Criminal Practice and Procedure NSW,* Lexis Nexis, (loose-leaf and online), 2021
- N Broadbent and D Buchanan, "Tendency Evidence in 2020" at https://publicdefenders.nsw.gov.au/Documents/broadbent-and-buchanan-tendency-evidence-2020.pdf.

[The next page is 4701]

The Special Statutory Compensation List

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

[5-1000] The Special Statutory Compensation List

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

Proceedings assigned to this List are under:

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

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

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

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

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

The Operation of the List

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

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

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

[5-1010] Powers when exercising compensation jurisdiction

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

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

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

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

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

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

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

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

[5-1020] Costs

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

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

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

Last reviewed: May 2023

(a) The Statutory Scheme

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

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

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

A former member who has resigned or retired can ask after his or her resignation or retirement for PSAC to certify that the member "was incapable, from an infirmity of body or mind, of personally exercising the functions of a police officer referred to in s 14(1) of the *Police Act* 1990 at the time of the member's resignation or retirement": s 10(1)(b), definition of "disabled member of police force".

The concepts "infirmity of body or mind" and "time of the member's resignation or retirement" were considered in *Day v SAS Trustee Corp* [2021] NSWCA 71.

If the certified infirmity is found to be caused by the member's being hurt on duty (HOD) a higher rate of pension is payable pursuant to s 10(1A). That finding is made by the Commissioner of Police (COP) through a delegate pursuant to s 31 of the *Police Act* 1990.

The basic HOD superannuation allowance is 72.75% of the member's, or former member's, attributed salary of office. If the member is totally incapacitated for work outside the police force, the member is entitled to an allowance of 85% of the attributed salary of office. There are further allowances. If the member is not totally incapacitated, the member may be entitled to an additional amount of not more than 12.25% commensurate with the member's incapacity for work outside the police force: s 10(1A)(b). If the member is totally incapacitated for work outside the police force, the member may be entitled to a further amount of pension, not less than 12.25% and not greater than 27.25% (i.e. between 85% and 100%) "commensurate, in the opinion of STC, with the risks to which the member was … required to be exposed": s 10(1A)(c). This is known as the "special risk benefit" where "the member was hurt on duty because the member was required to be exposed to risks to which members of the general workforce would normally not be required to be exposed in the course of their employment": s 10(1A)(c) chapeau.

Where a member is medically discharged with a finding of HOD, the superannuation allowance commences on the day after medical discharge. Section 9A governs the date of commencement of other HOD pensions. The construction of the section was discussed in *SAS Trustee Corp v Colquhoun* [2022] NSWCA 184. The date of the commencement of additional amounts of a superannuation allowance is governed by s 10(1D). These two provisions raise questions about "backdating", the subject of many applications to the court.

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

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

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

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

(b) Applications to the District Court

An application (which is really a hearing de novo) lies to the District Court from any decision of the STC (including a delegated decision by PSAC) arising under the Act or from any decision of the COP on a question of HOD. The right to make an application about a decision of PSAC was confirmed by *SAS Trustee Corp v Rossetti* [2018] NSWCA 68 which overruled what was thought to be the way of challenging PSAC's determinations or failure to determine prior to that time. Since the decision in *Rossetti*, there have been a number of applications to the court concerning old decisions of PSAC, for example *Day v SAS Trustee Corp* [2020] NSWDC 381 and on appeal [2021] NSWCA 71. The most recent curial decision concerning old decisions of PSAC is *Pascoe v SAS Trustee Corp* [2022] NSWCA 244.

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

Costs are considered above at [5-1020].

(c) Hurt on Duty (HOD)

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

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

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

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

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

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

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

The following authorities need to be considered:

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

Other areas peculiar to HOD claims

- police off duty — putting themselves back on duty: *Lavin v COP* (2007) 4 DDCR 657
- reacting to the death of other police: *King v COP* (2004) 2 DDCR 416 at [8]–[11]; *Rogers v COP* (2005) 2 DDCR 515
- being named in the Wood Royal Commission: *Brady v COP* (2003) 25 NSWCCR 58. There are a number of unreported decisions of the Compensation Court on this issue. The essential issue

is what caused the member to be called/ cross-examined/ named etc in the Royal Commission. If it were an allegation of illegal conduct or misconduct, such conduct will need to be proved in this Court and then the decision made as to whether the member had taken himself outside the course of his employment and, if not, whether there was merely misconduct. If the latter, s 14 of the WCA needs to be considered

- allegations of crime or misconduct: *Schinnerl v COP* (1995) 11 NSWCCR 278 (lying to Internal Affairs); *Liversidge v COP* (2003) 25 NSWCCR 333 (an arrest found unlawful by the High Court, the member pleaded guilty to a departmental charge and was sued civilly); *Remoundos v COP* (2006) 3 DDCR 616 (after going on sick leave after a trivial administrative disagreement member engaged in drug trafficking); *Holovinsky v COP (No. 2)* (2006) 4 DDCR 122 (obtaining criminal intelligence of drug trafficking the wrong way)
- suicide: *Smith v COP (No. 2)* (2000) 20 NSWCCR 27; *Guff v COP* (2007) 5 DDCR 132
- Police Sporting Team injury: *Clark v COP* (2002) 1 DDCR 193, and
- misperception: *Townsend v COP* (1992) 25 NSWCCR 9 (a misperception of actual events, due to irrational thinking of a member leading to a psychiatric illness does not make that illness HOD).

(d) PSAC Certificate is binding

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

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

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

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

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

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

   Uninjured able to earn $1000 pw

   Now able to earn $600 pw

   Ability now 60%

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

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

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

The following authorities need to be considered:

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

(g) Provision for past and future

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

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

(h) Section 12D quantum claims

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

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

[5-1040] Police Act 1990

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

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

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

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

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

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

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

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

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

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

[5-1050] Sporting Injuries Insurance Act 1978

Last reviewed: May 2023

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

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

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

There is no reported case law.

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

Last reviewed: May 2023

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

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

Part 3 of the Act applies to:

(a) members of the State Emergency Service

(b) members of the NSW Volunteer Rescue Association

(c) members of Surf Life Saving NSW

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

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

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

The claims are decided by the Self Insurance Corporation (s 30) and any dissatisfied claimant can ask for a determination of the claim by the District Court: s 30(4). Claims under this Act are few and usually involve questions of quantum of death benefits, weekly payments or lump sum compensation.

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

Last reviewed: May 2023

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

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

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

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

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

Subsection 7(4) provides:

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

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

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

The Act does not apply to Federal employees: *O'Brien v DDB* (2000) 22 NSWCCR 193. The Act also does not apply to volunteer "workers": *Death v Workers Compensation (Dust Diseases) Authority (No 1)* [2020] NSWDC 103.

Legislation

- *District Court Act* 1973 Pt 3 Div 8A
- *Police Regulation (Superannuation) Act* 1906 ss 1, 7, 8, 9A, 10, 10B, 11A, 12C, 12D, 14, 21
- *Police Act* 1990 ss 14, 216, 216A, 216AA
- *Sporting Injuries Insurance Act* 1978 ss 4, 5, 24, 29, Sch 1
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987, ss 16, 24, 30
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation* 2017 cl 9
- *Workers Compensation (Dust Diseases) Act* 1942, ss 7, 8, 8I

Rules

- UCPR r 1.27, Sch 11 Pts 4–5

Further references

Butterworths, Mills Workers Compensation Practice (NSW)

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

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Proceedings for defamation in NSW

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

[5-4000] Introduction

The topics covered by this section are:

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

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

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

[5-4005] The legislative framework

Last reviewed: May 2023

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

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

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

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

The *Limitation Act* 1969, s 14B provides that an action for defamation is not maintainable if brought after the end of a limitation period of one year running from "the date of the publication of the matter complained of". "Publication" occurs each time the matter is read, heard or seen. The limitation period can be extended in limited circumstances: *Limitation Act* 1969, s 56A. Because every communication of defamatory matter gives rise to a separate cause of action (known as the "multiple publication rule"), problems may arise applying the limitation period in defamation, particularly where the material is published online. The *Defamation Amendment Act* 2020 (discussed further below) introduced a "single publication rule" under the *Limitation Act* 1969, s 14C for publications after the date of the amendments. This provides that, where a publisher publishes defamatory matter and subsequently the publisher or an associate publishes substantially the same defamatory matter, the cause of action in defamation is taken to accrue at the date of first publication. The interaction of the old and new limitation provisions can create complexities: *Lehrmann v Network Ten Pty Ltd (Limitation Extension)* [2023] FCA 385; *Ingram v Ingram* [2022] NSWDC 653 at [32]–[36].

[5-4006] Defamation Amendment Act 2020

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

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

A memorandum as to the principal changes made by the Act appears at Appendix 1. Perhaps the most important of these changes, in terms of interlocutory and trial procedure, is the introduction of a serious harm threshold (s 10A) and a mandatory requirement for service of a concerns notice (s 12B). Such a notice must contain the information identified in s 12A. Failure to send a notice at all, or sending a non-compliant notice, will result in the proceedings being struck out, as the statutory language is mandatory and not directory and errors of this kind cannot be retrospectively corrected: *Clayton v Heffron* (1960) 105 CLR 214 at 247 (per Dixon CJ, McTiernan, Taylor and Windeyer J), applied in *Hooper v Catholic Family Services trading as Centacare Catholic Family Services* [2023] FedCFamC2G 323 at [51]–[68]; see also *M1 v R1 & Ors* [2022] NSWDC 409 at [25]. A list of links to the amending legislation in each of the States and Territories (except Western Australia and the Northern Territory, which have yet to consider the legislation) appears as Appendix 2.

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

[5-4007] Publications made on the internet

The most significant changes to defamation law over the past decades arise from the impact of electronic publication upon traditional principles of law developed for printed publications, often

with a limited extent of publication. By comparison, publications on the internet are not only instantaneous and worldwide but are continuous in nature, in that a new cause of action is created each time the publication is accessed or downloaded: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575. All areas of defamation law are affected, including limitation issues, defences and damages assessments.

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

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

The *Online Safety Act* may also need to be consulted where an online publication is offensive, as opposed to (or in addition to) any claim for defamation. The *Online Safety Act* provides for the appointment of an eSafety Commissioner as well as a complaints process for the removal of online cyberabuse. The definition of "serious harm" in s 5 ("serious physical harm or serious harm to a person's mental health, whether temporary or permanent") may be a useful analogy in rulings on serious harm under s 10A of the amended legislation (for publications made after 1 July 2021 in those States and Territories where the uniform legislation has been amended).

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

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

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

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

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

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

Kiefel CJ, Keane and Gleeson JJ considered that the media companies had facilitated, encouraged and thereby assisted the posting of comments by the third-party Facebook users, which rendered them the publishers of those comments. Gageler and Gordon JJ, similarly emphasized that the media companies had chosen to operate public Facebook pages in order to engage commercially with the over 15 million Australians who were Facebook users, concluded that these arrangements gave their claim of being passive and unwitting victims of Facebook's method of functioning an air of unreality.

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

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

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

[5-4010] The pleadings

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Defamation cases are conducted in the Supreme Court in accordance with Practice Note No SC CL 4 — Defamation List (commenced 5 September 2014), a similar form of which is in use in the District Court (DC Practice Note No 6 — Defamation List (commenced 9 February 2015)). The practice note regulates the speedy and efficient disposal of interlocutory applications and emphasises the importance of proportionality. As a consequence of the cross-vesting legislation, defamation proceedings may also be commenced in the Federal Court of Australia where there is a cause of action in the ACT or the NT: *Crosby v Kelly* (2012) 203 FCR 451. The presumptive mode of trial in the Federal Court is trial by judge alone. Although the Federal Court has a discretion to order trial by jury, the provisions of the *Federal Court of Australia Act* 1976 (Cth) on the mode of trial

in that forum override the right of any party to elect to have a defamation case tried by a jury under State defamation legislation. The Full Federal Court has stated that trial by jury in a defamation case in the Federal Court will be exceedingly rare: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61.

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

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

The concerns notice

Before proceedings are commenced, the plaintiff must serve a concerns notice on all parties likely to be the subject of any claim: *Defamation Act* 2005 s 12B. This is a substantive, not a procedural, requirement. Failure to provide particulars of serious harm or the other essential elements in s 12A(1)(a), or to provide reasonable further particulars if sought, will result in the concerns notice being invalid. Any proceedings commenced on the invalid concerns notice (or without a concerns notice) will be struck out: *Randell v McLachlain* [2022] NSWDC 506.

Proceedings cannot be commenced until 28 days after service of the concerns notice unless leave of the court is granted (*Woolf v Brandt* [2022] NSWDC 623; *Hoser v Herald and Weekly Times Pty Limited & Anor (Ruling)* [2022] VCC 2213) or, if there is a request for particulars, within a further 14 days (or other time agreed by the parties) of their answer: s 12A(3)–(5).

The concerns notice must be attached to the statement of claim: UCPR r 15.19(2)(c).

Where further publications are made by the defendant after proceedings have been commenced, it is not necessary to send a further concerns notice, even if those publications are not similar in nature: *Newman v Whittington* [2022] NSWSC 1725. There has not yet been any judicial consideration of the situation where another defendant is joined to proceedings that have already commenced, or where a defendant brings a cross-claim; however, in *Murdoch v Private Media Pty Ltd (No 4)* [2023] FCA 114, leave was granted to the plaintiff to join two additional defendants without any discussion of these issues.

The statement of claim

The pleadings must contain full particulars of the matter complained of and its context, the imputations pleaded to arise (whether in their natural and ordinary meaning or by true innuendo), details of publication (including particulars of identification if the plaintiff is not named) and republication, as well as any claim for special damages and aggravated compensatory damages: Tobin & Sexton at [25,015]–[25,115]. In addition, for actions commenced in relation to publications after 1 July 2022, particulars of serious harm must be provided, not only in the statement of claim but in the concerns notice that precedes it: *Defamation Act* 2005 s 12A(1)(a)(iv). Exemplary damages are not available: s 37.

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

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

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

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

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

The statement of claim must also include particulars of serious harm to reputation for publications made after the date s 10A comes into force. This is a new statutory element of the cause of action in defamation, in addition to the existing common law elements of defamatory matter, identification and publication. The element of serious harm to reputation was introduced by the *Defamation Amendment Act* 2020, which commenced on 1 July 2021. It is modelled on the *Defamation Act* 2013 s 1, which applies in England and Wales. See generally D Rolph, "A serious harm threshold for Australian defamation law" (2022) 51 *Australian Bar Review* 185.

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

Prior to the introduction of s 10A, damage to reputation in defamation actions was presumed and it was not necessary to allege or prove injury to reputation: *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 150 per Windeyer J; *Bristow v Adams* [2012] NSWCA 166. For actions the subject of the legislative amendments, the plaintiff must now include particulars of serious harm in the concerns notice (s 12A(1)(a)(iv)) as well as in the statement of claim: *Newman v Whittington* [2022] NSWSC 249 at [47]. The claim for compensatory damages, special damages and/or aggravated compensatory damages, together with particulars of the facts and matters relied upon (UCPR r 15.31), are still provided in the same way.

Two kinds of serious harm – past and future – may be particularised in both the concerns notice and the statement of claim: *Banks v Cadwalladr* [2022] EWHC 1417 at [51]. These particulars should be "fact rich": *High Quality Jewellers Pty Ltd (ACN 119 428 394) & Ors v Ramaihi (Ruling)* [2022] VCC 1924 at [10].

Damages for non-economic loss under the UDA are capped: s 35. For publications made after 1 July 2021, that cap is a "hard" cap. A plaintiff has also always been entitled to claim general

damages for loss of business (as opposed to special damages): *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225; Tobin & Sexton at [25,110]. The relationship between an *Andrews* claim and the cap on damages has not yet been authoritatively determined. Any claim for special damage should be particularised: Tobin & Sexton [25,105].

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

The defence

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

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

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

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

1. **Justification (s 25):** UCPR rr 14.32 and 15.22. The most common problems with this defence arise from last-minute particulars, or an application to plead it just before the trial: *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648; Tobin & Sexton at [25,175]. The particulars of this defence, other than in clear situations where it is fully set out in the publication, should be set out with precision, and may include material not referred to in the matter complained of, including events subsequent to the publication: Tobin & Sexton at [25,180]–[25,190].
2. **Contextual truth (s 26):** UCPR rr 14.33 and 15.23. Although the scope of this defence was reduced by *Besser v Kermode*, above, the reformulated defence, which came into effect on 1 July 2021, should revitalise this defence, in particular by permitting the defendant to "plead back" the plaintiff's imputations as contextual imputations. See Tobin & Sexton at [25,145]–[25,160]. The pleadings and particulars are described in Tobin & Sexton at [25,165]–[25,170].
3. **Absolute privilege (s 27):** UCPR rr 14.34 and 15.24. This defence is commonly dealt with as a summary judgment application.
4. **Publication of public and official documents (s 28):** UCPR rr 14.35 and 15.25.
5. **Fair report of proceedings of public concern (s 29):** UCPR rr 14.36 and 15.26.

6. **Qualified privilege (s 30):** UCPR rr 14.37 and 15.27. The requirements for particulars of this defence are set out in Tobin & Sexton at [25,215]–[25,220]. If this defence is pleaded, the plaintiff should usually file a reply, in order to put in issue whether the publication was "reasonable" in all the circumstances within the meaning of ss 30(1)(c) and 30(3). Note that this defence differs from the common law defence, which is described in further detail below.
7. **Publication of matter concerning issue of public interest (s 29A):** UCPR r 14.36A.
8. **Honest opinion (s 31):** UCPR rr 14.38 and 15.28. This statutory defence is, with some modifications, adapted from the common law defence of fair comment, but it is still possible to rely upon the common law defence. There are three forms of honest opinion defence: s 31(1)–(3). If this defence is pleaded, the plaintiff should usually file a Reply, in order to put in issue the matters in s 31(4). The defence has rarely been successful, but see *O'Brien v Australian Broadcasting Corp* [2016] NSWSC 1289.
9. **Scientific or academic peer review (s 30A):** UCPR r 14.37A.
10. **Innocent dissemination (s 32):** UCPR rr 14.39 and 15.29. This defence, once little used, is of significance for internet publications. In addition to s 32, an ISP may rely upon *Online Safety Act* 2021 (Cth) s 235; see also Tobin & Sexton [24,035]; Collins at [3.08], [16.133]–[16.144]. The common law defence of innocent dissemination also survives.

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

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

1. **Offer of amends:** *Defamation Act* Pt 3, Div 1. This provides for service of a "concerns notice" (s 14(2)) followed by a procedure for the making of an offer to make amends (s 15) which may be withdrawn (s 16) or accepted (s 17). A concerns notice is now mandatory; defamation proceedings cannot be commenced without a concerns notice having been served on the defendant: (s 12B). As to the formal requirements of a concerns notice, see s 12A. For the avoidance of doubt, a document filed or lodged in a proceeding to commence defamation proceedings does not constitute a Concerns notice: s 12A(2). Where there is a failure to accept a reasonable offer to make amends "a court" (s 18(2)) must determine whether the offer was made as soon as practicable and was reasonable, having regard to the circumstances set out in s 18(2). The provisions of the *Defamation Act* prior to the new amendments were unclear as to whether determination of these issues is a matter for the jury or for a judge sitting alone: (*Hunt v Radio 2SM Pty Ltd (No 2)* (2010) 10 DCLR (NSW) 240) but it is now expressly provided that this is a matter for determination by the trial judge: s 18(3). The defence is not limited to small publications, and substantial damages may be awarded. In *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 McCallum J held that an offer of amends of $50,000 and an apology were insufficient where the imputations were gravely serious claims that a teacher had sexual relations with underage students; at that time the award of $350,000 was the highest sum awarded under the uniform legislation.
2. **Statutory defences containing a good faith provision:** An example of a statutory provision offering a defence for a publication made in good faith is *Health Care Complaints Act* 1993 (NSW), s 96.
3. **Common law variant of justification (*David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667):** This defence has been held by the NSW Court of Appeal (see *Fairfax Media Publications Pty Ltd v Bateman* (2015) 90 NSWLR 79) to be unavailable in this State, but it is available in most other States and Territories; see, for example, *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206; *Balzolal v Fairfax Digital Australia and New Zealand Pty Ltd* [2016] QSC 175; *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314.

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

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

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

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

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

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

- if the plaintiff is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act*, s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, or in relation to statements made concerning court proceedings (*Cumberland v Clark* (1996) 39 NSWLR 514 at 518–521) or in parliament (*Della Bosca v Arena* [1999] NSWSC 1057);
- where the proceedings may be struck out as an abuse of process; for example, where other proceedings have been brought for the same publication: *Bracks v Smyth-Kirk* [2009] NSWCA 401. Leave to commence proceedings under s 23 may be granted retrospectively: *Carey v Australian Broadcasting Corp* (2012) 84 NSWLR 90;

- where issues of proportionality (*Bleyer v Google Inc* (2014) 88 NSWLR 670) or or a failure to meet the minimum threshold of seriousness (*Kostov v Nationwide News Pty Ltd* (2018) NSWLR 1073) arise. This is a controversial area of the law, as these doctrines have yet to receive appellate confirmation; or
- note also the entitlement for the early determination of "serious harm" set out in s 10A for publications to which the 2021 amendments apply.

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

The Reply

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

Other pleadings

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

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

Last reviewed: May 2023

Applications to amend or strike out portions of the pleadings in defamation actions occur most commonly at two stages. The first is at the commencement of the litigation. Applications for rulings at this stage usually consist of challenges to the form and capacity of the plaintiff's imputations and, after the defence has been filed, if contextual truth is pleaded, an application by the plaintiff either to strike out or to plead back contextual imputations: *McMahon v John Fairfax Publications Pty Ltd*

(No 3) [2012] NSWSC 196. Applications to strike out proceedings commenced after the one-year limitation period are generally brought at the commencement of the proceedings rather than at the trial. The most common applications brought at the commencement of proceedings are for the early determination of the threshold issue of serious harm and applications to strike out proceedings by reason of asserted defects in the concerns notice and statement of claim in particularising serious harm.

Applications for amendment of pleadings are often brought shortly before the trial: *Lee v Keddie* [2011] NSWCA 2; *Murdoch v Private Media Pty Ltd (No 4)* [2023] FCA 114 at [31] and [53] (trial date vacated due to plaintiff's counsel's "mistakes"); *McMahon v John Fairfax Publications Pty Ltd* [2011] NSWSC 485. They may also be brought during (*TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682 at 695; *Ainsworth v Burden* [2005] NSWCA 174 at [51]), or even after the trial: *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [52]ff. Where the result of amendment would be to adjourn or delay the trial, these applications are often refused: *Lee v Keddie*.

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

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

Last reviewed: May 2023

When a judge makes orders striking out imputations, pleadings, or a cause of action, reasons should be given: *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWCA 6 at [102]. Imputations have achieved a greater importance in document drafting as a result of the requirement, for claims brought under the amended legislation, that the imputations to be relied upon must be set out in the concerns notice: s 12A(1)(a)(iii); s 12B(2)(b).

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

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

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

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

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

2. The correct approach to determining issues of capacity is set out in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164–167, *Griffith v John Fairfax Publications Pty Ltd* [2004] NSWCA 300 at [19]–[20] and *Favell v Queensland Newspapers*

Pty Ltd, above. In *Hue v The Vietnamese Herald* [2009] NSWSC 1292 at [9], McCallum J summarised the principle very simply as being "whether the meaning contended for is reasonably capable of being conveyed by the matter complained of", noting the statement in *Favell* at [17] that the question is ultimately what a jury could properly make of the imputation. The High Court stated:

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

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

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

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

[5-4040] Other interlocutory applications

Last reviewed: May 2023

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

1. **Discovery before action:** Where a plaintiff seeks preliminary discovery to enable proceedings to be commenced, an application may be brought under UCPR r 5.2(2)(a). There is, however, a rule of practice that both during the process of discovery and in pre-discovery proceedings, a media defendant will not be required to disclose the sources for the matter complained of if those sources provided information to the media defendant on conditions of confidentiality ("the newspaper rule"): *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 (the *Newspaper Rule* case); *Guide Dog Owners' & Friends' Association v Herald & Weekly Times* [1990] VR 451.The principles are set out by McColl JA in *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506 at [46]–[52]. Proceedings should not already be on foot: *Nine Network Australia Pty Ltd v Ajaka* [2022] NSWCA 91.

2. **Interlocutory injunction:** The circumstances in which an interlocutory injunction will be granted in defamation actions are rare as, in addition to the barriers faced by litigants in other causes of action (*American Cyanamid v Ethicon Ltd* [1975] AC 396), a plaintiff in defamation proceedings faces the additional hurdle of balancing the asserted damage to his reputation with the defendant's entitlement to freedom of speech: *Church of Scientology of California Inc v Readers Digest Services Pty Ltd* [1980] 1 NSWLR 344; see also *Australian Broadcasting*

Corp v O'Neill (2006) 227 CLR 57. Justice Heydon, in the latter case, in dissent, said that the effect of the majority's decision was that "as a practical matter no plaintiff is ever likely to succeed in an application against a mass media defendant for an interlocutory injunction to restrain publication of defamatory material on a matter of public interest, however strong the plaintiff's case, however feeble the defences and however damaging the defamation": at [170]. The relevant principles are discussed in Tobin & Sexton at [23,001]–[23,037] and in George at 39.2. Such applications are generally brought in the Supreme Court, although the District Court's jurisdiction would permit the making of ancillary interlocutory orders.

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

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

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

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

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

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

6. **Strike-in applications:** The plaintiff must plead the defamatory words and any other words capable of materially altering the meaning of the matter complained of. Determining the context of the publication may be difficult if it is, for example, one of a series of publications separated by time, or space, such as book instalments (*Burrows v Knightley* (1987) 10 NSWLR 651), or if the plaintiff has sued on part only of a broadcast: *Gordon v Amalgamated Television Services Pty*

Ltd [1980] 2 NSWLR 410 at 413–5; *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605 at [26]. An application may be made to "strike out" portions of a matter complained of if the plaintiff has included material that is arguably a separate publication or (more commonly) to "strike in" portions of a publication which have been excluded by the plaintiff.

The most common "strike in" issue is the role of the hyperlink: *Crookes v Wikimedia Foundation Inc* (2011) SCC 47 (Supreme Court of Canada); Collins at [3.11]ff; [5.29]–[5.34]; see also *Google LLC v Defteros* [2022] HCA 27.

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

8. **Transfer of proceedings to another court:** Applications to transfer proceedings to another jurisdiction proceed on the same bases as applications in other actions. In *Crosby v Kelly* (2012) 203 FCR 451 the Full Court of the Federal Court held that *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) s 9(3) created a surrogate Commonwealth law by reference to the jurisdiction of the ACT Supreme Court, thereby conferring jurisdiction to hear defamation actions.

[5-4050] Limitation issues

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

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

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

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

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

Last reviewed: May 2023

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

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

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

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

- **No case submission:** where the claim is clearly hopeless, an application may be made during the trial for the whole case to be struck out: *Wijayaweera v St Gobain Abrasives Ltd (No 2)* [2012] FCA 98 (note that this application proceeds on different principles to those applicable to an application to take a defence or the whole action from the jury; see [5-4070] below);
- **Reputation:** the plaintiff may seek to lead evidence about good reputation (*Mizikovsky v Queensland Television Ltd (No 3)* [2011] QSC 375) and/or the defendant about bad reputation: Tobin & Sexton at [26,575];
- **Special damage:** evidence, including expert evidence, may be led, in the same manner as in other causes of action: Tobin & Sexton at [26,555];
- **Splitting/inverting the case:** see Tobin & Sexton at [26,568]; *French v Triple M Melbourne Pty Ltd (Ruling No 2)* [2008] VSC 548;
- **After the judgment:** in rare cases, an application may be made to the court to correct an error or oversight. In *Duma v Fairfax Media Publications Pty Limited (No 4)* [2023] FCA 159, the trial judge reduced the damages awarded from $545,000 to $465,000 by reason of having overlooked evidence about the mitigating impact of an award of damages against another defendant.

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

Last reviewed: May 2023

Delineation of the role of judge and jury

The jury determines whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established: s 22(2). However, if an issue relating to defences is dealt with by the judge, rather than the jury, at general law, this continues to be the case under the *Defamation Act* 2005: s 22(5)(b). It is for the judge, however, to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount: s 22(3). Section 10A(4) of the *Defamation Act* specifically grants the court (and not the jury) power to determine serious harm.

Empanelling the jury

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

Judge's opening remarks to the jury

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

The questions to go to the jury

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

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

Opening and closing addresses of counsel

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

Applications to discharge the jury during the trial

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

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

Separate ruling on imputation meanings

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

Delays during the trial

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

Application to take a defence away from the jury

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

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

Summing up by the judge to the jury

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

It is acceptable for the trial judge to emphasise particular arguments by one side or to take such other steps as are necessary to maintain a reasonable equilibrium in the way in which issues go to the jury: *Illawarra Newspapers Pty Ltd v Butler* [1981] 2 NSWLR 502 at 509 per Samuels JA. While judges express opinions in other common law jurisdictions (Brown [17.2(3)(d)], and formerly did so in Australia (*Jackson v Brennan* (1911) 13 WALR 121; *Cunningham v Ryan* (1919) 27 CLR 294; *Seymour v Australian Broadcasting Corp* (1990) 19 NSWLR 219 at 225 per Glass JA), judges should be cautious about expressing views at any stage of the trial: *Channel Seven Sydney Pty Ltd v Mohammed* (2008) 70 NSWLR 669.

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

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

The jury verdict

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

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

[5-4080] Common evidence problems

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

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

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

[5-4090] Damages

Last reviewed: May 2023

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

Section 35 imposes a cap on damages that can be awarded in "defamation proceedings" ($250,000 as at 1 January 2006, which is revised on 1 July of each year in accordance with the provisions of s 35(3); see the table in Tobin & Sexton at [20,100] for the current maximum figure). The maximum amount of damages for non-economic loss is only to be awarded in the most serious case: s 35(2). The cap applies to an award in particular proceedings, whether or not there are multiple causes of action: *Davis v Nationwide News Pty Ltd* (2008) 71 NSWLR 606. It is unresolved whether the cap applied separately to each plaintiff in proceedings with multiple plaintiffs.

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

[5-4095] Aggravated compensatory damages

Last reviewed: May 2023

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

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

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

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

From 1 July 2021, following the commencement of the *Defamation Amendment Act* 2020, a different approach to the assessment of aggravated damages now applies. An award of ordinary compensatory damages can only be made up to the statutory cap on damages for non-economic loss: s 35(1)–(2).

If the court is satisfied that an award of aggravated damages should be made, it may do so but must assess aggravated damages as a separate head of damages from ordinary compensatory damages: s 35(2B); *Doak v Birks* [2022] NSWDC 625 at [113]–[130]. This is so whether or not the award

of aggravated damages would exceed the cap on damages for non-economic loss. The approach under statute to the assessment of aggravated damages differs from the approach at common law. Conventionally, at common law, damages for ordinary and aggravated compensatory damages were assessed together.

[5-4096] Special damages and injury to health

Claims for special damages in defamation may be brought where it is asserted that the publication of the matter complained of results in actual loss: see Tobin & Sexton at [21,165]. The range of losses may be quite far-reaching, such as the cost of making films to combat the negative publicity engendered by the defamatory publication (*Comalco Ltd v ABC* (1985) 64 ACTR 1; *ABC v Comalco Ltd* (1986) 12 FCR 510) or the loss of film roles for an actress: *Wilson v Bauer Media Pty Ltd* [2017] VSC 521. Such a claim requires specific pleading and is generally supported by expert evidence. Such a claim differs from an "Andrews" claim (*Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225) for general loss of business, which is generally only supported by particulars and discovery: see Tobin & Sexton at [21,175].

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

[5-4097] Derisory damages and mitigation of damages

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

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

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

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

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

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

Last reviewed: May 2023

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

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

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

[5-4100] Costs

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

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

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

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

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

[5-4110] Current trends

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

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

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

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

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

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

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

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

Amendment of *Defamation Act* 2005

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

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

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

Amendment of *Limitation Act* 1969

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

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

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

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

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

The following factors should be considered:

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

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

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

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

[5-4220] Further references

Legislation

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

Rules

- UCPR rr 5.2(2)(a), 14.22, 14.31, 14.32, 14.33, 14.34, 14.35, 14.36, 14.37, 14.38, 14.39, 14.40, 15.1, 15.19, 15.21, 15.22, 15.23, 15.24, 15.25, 15.26, 15.27, 15.28, 15.29, 15.30, 15.31, 29.2, 29.2A, Pt 42

Practice Note

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

Further references

Books

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

Articles

- J Cashen "Defamation cap rising well above inflation", *Gazette of Law and Journalism*, 10 December 2014
- J Gibson, "Adapting defamation law reform to online publication" (2018) 22 *MALR* 119
- K Gould, "Hyperlinking and defamatory publication: a question of 'trying to fit a square archaic peg into the hexagonal hole of modernity'?" (2012) 36 *Aust Bar Rev* 137
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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

Last reviewed: May 2023

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]

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

The pre-2012 scheme provides for:

- indexed maximum weekly payments where a worker is rendered unable to work as a result of a workplace injury at the rate of the worker's current weekly wage to a maximum of $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]
- any reasonably necessary domestic assistance[12]
- compensation, in some circumstances, for gratuitous domestic assistance provided to the worker, and[13]
- compensation for property damage.[14]

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.[15] This is currently $871,200, and is to be apportioned between dependents,[16] or otherwise paid to the worker's legal personal representative.[17] Provision is also made for weekly payments for dependent children[18] and funeral expenses.[19]

This compensation scheme is regulated by State Insurance Regulatory Authority.[20] Insurance and Care NSW (icare)[21] acts on behalf of the Workers Compensation Nominal Insurer, the statutory insurer in NSW.[22]

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.[23]

[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 53 of 2012.
9 *Workers Compensation Act* 1987, s 37 prior to amendments made by Act 53 of 2012.
10 *Workers Compensation Act* 1987, s 60.
11 *Workers Compensation Act* 1987, s 66.
12 *Workers Compensation Act* 1987, s 60AA.
13 *Workers Compensation Act* 1987, s 60AA(3).
14 *Workers Compensation Act* 1987, Div 5 Pt 3.
15 See generally *Workers Compensation Act* 1987, Pt 3 Div 1.
16 *Workers Compensation Act* 1987, s 25(1)(a).
17 *Workers Compensation Act* 1987, s 25(1).
18 *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.
19 *Workers Compensation Act* 1987, s 26.
20 *State Insurance and Care Governance Act* 2015, Pt 3.
21 *State Insurance and Care Governance Act* 2015, Pt 2.
22 *Workers Compensation Act* 1987, Div 1A Pt 7.
23 *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").[24]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[25] 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.[26]

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;[27]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[28]
- payment for the commercial provision of domestic assistance;[29] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[30]

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

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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24 *Workers' Compensation (Dust Diseases) Act* 1942, s 5.
25 *Workers' Compensation (Dust Diseases) Act* 1942, ss 7–8.
26 *Workers' Compensation (Dust Diseases) Act* 1942, s 8I.
27 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2).
28 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2)(d).
29 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2)(d).
30 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2)(d). Damages for gratuitous provision of attendant care services are also recoverable via common law action: *Civil Liability Act* 2002, s 15A.
31 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2B)(b)(ii) which sets an amount of $137.30 per week subject to indexation in accordance with s 8(3)(d).
32 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2B)(bb).
33 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2B)(b)(ii).
34 *Workers' Compensation (Dust Diseases) Act* 1942, s 8(2B)(b)(iii) which sets an amount of $69.40 per week subject to indexation in accordance with s 8(3)(d).
35 *Workers' Compensation (Dust Diseases) Act* 1942, 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.[36] 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.[37] 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.[38]

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

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

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

[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;[41]
- 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%;[42]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[43]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[44]
- an exclusion of the damages payable for the loss of the services of a person;[45]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[46] 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;[47] and
- an exclusion of the award of exemplary or punitive damages.[48]

The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim resolution,[49] and that provide for an assessment process as a precondition to commencement of court proceedings.[50]

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.[51]

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

41 *Motor Accidents Compensation Act* 1999, s 125; Motor Accidents Compensation (Determination of Loss) Order 2009, O 3.
42 *Motor Accidents Compensation Act* 1999, ss 131, 132.
43 *Motor Accidents Compensation Act* 1999, s 134; Motor Accidents Compensation (Determination of Loss) Order 2009, O 4.
44 *Motor Accidents Compensation Act* 1999, s 141B. 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.
45 *Motor Accidents Compensation Act* 1999, s 142.
46 *Motor Accidents Compensation Act* 1999, s 127(2).
47 *Motor Accidents Compensation Act* 1999, 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.
48 *Motor Accidents Compensation Act* 1999, s 144.
49 *Motor Accidents Compensation Act* 1999, Pt 4.3.
50 *Motor Accidents Compensation Act* 1999, s 108. See Pt 4.4 for details of the claims assessment process.
51 *Motor Accidents Compensation Act* 1999, s 109.

where the injury or death arose as the result of a blameless accident.[52] 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.[53] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[54]

[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.[55] Statutory benefit payments are reduced after 52 weeks for contributory negligence, if applicable.[56] A claim for statutory payments must be made within 3 months of the motor accident.[57]

Damages are payable for persons who were not at fault and have more than threshold injuries. A "threshold injury" is defined as a soft tissue injury and a minor psychological or psychiatric injury that is not a recognised psychiatric illness.[58] 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.[59]

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.[60]

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%.[61]

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.

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

52 *Motor Accidents Compensation Act* 1999, Pt 1.2.
53 *Motor Accidents (Lifetime Care and Support) Act* 2006, s 4.
54 See *Motor Accidents (Lifetime Care and Support) Act* 2006, 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.
55 Note that journey claims were removed by the 2012 workers' compensation amendments.
56 *Motor Accident Injuries Act* 2017, s 3.38(1) (previously 26 weeks, amendment commenced 1 April 2023).
57 *Motor Accident Injuries Act* 2017, s 6.13(1).
58 *Motor Accident Injuries Act* 2017, s 1.6 (previously "minor injury", changes to terminology commenced 1 April 2023), "soft tissue injury" is separately defined in s 1.6(2).
59 *Motor Accident Injuries Act* 2017, ss 4.11, 4.13, 4.22, as at 1 October 2022.
60 *Motor Accident Injuries Act* 2017, s 3.4(4), commenced 29 March 2022.
61 Sections 6.14(1), 7.33 and 6.23(1) were repealed on 28 November 2022.

a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[62] 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.[63] 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.[64] 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.[65] 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.[66] 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.[67]

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;[68]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[69]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[70]
- 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;[71]

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62 *Motor Accident Injuries Act* 2017, s 7.23.
63 *Motor Accident Injuries Act* 2017, ss 4.11 and 4.13.
64 *Motor Accident Injuries Act* 2017, s 6.31.
65 *Motor Accident Injuries Act* 2017, s 6.32.
66 *Motor Accident Injuries Act* 2017, s 6.33.
67 *Motor Accident Injuries Act* 2017, s 6.34.
68 *Civil Liability Act* 2002, s 12, (approximately $3,617).
69 *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).
70 *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).
71 *Civil Liability Act* 2002, s 15C.

- 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;[72]
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[73]
- 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;[74] and
- exemplary, punitive or aggravated damages cannot be awarded.[75]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[76] 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.[77]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[78]

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.[79]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[80]

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.[81]

Future losses are currently calculated according to the 5% actuarial discount rate.[82]

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.[83]

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72 *Civil Liability Act* 2002, s 16; Civil Liability (Non-economic Loss) Order 2010, O 3.
73 *Civil Liability Act* 2002, s 14.
74 *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.
75 *Civil Liability Act* 2002, s 21.
76 *Civil Liability Act* 2002, s 29.
77 *Civil Liability Act* 2002, s 30.
78 *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.
79 *Workers Compensation Act* 1987, s 151E.
80 *Workers Compensation Act* 1987, s 151H.
81 *Workers Compensation Act* 1987, s 151G.
82 *Workers Compensation Act* 1987, s 151J.
83 *Workers Compensation Act* 1987, s 151I.

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.[84]

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;[85]
- 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;[86] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[87]

[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;[88]
   - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[89]
   - 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.[90]

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.[91] It does not, however, bar dust diseases victims or their dependants from claiming statutory dust diseases workers' compensation benefits, where the victim's disease was work related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,[92] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

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84 *Workers Compensation Act* 1987, s 151M.
85 *Workers Compensation Act* 1987, s 151A(1)(a).
86 *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.
87 *Workers Compensation Act* 1987, s 151A(1)(c).
88 *Civil Liability Act* 2002, ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
89 *Civil Liability Act* 2002, s 15B. These are also known as *Sullivan v Gordon* damages.
90 See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
91 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.
92 *Workers Compensation Act* 1987, s 151A(1)(a). See above, para 1.54.

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.[93] 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.[94]

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".[95] 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;[96]
- 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;[97]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[98]

93 *Dust Diseases Tribunal Act* 1989, s 10.
94 *Dust Diseases Tribunal Act* 1989, s 3. For example occupational asthma caused by a dust capable of causing dust disease: *Manildra Flour Mills v Britt* [2007] NSWCA 23.
95 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.
96 *Dust Diseases Tribunal Act* 1989, s 25(3).
97 *Dust Diseases Tribunal Act* 1989, s 25A.
98 *Dust Diseases Tribunal Act* 1989, s 25B.

- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;[99]
- the calculation of future losses by reference to a 3% actuarial discount table;[100]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[101]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[102] 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.[103]

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[104]
- 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.[105]

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.[106] 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.[107] In addition, unlike the general workers' compensation scheme,[108] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[109]

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

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99 *Dust Diseases Tribunal Act* 1989, s 41.

100 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.

101 *Dust Diseases Tribunal Act* 1989, s 12A.

102 See *Civil Liability Act* 2002, 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)).

103 *Dust Diseases Tribunal Act* 1989, 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.

104 *Dust Diseases Tribunal Act* 1989, s 12B

105 *Dust Diseases Tribunal Act* 1989, s 11A.

106 See *Workers' Compensation (Dust Diseases) Act* 1942, s 8AA(4).

107 *Workers Compensation Act* 1987, s 151A(1)(b).

108 See *Workers Compensation Act* 1987, s 151A(1)(a).

109 *Workers' Compensation (Dust Diseases) Act* 1942, s 8E.

110 *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.

compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[111]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[112]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[113] 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).[114]

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").[115] 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.[116]

In an estate action, the economic loss damages recoverable comprise:[117]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[118] and provided by, the deceased to other people, prior to death;[119]
- the loss of the deceased's earning capacity to the date of death; and
- funeral expenses.[120]

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"),[121] nor do they include exemplary damages.[122]

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111 See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.

112 *Dust Diseases Tribunal Act* 1989, s 12D.

113 *Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.

114 *Civil Liability Act* 2002, 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.

115 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(1).

116 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).

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

118 *Civil Liability Act* 2002, s 15A, also known as *Griffiths v Kerkemeyer* damages.

119 *Civil Liability Act* 2002, s 15A, also known as *Griffiths v Kerkemeyer* damages.

120 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(c).

121 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(a)(ii).

122 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(a)(i).

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[123]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[124] 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.[125] 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.[126]

[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,[127] 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.[128] Only one such dependency action can be brought.[129]

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,[130] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[131] Although the relevant provision does not explicitly limit the damages recoverable in this way,[132] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[133] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[134]

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

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[135] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[136]

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123 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).

124 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.

125 *Dust Diseases Tribunal Act* 1989, s 12B.

126 *Motor Accidents Compensation Act* 1999, s 137(4); *Workers Compensation Act* 1987, s 151M(4); *Civil Procedure Act* 2005, s 100(4).

127 *Compensation to Relatives Act* 1897, s 4.

128 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: *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(5).

129 *Compensation to Relatives Act* 1897, s 5.

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

131 *Compensation to Relatives Act* 1897, s 3(2).

132 *Compensation to Relatives Act* 1897, s 3(1).

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

134 *Compensation to Relatives Act* 1897, s 4(1).

135 *Compensation to Relatives Act* 1897, s 3(1).

136 *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

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

The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.[137]

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.[138]

[The next page is 7001]

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

138 See *Civil Liability Act* 2002, ss 11A(1), 11A(2), 14; *Motor Accidents Compensation Act* 1999, s 127(1)(b), (c); *Workers Compensation Act* 1987, ss 151E(1), (3), 151J.

Damages

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Damages

Interest

[The next page is 7051]

Damages

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

[7-0000] General principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The recognised heads of damage are:

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

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

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

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

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

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

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

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

Interim payments

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

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

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

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

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

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

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

Court structured settlements

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

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

Lifetime care and support

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

[7-0020] Actual loss

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

Prospective consequences

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

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

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

Example

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

Extras and discounts

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

Mitigation

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

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

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

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

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

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

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

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

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

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

Loss of amenity of the use of a chattel

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

Aggravation

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

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

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

Pre- and post-injury conditions

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

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

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

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

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

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

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

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

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

Material contribution

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

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

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

Life expectancy

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

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

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

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

[7-0030] Contributory negligence

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

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

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

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

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

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

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

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

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

Apportionment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Blameless accidents

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

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

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

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

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

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

Heads of Damage

[7-0040] Non-economic loss

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

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

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

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

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

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

Assessing non-economic loss

The *Motor Accidents Compensation Act* applies to injuries suffered in accidents occurring after midnight on 26 September 1995. Sections 131–134 (and s 135, repealed in 2020) deal with non-economic loss. To qualify for an award the plaintiff's level of whole-person impairment must be assessed at greater than 10%. If the parties disagree on this question, a medical assessor, whose determination is binding on the parties and the courts, is appointed by the Motor Accidents Authority. Unlike the *Motor Accidents Act* and the *Civil Liability Act*, s 134 does not require that the court assess damages as a proportion of the maximum sum fixed for an award of non-economic loss. Damages are assessed with the application of common law principles up to the maximum provided for in s 134. This was explained by Heydon JA in *Hodgson v Crane* (2002) 55 NSWLR 199 when he said it was not possible to construe the concept of proportionality out of the language of ss 131–134. When the threshold of 10% permanent impairment was passed, the court was required to assess non-economic loss without statutory restraint except for the maximum that may be awarded: at [39].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7-0050] Pecuniary losses

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

Income loss

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

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

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

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

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

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

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

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

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

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

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

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

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

His Honour's summary at [89] was:

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

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

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

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

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

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

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

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

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

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

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

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

Loss of income from operation of a business

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

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

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

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

Vicissitudes

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

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

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

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

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

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

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

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

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

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

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

Statutory provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Superannuation

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

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

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

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

The Fox v Wood component

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

[7-0060] Out-of-pocket expenses

Medical care and aids

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

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

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

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

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

The assessment for future needs involves consideration of the following:

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

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

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

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

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

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

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

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

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

Attendant care

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

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

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

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

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

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

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

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

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

Justices Toohey, McHugh, Gummow and Kirby said:

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

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

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

Legislative provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commercially provided services

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

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

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

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

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

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

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

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

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

Loss of capacity to care for others

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7-0070] Compensation to relatives

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

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

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

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

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

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

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

[7-0080] Servitium

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

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

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

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

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

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

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

[7-0085] Motor Accident Injuries Act 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) rehabilitation,

(d) ambulance transportation,

(e) respite care,

(f) attendant care services,

(g) aids and appliances,

(h) prostheses,

(i) education and vocational training,

(j) home and transport modification,

(k) workplace and educational facility modifications,

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

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

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

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

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

Economic loss

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

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

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

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

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

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

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

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

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

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

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

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

Non-economic loss

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

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

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

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

Contributory negligence

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

Miscellaneous

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

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

[7-0090] Funds management

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

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

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

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

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

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

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

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

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

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

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

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

Entitlement

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

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

Calculation of the employer's contribution

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

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

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

The third party's contribution

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

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

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

[7-0110] Punitive damages

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

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

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

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

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

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

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

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

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

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

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

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

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

Aggravated damages

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

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

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

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

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

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

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

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

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

Exemplary damages

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

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

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

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

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

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

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

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

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

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

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

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

[7-0120] Offender damages

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

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

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

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

[7-0125] Illegality as a limiting principle

Last reviewed: May 2023

For the purposes of damages for personal injury, unreasonable or illegal conduct is not usually reasonably foreseeable. Thus, a defendant should not ordinarily be held responsible for the losses a plaintiff sustains that result from a rational and voluntary decision to engage in criminal activity: *State Rail Authority of NSW v Wiegold* (1991) 25 NSWLR 500 at 517. In *Wiegold*, the plaintiff was seriously injured in the course of his work as a rail maintenance worker due to the negligence of his employer. The plaintiff's injuries prevented him from working at full capacity and, as a result, he struggled financially. He was convicted of cultivating indian hemp and given a custodial sentence; as a result of his imprisonment and consequent inability to attend work, his employment was terminated. The plaintiff claimed damages for personal injuries suffered in the course of employment.

The trial judge held that the plaintiff's conviction should be ignored when assessing his economic loss after his release from prison as the plaintiff was induced into the criminal enterprise by his impecuniosity, which resulted from the workplace accident. The Court of Appeal, by majority, disagreed, stating that, in this case, applying a simple but for test to determine causation would be inappropriate and, following *March v Stramare Pty Ltd* (1991) 171 CLR 506, it is erroneous to divorce considerations of public policy from the determination of issues of causation: at 511. It held that if a plaintiff has been convicted and sentenced for a crime, he or she "should bear the consequences of the punishment, both direct and indirect". If not, it risks generating "the sort of clash between civil and criminal law that is apt to bring the law into disrepute": at 514.

Other cases where illegality issues were raised have precluded an award of damages based on causation and policy considerations. For example, *Anderson v Hotel Capital Trading Pty Ltd* [2005] NSWCA 78 (appellant denied damages for work-related injury after which he suffered PTSD and became a heroin user leading to brain damage). *Wiegold* has been followed in *Holt v Manufacturers' Mutual Insurance Ltd* [2001] QSC 230 (award of general damages for motor vehicle accident discounted for plaintiff's drug taking); *Bailey v Nominal Defendant* [2004] QCA 344 (appellant not liable for economic loss flowing from respondent's misconduct resulting in his discharge from the Army, despite the misconduct being directly related to the psychiatric condition respondent suffered after work-related motor vehicle accident); *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 (appellants not liable for harm caused to respondent following incarceration in

psychiatric hospital despite appellants releasing respondent the day before he committed murder during a psychotic episode); and *Tomasevic v State of Victoria* [2020] VSC 415 (plaintiff denied damages for pecuniary loss in period during which the loss was a consequence of his commission of multiple indictable offences which led to cancellation of his registration as a teacher).

The majority in *Wiegold* distinguished *Grey v Simpson* (Court of Appeal, 3 April 1978, unrep) (addiction to heroin following pain consequential on injuries) on the basis the plaintiff had not been convicted of a crime (thus issues of public policy were not involved): at 514–515. See also *Trajkovski v Ken's Painting & Decorating Services Pty Ltd* [2002] NSWSC 568 at [36] which distinguished the principle in *Wiegold*.

[7-0130] Intentional torts

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

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

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

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

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

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

The attraction of this provision is that, if the wrong of which a plaintiff complains can be brought within its scope, the constraints on damages contained within the Act can be avoided, with the exception of those relating to the recovery for gratuitously provided care services. Damages in claims of intentional torts are at large, with the exception of those claimed for voluntarily provided care. They may therefore range from a nominal amount, where a plaintiff is unable to establish actual damage, to substantial damages on all heads for personal injury. Aggravated and exemplary damages are also available in appropriate cases. Application of the provisions of the section has not been straightforward, issues to date encompassing the following.

Pleadings

It is in this area that incongruity arises in the context of the law of negligence. In *New South Wales v Lepore* (2003) 212 CLR 511, a claim of vicarious liability against an employer, views diverged

on the question of whether a claim of intentional infliction of harm could be pleaded in negligence. McHugh J at [162] took the view that the plaintiff was entitled to elect to plead negligence or trespass to the person. He said an action for the negligent infliction of harm was not barred because of the intentional act of the person causing the harm. Gummow and Hayne JJ took a different view. They said at [270], that while negligently inflicted injury to the person could sometimes be pleaded in trespass to the person, the intentional infliction of harm cannot be pleaded as negligence.

Consent

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

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

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

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

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

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

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

Intent

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

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

It is the second of these requirements that presents the greatest challenge to litigants. In *White v Johnston* Leeming JA at [132] noted that these requirements took matters further than the tort of

assault and battery where it was unnecessary to establish that a defendant intended to cause harm. Even if a plaintiff was able to prove an intentional tort, he said, the action would be excluded from the *Civil Liability Act* only if it was also established that the defendant's conduct was carried out with intent to cause injury.

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

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

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

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

Causation

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

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

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

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

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

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

Injury

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

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

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

Onus

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

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

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

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

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

Vicarious liability

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

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

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

Legislation

- *Civil Liability Act* 2002, Pts 2A, 6, ss 3B, 5B, 5R, 5T, 7B (rep), 7F (rep), 12, 12(2), 13(1), 14, 15, 15(1), (2), (3), (5), 15A, 15B, (2)(b), (2)(d), (5), (6), (7), (8), (9), (10), (11), 15C, 16, (1), (3), 17, 21, 26X, 26C, 34, 48, 49, 50, 71(1)
- *Civil Procedure Act* 2005, s 82

- *Compensation to Relatives Act* 1897, s 3(3)
- *Fatal Accidents Act* 1959 (WA)
- *Law Reform (Miscellaneous Provisions) Act* 1965
- *Motor Accidents Act* 1974
- *Motor Accidents Act* 1988, ss 49, 74, 76, 79(3)
- *Motor Accidents Compensation Act* 1999, ss 3, 7A, 7B(1), 7F, 83, 125(2), 126, 127(1)(d), 130, 130A (rep), 134, 131–134, 135 (rep), 136, 138, 140, 141B, 141C, 142, 143, 144, 146
- *Motor Accidents (Lifetime Care and Support) Act* 2006
- *Workers Compensation Act* 1987, ss 151H, 151I, 151IA, 151AD, 151J, 151L, 151N, 151O 151Q, 151R, 151Z, (1)(d), (2), (2)(a), (b), (d)
- *Workplace Injury Management and Workers Compensation Act* 1998, Pt 7, s 322(1)
- *Social Security Act* 1991
- *Victims Compensation Act* 1996 (rep, now *Victims Rights and Support Act* 2013)

Further references

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

[The next page is 7501]

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) 38 NTLR 101; *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) 38 NTLR 101; *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

Last reviewed: May 2023

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]; *Constantinidis v Prentice (No 2)* [2023] NSWSC 160 at [20]. 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); *Constantinidis v Prentice (No 2)* at [19]–[20] (any costs assessment was likely to be lengthy, expensive and out of proportion to the modest amount of costs being assessed due to plaintiff's repeated attempts to litigate the same matters over and over again); 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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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

Last reviewed: May 2023

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. It must be shown beyond reasonable doubt that the conduct was a deliberate breach of the order and the prosecutor bears the onus of establishing that the alleged contemnor did something or failed to do something that he could have otherwise done: *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 at [250]. For a helpful review of applicable principles, see *Commonwealth Bank of Australia v Salvato (No 4)* [2013] NSWSC 321 at [126]–[130]; *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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