Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 53

August 2023

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 53

Update 53, August 2023

[1-0000] Disqualification for bias

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15, in which there was a finding of apprehended bias in a multi-member court, has been added at **[1-0020] Apprehended bias**, **[1-0030] Procedure** and **[1-0040] Circumstances arising outside the hearing calling for consideration**.

Bakarich v Commonwealth Bank of Australia [2010] NSWCA 43 has also been added at **[1-0040]** as an example of a judge having previously shared chambers with a legal practitioner involved in a case not giving rise to a finding of apprehended bias.

At **[1-0050] Circumstances arising during the hearing** *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 and *Odtojan v Condon* [2023] NSWCA 129 have been added regarding the limits of judicial interventions and observations.

[2-1800] Consolidation and/or joinder of proceedings

At **[2-1800] Consolidation of proceedings** *ABC v AI* [2023] NSWSC 825 has been added as an example where an order was made that two proceedings be heard together pursuant to UCPR r 28.5 in the interests of justice.

[2-2600] Stay of pending proceedings

At **[2-2690] Other grounds on which proceedings may be stayed**, examples have been added of cases involving historical sexual abuse: *MXS2 v Georges River Grammar School* [2023] NSWSC 529 (a fair trial would not be possible in the circumstances); *BRJ v The Corporate Trusteees of The Diocese of Grafton* [2022] NSWSC 1077; cf *Patsantzopoulos by his tutor Naumov v Burrows* [2023] NSWCA 79 (application for permanent stay not made out).

[2-3900] Limitations

Anderson v State of NSW [2023] NSWCA 160 has been added at **[2-3920] Provisions applicable to all three categories** and **[2-3965] Cross references to related topics** for its discussion of ss 50F(3) and 6A *Limitation Act* 1969.

[2-4100] Freezing orders

References to *Frigo v Culhaci* [1998] NSWCA 88; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 have been added at **[2-4110] Freezing orders.**

At **[2-4120] Strength of case** *Samimi v Seyedabadi* [2013] NSWCA 279 has been added as an example regarding what constitutes a "good arguable case", and *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 and *Tomasetti v Brailey* [2012] NSWCA 6 have been added for their comments on when a freezing order is sought by an unsuccessful litigant pending appeal.

[2-4600] Persons under legal incapacity

At **[2-4700] Compromise** three cases have been added to exemplify the test of whether the compromise or settlement is in the best interests of the plaintiff: *Nolan v Western Sydney Local*

Health District [2023] NSWSC 671; *Karvelas (an Infant) v Chikirow* (1976) 26 FLR 381 and *Robinson v Riverina Equestrian Association* [2022] NSWSC 1613. At **Further reading**, an article by the Hon P Brereton, "Acting for the incapable — a delicate balance" has been added.

[2-5400] Parties to proceedings and representation

Findlay v DSHE Holdings Ltd [2021] NSWSC 249; *Ellis v Commonwealth* [2023] NSWSC 550; *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 and *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 have been added at **[2-5500] Representative proceedings in the Supreme Court** under the new heading "**Settlement/discontinuation of proceedings**" regarding considerations when assessing if a settlement is fair and reasonable. *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93 has also been added for its discussion on the discretionary nature of s 173 *Civil Procedure Act* 2005.

[2-7600] Vexatious litigants

The title of the chapter has been changed to "**Vexatious proceedings**" to be more in keeping with the name of the *Vexatious Proceedings Act* 2008.

Proietti v Proietti [2023] NSWCA 132 has been added at **[2-7610] Inherent jurisdiction and powers of courts and tribunals** as an example of the fact that the court has power to make orders appropriately adapted to the circumstances of the case.

A paragraph on *Teoh* directions has also been added at **[2-7610]** based on *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125.

[5-2000] Monetary jurisdiction in the District Court

Adjustments have been made throughout to include the new jurisdictional limit in the District Court as at 16/12/2022 of $1,250,000 (previously $750,000), effected by the *District Court Amendment Act* 2022, s 4(1).

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

At **[6-1010] General workers** and **[6-1020] Dust disease workers** some monetary amounts have been updated to accord with the Workers Compensation (Indexation) Order 2023.

[7-0000] Damages

Payne (t/as Sussex Inlet Pontoons) v Liccardy [2023] NSWCA 73 has been added at **[7-0030] Contributory negligence** for Beech-Jones JA's analysis of the elements of s 50 *Civil Liability Act* 2002, along with other Court of Appeal judgments which have opined that ss 50(2) and (3) of the Act are not easily reconciled: *Jackson v Lithgow City Council* [2008] NSWCA 312 and *NSW v Ouhammi* (2019) 101 NSWLR 160.

At **[7-0050] Pecuniary losses** *Chen v Kmart Australia Ltd* [2023] NSWCA 96 has been added as an example of an appeal regarding assessment of loss of future earning capacity of an injured child where a modest buffer sum was awarded. Cf *Clancy v Plaintiffs A, B, C and D* [2022] NSWCA 119, where the court found the primary judge's assessment of C's damages for future economic loss in the sum of $111,000, by way of a buffer, could not be sustained. See also, *Penrith City Council v Parks* [2004] NSWCA 201, for a discussion of s 13 *Civil Liability Act* 2002 and where a buffer was awarded.

[8-0000] Costs

Gokani v Visvalingam Pty Ltd [2023] NSWCA 80 has been added at **[8-0120] Legal practitioners** regarding application of the tests in Sch 2, cl 5 *Legal Profession Uniform Law Application Act* 2014 and s 99 *Civil Procedure Act* 2005.

In **Further references** the final resource has been updated to the Costs Assessment Rules Committee's "Guideline: costs payable between parties under court orders", published 25 May 2023.

[10-0000] Contempt in the face of the court

A **[10-0150] General** *He v Sun* (2021) 104 NSWLR 518 and *Matthews v ASIC* [2009] NSWCA 155 have been added to the discussion of an appropriate penalty for contempt of court.

Judicial Commission of New South Wales

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August 2023

FILING INSTRUCTIONS OVERLEAF

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Level 5, 60 Carrington Street, Sydney NSW 2000

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FILING INSTRUCTIONS

Update 53

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Disqualification for bias

[1-0000] Introduction

Bias may involve actual or apprehended bias.

[1-0010] Actual bias

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

[1-0020] Apprehended bias

Last reviewed: August 2023

The test for determining whether a judge should disqualify himself or herself by reason of apprehended bias is the objective "double might" test: "whether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide [emphasis added]": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; *Charisteas v Charisteas* [2021] HCA 29 and *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 at [50], [175], [292]; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 255 CLR 135. The resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place: *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 at [41]–[43] (citing *Ebner* at [7]–[9], [33]).

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

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

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

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

[1-0030] Procedure

Last reviewed: August 2023

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

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

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

The procedure to determine bias in a multi-member court is not settled: see obiter dicta in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 where Kiefel CJ and Gageler J considered the objection to jurisdiction on the ground of apprehension of bias ought to have been considered and determined by the Full Court rather than by the individual judge alone; Gordon, Edelman, Steward and Jagot JJ considered that the judge the subject of the recusal application should consider the issue first, personally and independently of other members of the court; and Gleeson J found it unnecessary to express an opinion as the matter was the subject of possible law reform.

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

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

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

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

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

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

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

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

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

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

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

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

Where there is a finding of apprehended bias in a multi-member court, the full court will be deprived of jurisdiction to hear and determine the appeal even if the decision was in fact unanimous: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* at [57], [65], [188], [301], [304].

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

Last reviewed: August 2023

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

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

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

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

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

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

(g) The fact that the judge more than 14 years previously had shared chambers and associated in a professional capacity with a legal representative involved in a case was not a ground for disqualification: *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 at [25]–[27], [29].

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

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

(j) The fact that the judge has acted in a professional capacity in another matter or matters for a party will not generally be a ground for disqualification: *Re Polites; Ex p Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 87–88; *Australian National Industries v Spedley Securities Ltd (in liq)*; *Bakarich v Commonwealth Bank of Australia* at [24].

(k) The fact that the judge has previously appeared as counsel against the appellant in a conviction appeal gave rise to disqualification, particularly as the earlier prosecution was connected with the case before the court: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15.

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

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

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

[1-0050] Circumstances arising during the hearing

Last reviewed: August 2023

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

It does not, however, follow that trial judges must sit in stony silence, without exposing their views, at risk of being accused of bias. The expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias; whether judicial interventions and observations exceed what is proper and reasonable expression of tentative views is a matter of judgment taking into account all of the circumstances of the case: *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 at [112]. Genuine engagement and debate about critical issues is permissible: *Re Keely; Ex p Ansett Transport Industries (Operations) Pty Ltd* [1990] HCA 27; *Barbosa v Di Meglio* [1999] NSWCA 307 and *Odtojan v Condon* [2023] NSWCA 129 at [45]–[46], and "critical, strong and candid" judicial statements will not necessarily lead to a finding of bias: *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* at [180]. However, undue interference by a judge, for example, in questioning parties or witnesses, or in taking up the arguments of one party, may cross the line, as can expressions of opinion as to the likely outcome of the case prior to the conclusion of the evidence and submissions. For guidelines concerning the extent to which judicial intervention is or is not permissible, see *Galea v Galea* (1990) 19 NSWLR 263 at 281–282 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen*, above.

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

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

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

There are four exceptions to this:

1. trivial matters of practice, procedure or administration (eg the start time or location of a matter, or whether the judge is robing)

2. ex parte matters

3. where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (eg for the filing of material physically or electronically with a judge's associate), and
4. exceptional circumstances.

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

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

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

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

[1-0060] Immunity from suit

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

Further references

- B Cairns, "Bias and procedural fairness at trial" (2021) 9 *Journal of Civil Litigation and Practice* 182
- J Sackar, "Disqualification of judges for bias", at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf, accessed 16 May 2018.
- Australian Law Reform Commission, *Without fear or favour: judicial impartiality and the law on bias,* Report No 138, 2021
- S Gageler, "Judicial legitimacy", paper presented at the 2022 Australian Judicial Officers Association Colloquium, Hobart, 7 October 2022, at https://www.ajoa.asn.au/wp-content/uploads/2022/10/Judicial-Legitimacy-final.pdf, accessed 6 March 2023.

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Consolidation and/or joinder of proceedings

[2-1800] Consolidation of proceedings

Last reviewed: August 2023

Where several proceedings are pending in the Supreme Court, District Court or General Division of the Local Court, or the Dust Diseases Tribunal, and it appears that:

- they involve a common question
- the relief claimed is in respect of, or arises out of, the same transaction or series of transactions, or
- for some other reason it is desirable;

the court may order:

- that they be consolidated
- that they be tried together, or one immediately after another, or
- that any of them be stayed until after the determination of any other of them: r 28.5.

Note: The rule does not apply to the Small Claims Division of the Local Court.

The development of the law and the current practice relating to consolidation and related matters were extensively considered by Austin J in *A Goninan & Co Ltd v Atlas Steels (Australia) Pty Ltd* [2003] NSWSC 956 in which his Honour made an order consolidating five separate proceedings involving seven different parties into one proceeding, where all the proceedings raised the common issue of whether the steel supplied and used in the manufacture of certain coal wagons was defective. The value of the order was that the five proceedings became one single proceeding, with one of the parties as plaintiff and two of the others as defendants, while each of the original parties was able to pursue their claims against the others by way of cross-claim, resulting in only one set of pleadings of lesser volume, avoiding repetition and potentially making it easier to identify the real issues, simplifying discovery and subpoenas, and reducing the complexity of the trial.

The power to order consolidation or joint hearings is discretionary and will not be exercised if a party can show a real possibility of prejudice. For example, a joint hearing was refused because it was held not to be in the interests of justice in *Skinner v Shine Pty Ltd* [2019] NSWSC 1709, where Adamson J stated: "This court ought not permit a situation where defendants will be, in effect, held hostage in proceedings in a substantial part of which they have little or no interest, merely because it might be more convenient for the plaintiff to have them assembled for the purposes of increasing the prospects of settlement": at [22].

An order can be made on terms, and such terms should, so far as appropriate in the particular case, identify the proceedings into which the others are to be consolidated, designate who is to be the plaintiff(s) and defendant(s), give directions as to pleadings and other matters, and, where appropriate, make special orders to preserve any party's rights under the *Limitation Act* 1969.

Note that if the effect of the order for consolidation is the joinder of a number of parties as plaintiffs, they must all act by the one solicitor, in accordance with the general rule that plaintiffs must always 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.

A more common order is that two or more proceedings be heard together and the evidence in one is to be evidence in the other(s). In such a case, the parties and the pleadings remain as they were

subject to any subsequent amendments, but there is only one hearing. Such an order is appropriate where the proceedings are less complex, even though they may involve common questions of law or fact such as where a number of persons sue in different proceedings for personal injuries arising out of the same accident, and there is a common issue as to the negligence of the defendant or defendants.

For example, in *ABC v AI* [2023] NSWSC 825 an order was made that two proceedings be heard together pursuant to r 28.5 in the interests of justice. Determinative factors included that the witnesses in the cases would be the same; there was significant factual cross-over between the cases; it would not be possible to hear and determine any assessment of damages separately in each of the cases; and, unless the cases could be heard together, there was a risk that two separate judges may arrive at inconsistent judgments: at [8]–[9].

Similarly, a number of separate claims under the *Succession Act* 2006, Ch 3, where the different plaintiffs may be in effect competing against each other, are appropriate for orders that they be heard together.

The cases to be consolidated or heard together must all be in the one court; and, in the Supreme Court, in the one division. It may therefore be necessary to first move proceedings into a different court or division, so that appropriate orders can then be made.

[2-1810] Sample orders

For consolidation

I order:

1. That proceedings numbered 1234 of 2006, 4567 of 2006 and 6789 of 2005 be consolidated.
2. That the consolidated proceedings bear the number 1234 of 2006.
3. That in the consolidated proceeding:
   (a) AB is the plaintiff;
   (b) CD and EF are defendants;
   (c) AB, CD, EF and any other parties to any of the previous proceedings may be joined as cross defendants;
   (d) The statement of claim [or of cross-claim] in proceedings no [.....] of 2006 be the statement of claim;
   (e) The respective statements of claim [*or of cross-claim*] in proceeding nos [.....] and [.....] be cross-claims by the respective plaintiffs or cross defendants as cross-claimants against the respective defendants or cross defendants as cross defendants;
   (f) The plaintiff and cross-claimants in the consolidated proceedings are to re-plead and make any necessary applications for leave to join parties or add causes of action, and the defendants and cross defendants are to re-plead in response in accordance with a timetable to be settled by the Registrar;
   (g) For the purpose of the consolidated proceeding, claims are to be taken to have been first filed at the time and in the manner in which they were first filed in any of the previous proceedings;

(h) Any particulars [*lists of documents or answers to interrogatories*] provided in any of the previous proceedings are to be particulars [*lists of documents or answers to interrogatories*] provided in the consolidated proceeding.

4. That the consolidated proceedings be stood over to [.....] am on [.....] before the Registrar for further directions.
5. Costs reserved (or otherwise as appropriate).

[2-1820] For proceedings to be heard together

I order that:

1. Proceedings numbers 1234 of 2006 and 5678 of 2006 be heard together and that the evidence in one case be evidence in the other.
2. Costs of the motion to be costs in the cause (or otherwise as appropriate).

Legislation

- *Civil Procedure Act* 2005 s 56
- *Limitation Act* 1969
- *Succession Act* 2006 Ch 3

Rules

- UCPR r 28.5

[The next page is 1031]

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) 265 CLR 77 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

Last reviewed: August 2023

- 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) 101 NSWLR 762 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]. *MXS2 v Georges River Grammar School* [2023] NSWSC 529 at [63].There is no necessary inconsistency between a person being found unfit to stand trial in criminal proceedings, but failing to establish that a permanent stay ought to be granted in civil proceedings against them for the same conduct. That is because of the different applicable statutory provisions and the principles of the common law. The impossibility of obtaining instructions from a defendant who is deceased does not of itself prevent the continuation of civil proceedings: *Patsantzopoulos by his tutor Naumov v Burrows* [2023] NSWCA 79 at [36]; cf Garling J in *BRJ v The Corporate Trustees of The Diocese of Grafton* [2022] NSWSC 1077 at [115]. Where the defendant has died or become incapacitated, some weight is attached to whether the allegations were put to the defendant before their death or incapacitation: *Moubarak by his tutor Coorey v Holt* at [163]; *Patsantzopoulos by his tutor Naumov v Burrows* at [33], [35]; *Gorman v McKnight* (2020) NSWCA 20 at [78]–[80].
- For a discussion of lack of proportionality as a ground for a permanent stay, see *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639; [2016] NSWCA 296 at [130]–[143].

This list is not necessarily comprehensive.

Legislation

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

Rules

- UCPR rr 12.4, 12.10, 22.5

Further references

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

[The next page is 1255]

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

Last reviewed: August 2023

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. Where a minor is involved, the relevant focus is on facts that are known or ought to be known by a "Capable Person" (which are then taken to be facts that are known or ought to be known by the minor): see *Anderson v State of NSW* [2023] NSWCA 160 at [44].

[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 JA 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

Last reviewed: August 2023

- 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. For s 6A to apply, the conduct complained of must constitute child abuse defined as (a) sexual abuse, (b) serious physical abuse, or abuse connected with (a) or (b). There is no definition in the *Limitation Act* of sexual abuse but on a proper construction, the reference to "sexual abuse" as part of the definition of "child abuse" in s 6A(2) means conduct which has a sexual connotation: *Anderson v State of NSW* [2023] NSWCA 160 at [24]–[25] (in which strip searches of two minors by police was held not to constitute child abuse for the purposes of s 6A).

[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]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]
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]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]	
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]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]
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]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]	
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]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]	
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]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
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]	
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

Last reviewed: August 2023

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: *Frigo v Culhaci* [1998] NSWCA 88, approved in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [51]; *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* 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.

See *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 at [4].

[2-4120] Strength of case

Last reviewed: August 2023

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; *Samimi v Seyedabadi* [2013] NSWCA 279 at [69]. 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.

Where a freezing order is sought by an unsuccessful litigant pending appeal it will usually be more difficult, although far from impossible, to discharge the onus of establishing a good arguable case: *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 at [6]. Establishing a good arguable case does not involve a preliminary assessment of the merits of the appeal; all that is necessary is that the grounds (or one or more of them) raise a fairly arguable point: at [19]. Note that in *Tomasetti v*

Brailey [2012] NSWCA 6 at [19], Campbell JA expressed reservations about the requirement to demonstrate a good arguable case in the context of an application for a freezing order pending appeal, where the appellant has failed in the court below.

[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: August 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: August 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 or settlement of the proceedings or an acceptance of money paid into court without the approval of the court: s 76(3). The test is whether the court is satisfied that the compromise or settlement is in the best interests of the plaintiff: *Nolan v Western Sydney Local Health District* [2023] NSWSC 671 at [3]; *Karvelas (an Infant) v Chikirow* (1976) 26 FLR 381 at 382; *Robinson v Riverina Equestrian Association* [2022] NSWSC 1613 at [5]. 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.

Further reading

P Brereton, "Acting for the incapable — a delicate balance", address to the Law Society of NSW & Carers NSW, CLE Breakfast: How to Care in 2011, Sydney 30/6/2011.

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

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Parties to proceedings and representation

[2-5400] Application

Part 7 of the UCPR applies to all courts except that Div 2, dealing with representative actions, and Div 6, dealing with relators, does not apply to the Small Claims Division of the Local Court.

Part 10 of the CPA concerning representative proceedings in the Supreme Court commenced operation on 4 March 2011.

[2-5410] By whom proceedings may be commenced and carried on

A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person: r 7.1. Where proceedings are commenced by a natural person on behalf of another person pursuant to a power of attorney, the court may order that the proceedings be carried on, on behalf of that other person, by a solicitor: r 7.1(1A). A solicitor on the record must hold an unrestricted practising certificate: r 7.1(6).

As to a litigant in person see "Unrepresented litigants and lay advisers" at [1-0800].

A company within the meaning of the *Corporations Act* 2001 (Cth) may commence and carry on proceedings in any court by a solicitor or by a director of the company and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the company: r 7.2.

Rule 7.2 is qualified by the provision in r 7.3 that, in the case of the Supreme Court, commencement by a director is only authorised if the director is also a plaintiff in the proceedings.

A corporation, other than a company within the meaning of the *Corporations Act* 2001 (Cth), may commence and carry on proceedings in any court by a solicitor. In any court, other than a Local Court, by a duly authorised officer of the corporation; and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the corporation: r 7.1(4).

See r 7.1(5) as to provisions applicable in the Local Court permitting specified proceedings to be commenced, and unless the court otherwise orders, carried on by specified persons.

[2-5420] Affidavit as to authority to commence and carry on proceedings in the Supreme Court or District Court

A person who commences or carries on proceedings in the Supreme Court or District Court as the director of a company within the meaning of the *Corporations Act* 2001 (Cth) or as the authorised officer of a corporation not being such a company, must file with the originating process, notice of appearance or defence, an affidavit of his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority: r 7.2(1).

The requirements of the respective affidavits are set out in r 7.2(1) and (3). A significant feature of those requirements is that the director or officer acknowledge that he or she may be liable to pay some or all of the costs of the proceedings: r 7.2(2)(iv), (3)(iv).

[2-5430] Issue of subpoena

A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is issued is represented by a solicitor in the proceedings: r 7.3(1). Leave may be given generally or in relation to a particular subpoena or subpoenas: r 7.3(2). A subpoena may not be issued in relation to proceedings in the Small Claims Division of the Local Court except by the leave of the court: r 7.3(3).

[2-5500] Representative proceedings in the Supreme Court

Last reviewed: August 2023

General

Following amendments to the CPA in 2011, a new regime which echoed the provisions of Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) was enacted. (See Supreme Court Practice Note, No SC Gen 17, concerning representative proceedings, commencing 31 July 2017). Part 58 of the UCPR was inserted to make provision for opt out notice requirements together with Form 115, which may be downloaded from the Supreme Court website.

Part 10 permits the commencement of proceedings by a representative party and does not provide for the appointment of a representative party for defendants or respondents. However, the Supreme Court has jurisdiction to make such representative orders: *Ahmed v Choudbury* [2012] NSWSC 1452 and *Burwood Council v Ralan Burwood Pty Ltd (No 2)* [2014] NSWCA 179.

Claims under industrial awards

While an application "under" Pt 2 of Ch 7 of the *Industrial Relations Act* 1996 cannot be commenced or maintained on behalf of group members, proceedings under Pt 10 of the CPA can be commenced and maintained seeking relief in respect of any statutory debt that arises in favour of group members in respect of their award entitlements: *Fakhouri v The Secretary for the NSW Ministry of Health* [2022] NSWSC 233 at [1], [51].

Case management of representative proceedings

The representative proceedings are case managed by a Judge or Associate Justice of the Division in which they are commenced. (See [2-0000] ff as to case management.) The management of representative proceedings is discussed in *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26 at [4]-[10] and *Bright v Femcare Ltd* [2002] FCAFC 243 at [160].

Finklestein J, in *Bright v Femcare*, above, observed at [160]:

> By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures … it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.

See also *Giles v Commonwealth of Australia* [2014] NSWSC 83 and *Wigmans v AMP Ltd* [2021] HCA 7 at [116].

Commencement of representative proceedings

Proceedings can be commenced in the Supreme Court by seven or more people who have claims against the same person or persons. The claims must arise out of the same, similar or related circumstances and the claims must give rise to a substantial common question or law or fact: s 157(1). The person who commences the proceedings, known as the representative party, must have standing to commence representative proceedings on behalf of other persons. It is sufficient if the representative party has standing to commence proceedings on his or her own behalf: s 158(1).

A person may commence proceedings against more than one defendant. This can occur irrespective of whether or not the group have a claim against every defendant in the proceedings: s 158(2). This provision overcomes a contrary view expressed in *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229, in relation to Pt IVA.

Consent of a person to be a group member is not required unless he or she is a Minister or an officer of the Commonwealth, a State or a Territory. An incorporated company or association does not require to give consent, however, consent is required if the proposed group member is the Commonwealth, a State, Territory or a body corporate established for a public purpose by a Commonwealth, State or Territory law: s 159.

The originating process must describe or otherwise identify the group members, specify the nature of the claims and the relief claimed, and the question of law or facts common to the claims. It is not necessary to name or specify the number of the group members: s 161.

It is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals: s 166(2). As to the framing of group definitions, see *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61, per Sackville J at [19]-[23].

Specification of common questions is important. The court may make orders for a hearing of common questions; these are referred to as *Merck* orders after *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26. These common questions provide the backbone of the proceedings and "careful compliance" is "of the greatest importance", per Lindgren J in *Bright v Femcare Ltd* [2002] FCAFC 243 at [14]. See also *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26, at [6]; *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 at [66] and *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383.

Group members are given the option to opt out of representative proceedings in the Court: s 162. Part 58 of the UCPR provides that the opt out notice must be filed and served on the representative party in the approved form (see Form 115). The form specifies that the potential group member understands that he or she forgoes the right to share in any relief obtained by the representative party in the representative proceedings and will not be entitled to receive any further notification about the conduct or disposition of the proceedings, and, to the extent he or she has a claim against the defendant/s, any limitation period suspended by the commencement of the representative proceedings has recommenced to run.

Within 14 days after the opt out date, that is the date fixed by the court before which a group member may opt out, the representative party must provide to the other parties a list of the persons who have opted out: UCPR r 58.2(2).

If, at any stage of the proceedings, it appears likely to the court that there are fewer than seven group members, the court may, on such conditions as it thinks fit, order that the proceedings continue under Pt 10 or order that they no longer do so: s 164.

The court may, on application by the defendant or of its own motion, order that proceedings no longer continue under Pt 10 if it is satisfied that it is in the interests of justice to do so upon one or more of the grounds set out in the section: s 166(1). As to the ground of "inappropriateness", see *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275: s 166(2).

If the court orders proceedings not to continue under Pt 10, they may continue as proceedings by a representative party on its own behalf. The court may order that a group member be joined as an applicant in those proceedings: s 167(1).

Where it appears to the court that determination of the question or questions common to all group members will not finally determine the claims of a group member, the court may give direction in relation to the determination of the remaining questions: s 168(1). A sub-group may be established and a sub-group representative party appointed: s 168(2). The court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to that member's claims: s 169(1).

Settlement/discontinuation of proceedings

Representative proceedings may not be settled or discontinued without leave of the court: s 173(1). The court may make orders as to the distribution of settlement moneys: s 173(2). The court's approval under s 173 is a discretionary decision, and therefore can only be disturbed if a *House v The King* error[1] is established: *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93 at [2], [9]–[10],

1 That is, the primary judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, did not take into account some material consideration, or that, on the facts, his decision is unreasonable or plainly unjust.

[76]. As to settlement offers to group members, see *Courtney v Medtel Pty Ltd* [2002] FCA 957, per Sackville J at [64]. For a detailed discussion concerning the fairness and reasonableness of an overall settlement sum, see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche (No 2)* [2006] FCA 1388 at [42]–[64]. The central question for the court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole. The court's role in relation to group members is supervisory and protective, analogous to that which it assumes when approving settlements on behalf of persons with a disability: *Findlay v DSHE Holdings Ltd* [2021] NSWSC 249 at [12]–[14]. See also *Ellis v Commonwealth* [2023] NSWSC 550 at [7], [17]–[18]. Cases decided under the equivalent s 33V *Federal Court of Australia Act* 1976 (Cth) include: *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 at [62]; *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 at [8].

With the leave of the court, a representative party may settle their own claim at any stage of the representative proceedings: s 174(1). They may, with leave, withdraw as a representative party: s 174(2). By order, another group can be established: s 174(3). Before granting leave to withdraw as a representative party, the court must be satisfied that notice has been given to group members, that the notice was given in sufficient time for them to apply for another person to be substituted, and that any application for substitution has been determined: s 174(4).

Parallel representative proceedings in relation to the same controversy

There is no provision in Pt 10, CPA that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. Where seven or more persons have claims against the same person, and the conditions in s 157(1)(b) and (c) are met, s 157 permits "one or more" of those persons to commence proceedings representing some or all of them. Provisions in Pt 10, such as ss 171 and 162, do not detract from the Supreme Court's power under s 67 to stay competing representative proceedings or impose any limitations: *Wigmans v AMP Ltd* [2021] HCA 7 at [78].

The Supreme Court's power to grant a stay under s 67 CPA of competing representative proceedings is not confined by a rule or presumption that the proceeding filed first in time is to be preferred. There is no "one size fits all" approach. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case: *Wigmans v AMP Ltd* [2021] HCA 7 at [52].

Notices

Part 10, Div 3 concerns notices. Section 175 provides for notices that must be given in representative proceedings. Generally, the court has a wide power to order that notice of any matter be given to the group or individual members: s 175(5). The court must be clear who is to give the notice and the way in which the notice is to be given: s 176(2). Any conditions and compliance periods must also be clearly specified in the order. Pursuant to s 175(6), notices must be given as soon as practicable after the happening of the event to which it relates.

Specifically, notices must be given for the following:

- commencement of the proceedings and the right of group members to opt out
- dismissal of the proceedings for want of prosecution
- withdrawal of a representative party.

The court has the power to dispense with compliance if the relief sought in the proceedings does not include any claim for damages (s 175(2)) or it may order that the notice includes a direction to a party to provide information relevant to the giving of the notice and relating to the costs of giving notice: s 176(3).

The court may also order that notice be given in the media, for example by means of press advertisement, radio or television broadcast: s 176(4). This may be particularly useful if the court is "not confident all the group members were known by name, and so could be notified by letter": *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 260, per Wilcox J. The court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practical and not unduly expensive, to do so: s 176(5).

Powers of the Court

In determining a matter in representative proceedings, pursuant to s 177(1), the court has the power to:

- determine a question of law
- determine a question of fact
- make a declaration of liability
- grant any equitable relief
- make an award of damages for group members, sub-group members or individual group members being specified amounts or amounts worked out in such a manner as the court specifies
- make an award of an aggregate amount of damages.

In making an award of damages, the court must make provision for the payment or distribution of the money to the group members entitled: s 177(2).

The court may provide for the constitution and administration of a fund: s 178. The court may give directions as it thinks just in relation to the manner in which a member's entitlement to damages is established and how to determine any disputes concerning that member's entitlement: s 177(4).

If a group member does not make a claim within the set timeframe, the court may allow his or her claim, taking into account such factors as whether it is just to do so or if the fund has not already been fully distributed: s 178(4). The defendant may apply to the court for an order to receive any money remaining in the fund: s 178(5).

The court may, of its own motion or on application by a party or a group member, make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceedings: s 183. However, s 183 is not a plenary power "at large" and is not a power conferred on the Supreme Court simply to make such orders "as the court thinks fit" or which are "in the interests of justice" or which will promote or facilitate settlement: *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 at [4]. Section 183 (and the identical s 33ZF of the *Federal Court of Australia Act* 1976) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To do so would be to use ss 183 and 33ZF as a vehicle for rewriting the scheme of the legislation: *BMW Australia Ltd v Brewster* [2019] HCA 45 at [70].

A majority of the High Court in *BMW Australia Ltd v Brewster* held that s 183, properly construed, does not empower a court to make a common fund order. Sections 183 and 33ZF empower the making of orders as to how an action should proceed in order to do justice; they are not concerned with the radically different question as to whether an action can proceed at all: at [3]. It is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court: at [47], [49].

In related litigation in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*, a five-judge bench of the Court of Appeal held that an order for "class closure" which in effect destroyed a person's cause of action within the limitation period, without a hearing and with no

guarantee that the person would necessarily know of the outcome or consequence of their failure to register, was not an order that was "necessary to ensure that justice is done in the proceedings" or "appropriate … to ensure that justice is done in the proceedings": at [12] The court held that he scheme of Pt 10 of the CPA is inconsistent with an interpretation of s 183 which empowered the Supreme Court to make an order effecting "class closure". In so finding, the Court of Appeal analysed and followed the construction of Pt 10 of the *Civil Liability Act* preferred by the majority of the High Court in *BMW Australia Ltd v Brewster*: at [99]. See also *Wigmans v AMP* (2020) 102 NSWLR 199.

If the court makes an award of damages, the representative party may apply for reimbursement of the representative party's costs: s 184. The court must be satisfied that the costs, reasonably incurred in relation to the representative proceedings, are likely to exceed the costs recoverable from the defendant. In this case, the court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded. The court may also make any other order that it thinks just.

Pursuant to s 179, a judgment given in representative proceedings must describe or otherwise identify the group members who will be affected by it and bind them, other than those who have chosen to opt out of the proceedings.

Appeals

Under Pt 10, Div 5, appeals can be brought before the Court of Appeal by the group or sub-group's representative in respect of the judgment to the extent that it relates to questions common to the group or sub-group's claims: s 180(1). The parties to an appeal which relates only to the claim of any individual group member are that group member and the defendant: s 180(2). If the representative party does not bring an appeal within the time provided for instituting appeals, another group member may bring an appeal within 21 days: s 180(3). The court may direct to whom and how a notice of appeal should be given: s 180(4). The notice instituting an appeal must describe or identify the members of the group or sub-group but not necessarily the number or the names of those members: s 180(5).

[2-5530] Representation in cases concerning administration of estates, trust property or statutory interpretation

Where a person or class of persons is, or may be interested in, or affected by proceedings, the court may appoint one or more of those persons to represent any one or more of them, provided that those proceedings concern the administration of a deceased person's estate, property subject to a trust or the construction of an Act, instrument or other document: r 7.6(1).

A person cannot be so appointed unless the court is satisfied that the person or a class, or a member of a class cannot, or cannot readily, be ascertained or, if ascertained, cannot be found or, if ascertained and found, it is expedient for the purpose of saving expense for a representative to be appointed to represent any one or more of them: r 7.6(2).

A person may be treated as having an interest or liability for the purpose of this rule even if it is a contingent or future interest or liability or if the person is an unborn child: r 7.6(3).

A judgment or order made in proceedings in which an appointment has been made under r 7.6, binds the persons or members of the class represented as if they had been a party: r 7.7.

The court may give the conduct of the whole or any part of any proceedings to such persons as it sees fit: r 7.8 and see *Ritchie's* at [7.8.5].

[2-5540] Judgments and orders bind beneficiaries

It is not necessary, in proceedings against a trustee, executor or administrator, to join as a party any of the persons having a beneficial interest under the trust or in the estate concerned: r 7.9(1), (2).

Any judgment or order is as binding on the beneficiary as it is on the trustee, executor or administrator: r 7.9(3).

However, if the court is satisfied that the representative, trustee, executor or administrator did not in fact represent a beneficiary, the court may order that the judgment or order not bind that beneficiary: r 7.9(4).

This rule does not limit the power of the court to order that a party be joined under r 6.24: r 7.9(5).

[2-5550] Interests of deceased persons

Where it appears to the court that a deceased person's estate is not represented in proceedings or that the executors or administrators of the estate have an interest that is adverse to the interests of the estate, it may order that the proceedings continue in the absence of a representative of the estate or appoint a representative for the purpose of the proceedings but only with the consent of the person to be appointed: r 7.10(1), (2). For an example of the appointment of such a representative, see *RL v NSW Trustee and Guardian (No 2)* [2012] NSWCA 78.

A judgment or order then binds the deceased person's estate to the same extent as the estate would have been bound had a personal representative of the deceased been a party: r 7.10(3).

Before making an order under the rule the court may order that notice of the application be given to such persons having an interest in the estate as it sees fit: r 7.10(4).

Sample orders

I order that the plaintiff X be appointed to represent the estate of the plaintiff Y, deceased for the purposes of this suit.

For further examples and appropriate title amendment, see *Re Hart; Smith v Clarke* [1963] NSWR 627 at 631.

[2-5560] Order to continue

An examples of a situation where the court orders the proceedings to continue is where another party has the same interest or the relevant interest is small: *Porters v Cessnock City Council* [2005] NSWSC 1275. See also *Borough of Drummoyne v Hogarth* (1906) 23 WN (NSW) 243.

[2-5570] Executors, administrators and trustees

In proceedings relating to an estate, all executors or administrators must be parties unless one or more of them has represented the other pursuant to r 7.4 : r 7.11(1).

In proceedings relating to a trust, all the trustees must be parties: r 7.11(2).

In proceedings commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to being joined as a plaintiff must be made a defendant: r 7.11(3).

[2-5580] Beneficiaries and claimants

In proceedings relating to an estate, all persons having a beneficial interest in a claim against the estate need not be parties, but the plaintiff may make parties of such of these persons as he or she thinks fit: r 7.12(1).

In proceedings relating to a trust, all persons having a beneficial interest under the trust need not be parties, but the plaintiff may make parties of such of those persons as he or she thinks fit: r 7.12(2).

Rule 7.12 has effect despite r 6.20. See "Joinder of causes of actions and parties" at [2-3400].

[2-5590] Joinder and costs

As to the appropriateness of joining beneficiaries and claimants and costs, see *Ritchie's* at [7.12.5]–[7.12.10], *Thomson Reuters* at [r 7.12.40].

[2-5600] Persons under legal incapacity

See "Persons under legal incapacity" at [2-4600].

[2-5610] Business names

Rules 7.19 and 7.20 provide that persons are to sue and be sued in their own name and not under any business name, except where the proceedings are in respect of anything done or omitted to be done in the course of, or in relation to, a business carried on under an unregistered name. In such a course the proceedings may be commenced against the defendant under the unregistered business name.

The unregistered name is taken to be a sufficient description of the person sued (r 7.20(2)) and any judgment or order in the proceedings may be enforced against the person carrying on the unregistered business: r 7.20(3).

[2-5620] Defendant's duty

If sued under a business name, a defendant must not enter an appearance or file a defence otherwise than under his or her own name: r 7.21(1). With the appearance or defence the defendant must file a statement of the names and residential addresses of all persons who were carrying on the business when the proceedings were commenced: r 7.21(2). Unless this is done, the court may order that the appearance or defence be struck out: r 7.21(3).

[2-5630] Plaintiff's duty

Where the defendant is sued under a business name, the plaintiff must take such steps as are reasonably practical to ascertain the name and residential address of the defendant and to amend such documents as will enable the proceedings to be continued against the defendant in his or her own name: r 7.22(1).

The plaintiff may not, except with the leave of the court, take any step in the proceedings other than the filing and serving of originating process and steps to ascertain the name and residential address of the defendant until the documents have been amended as above: r 7.22(2).

[2-5640] Relators

As to relator proceedings, see *Ritchie's* at [7.23.5]–[7.23.15] and *Thomson Reuters* at [r 7.23.40].

A relator must act by a solicitor: r 7.23(1). A solicitor may not act for a relator unless he is authorised to do so by the relator (r 7.23(2)(b)), and a copy of the instrument authorising the solicitor to so act has been filed: r 7.23(2)(b).

The consent of the Attorney General is needed for the commencement of relator proceedings, for they are brought in his or her name. However, if an action is commenced without the Attorney General as plaintiff, an amendment may be made with the permission of the Attorney General: *Farley and Lewers Ltd v The Attorney-General* [1963] NSWR 1624 at 1631.

[2-5650] Appointment and removal of solicitors

Subject to the content or subject matter otherwise indicating, every act or thing which, by or under the CPA or the UCPR or otherwise by law, is required or allowed to be done by a party, may be done by his or her solicitor: r 7.24.

As to the conduct of proceedings without retaining a solicitor, see "Unrepresented litigants and lay advisers" at [1-0800] and *Ritchie's* at [7.1.5], [7.24.5].

As to challenging the retainer of a solicitor see *Doulaveras v Daher* [2009] NSWCA 58 at [76]–[161].

[2-5660] Adverse parties

A solicitor or a partner of a solicitor who is a party to any proceedings, or acts as a solicitor for a party to any proceedings, may not act for any other party in the proceedings, not in the same interest, except by leave of the court.

Leave is commonly granted for a solicitor to appear for defendants in different interests in will-contention cases, unless there is likely to be an evidentiary dispute. Usually separate counsel are briefed for each interest.

[2-5670] Change of solicitor or agent

A party may change solicitors (r 7.26(1)) and a solicitor may change agents: r 7.26(2). The party or solicitor must file notice of the change: r 7.26(3). A copy of the notice filed must be served on all other active parties and, if practicable, on the former solicitor or agent: r 7.26(4).

An "active party" is defined in the dictionary to the UCPR as:

> a party who has an address for service in the proceedings, other than:
>
> (a) a party against whom judgment has been entered in the proceedings, or
>
> (b) a party in respect of whom the proceedings have been dismissed, withdrawn or discontinued,
>
> being, in either case, a party against whom no further claim in the proceedings subsists.

[2-5680] Removal of solicitor

A party who terminates the authority of a solicitor to act must file notice of the termination and serve a copy on all other parties and, if practicable, on the former solicitor: r 7.27(1), (2). The filing of the notice and its service may be effected by the former solicitor: r 7.27(3). Rule 7.27 does not apply to a change of solicitor referred to in r 7.26.

[2-5690] Appointment of solicitor by unrepresented party

A party who acts for himself may afterwards appoint a solicitor to act in the proceedings on the party's behalf: r 7.28(1). Notice of the appointment must be filed and served: r 7.28(2).

[2-5700] Withdrawal of solicitor

A solicitor who ceases to act may file the notice of change and serve the notice on the parties: r 7.29(1).

Except by leave of the court, a solicitor may not file or serve notice of the change unless he or she has filed and served on the client a notice of intention to file and serve the notice of change:

(a) in the case of proceedings for which a date for trial has been fixed, at least 28 days before doing so, or

(b) in any other case, at least seven days before doing so: r 7.29(2).

Unless the notice of change is filed with the leave of the court, the solicitor must include in the notice a statement of the date on which service of the notice of intention was effected: r 7.27(3).

Leave may be effected by post to the former client at the residential or business address last known to the solicitor: r 7.27(4).

As to a solicitor ceasing to act, see *Ritchie's* at [7.29.5] and *Thomson Reuters* at [r 7.29.40].

As to suggested form of notices, see *Thomson Reuters* at [r 7.29.60].

[2-5710] Effect of change

A notice of change of solicitor which is required or permitted to be given does not take effect as regards the court until the notice is filed (r 7.30(a)) and, as regards any person on whom it is required or permitted to be served, until a copy of the notice is served on that person: r 7.22(b).

Thus, service upon a solicitor who is still upon the record, but who is no longer retained, is good service: *Turpin v Simper* (1898) 15 WN (NSW) 117c.

[2-5720] Actions by a solicitor corporation

In the case of a solicitor corporation, any act, matter or thing authorised or required to be done which, in the circumstances of the case, can only be done by a natural person may be done by a solicitor who is a director, officer or employee of the corporation: r 7.31.

Legislation

- *Civil Procedure Act* 2005 Pt 10, Sch 6
- *Corporations Act* 2001 (Cth)
- *Federal Court of Australia Act* 1976 (Cth) Pt IVA
- *Industrial Relations Act* 1996 Ch 7, Pt 2

Rules

- UCPR Pt 7, Div 2, 6, rr 6.20, 6.24, 7.1-7.3, 7.6-7.12, 7.19–7.24, 7.26–7.31, Pt 58

Practice Note

- Supreme Court, General List: Practice Note SC Gen 17

[The next page is 1951]

Vexatious proceedings

[2-7600] Introduction

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

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

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

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

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

Last reviewed: August 2023

The Act does not limit, affect or displace any inherent jurisdiction or any powers that a court or tribunal has apart from the Act to restrict vexatious proceedings: s 7. It is also clear that there is power to make orders appropriately adapted to the circumstances of the case; see for example *Ghosh v Miller (No 2)* [2018] NSWCA 212. Also see *Choi v Secretary, Department of Communities and Justice* [2022] NSWCA 170 at [222]; *Hassan v Sydney Local Health District (No 5)* [2021] NSWCA 197; *Samootin v Shea* [2013] NSWCA 312 and *Proietti v Proietti* [2023] NSWCA 132 at [30]–[33].

Teoh direction

A Court may make a *Teoh* direction to prevent an abuse of process by the applicant making multiple applications. A *Teoh* direction imposes a procedural requirement that must be satisfied before the applicant can burden other parties and the court with successive applications seeking the same or effectively the same relief as those that have already been finally disposed of. This does not preclude access to the court and is consistent with the statutory mandate for the conduct of proceedings with a view to the just, quick and cheap resolution of the real issues in dispute (s 56 of the *Civil Procedure Act* 2005): *Teoh v Hunters Hill Council (No 8)* at [44]–[56], [69]–[71]; *Proietti v Proietti* at [39].

[2-7620] Vexatious proceedings order

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

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

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

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

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

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

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

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

[2-7630] "Frequently"

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

[2-7640] Discretion

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

[2-7650] Vexatious proceedings

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

[2-7660] Contravention of vexatious proceedings order

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

[2-7670] Applications for leave

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

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

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

[2-7680] Orders limiting disclosure

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

Legislation

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

[The next page is 3001]

Monetary jurisdiction in the District Court

Acknowledgement: the following material has been prepared by His Honour Judge L Levy of the District Court of New South Wales. Commission staff are responsible for updating it.

[5-2000] Jurisdiction according to the nature of proceedings

Last reviewed: August 2023

The monetary jurisdiction of the District Court varies according to the nature of the proceedings.

For claims involving the general law, including common law actions, intentional torts and commercial disputes, as at 16/12/2022 the jurisdictional limit of the District Court is $1,250,000: s 4(1) *District Court Act* 1973. For proceedings filed in the Court prior to the commencement date the previous jurisdictional limit of $750,000 applies.

The jurisdiction of the District Court to hear and determine motor accident claims and workplace injury damages claims is unlimited.

Problems with the jurisdictional limit can sometimes arise in respect of claims under the *Civil Liability Act* 2002. Since 1 July 2002, as a result of indexation, the maximum amount awardable for non-economic loss under that Act has increased from $350,000 to $705,000 (as at 1/10/2022): s 16. As a result, in combination with other heads of damage, damages awards can approach, and at times exceed the jurisdictional limit.

Section 144(2) CPA provides that if the District Court decides it lacks, or may lack, jurisdiction to hear and dispose of proceedings, the court must order the transfer of the proceedings to the Supreme Court: see *Mahommed v Unicomb* [2017] NSWCA 65.

[5-2005] Jurisdiction in "commercial matters"

Doubts as to the jurisdiction of the District Court in commercial matters were dealt with by the *Justice Legislation Amendment Act (No 3)* 2018. This Act amended the *District Court Act* 1973 to clarify that the District Court has jurisdiction to determine any action arising out of a commercial transaction in which the amount (if any) claimed does not exceed the court's jurisdictional limit: s 44(1)(c1) commenced on assent on 28 November 2018 and has retrospective effect from 2 February 1998. The amendment was made retrospective to ensure that past judgments are protected from challenge: Sch 3, Pt 10; Second Reading Speech p 70: Legislative Assembly, 24 October 2018. See *Gells Pty Ltd t/a Gells Lawyers v Jefferis* [2019] NSWCA 59 at [5]–[6].

[5-2010] Consent to court having unlimited jurisdiction

There may be some circumstances where a defendant has provided consent to the court having unlimited jurisdiction. This is usually made known at the commencement of the hearing by the filing of a memorandum consent to unlimited jurisdiction: s 51(2)(a) *District Court Act* 1973. The failure of the party to file a memorandum consent that has already been signed by the opposing party, may be treated as an irregularity: s 63(2) *Civil Procedure Act* 2005, and see *Woodward Pty Ltd v Kelleher* (unrep, 30/5/1989, NSWCA).

[5-2020] Extension of jurisdiction

Last reviewed: August 2023

There may be circumstances where, by the nature and extent of the particularisation of a claim capable of being seen as in excess of $1,250,000, by default, a defendant has not indicated an

objection to extend or expand the jurisdiction. In such circumstances, that extension is limited to an additional 50 per cent above the jurisdictional limit: s 51(2)(b) *District Court Act* 1973. In this way, the jurisdiction can increase from $1,250,000 to a maximum of $1,875,000: s 51(4). See *Hadaway v Robinson* [2010] NSWDC 188, where the plaintiff was awarded $1,161,368 (despite the pre-December 2022 jurisdictional limit of $750,000) in the absence of objection from the defendants. The Court inferred that, as there was no demur to the plaintiff's position, the first defendant had acceded to the extended jurisdictional submissions advanced by the plaintiff (at [686]). See *Katter v Melhem* (2015) 90 NSWLR 164 at [95]–[109].

[5-2030] Practical considerations

Last reviewed: August 2023

The following practical considerations arise:

- the entry of judgment beyond the jurisdictional limit is permissible: *Richards v Cornford* (2010) 76 NSWLR 572, per Basten JA at [12];
- It is possible that an appeal based on considerations of procedural fairness could arise from the entry of a judgment in excess of $1,250,000. Recognising this possibility, it may be preferable, where appropriate, to find a verdict in the assessed amount, but to defer the entry of final judgment of an amount in excess of $1,250,000, until the parties have had an opportunity to make submissions as to why the mechanism provided by s 51(2)(b) *District Court Act* 1973 should not apply and have effect.

Legislation

- *Civil Liability Act* 2002 s 16
- *Civil Procedure Act* 2005 ss 63(2), 144(2)
- *District Court Act* 1973 ss 4(1), 51(2)(a), (b), 51(4)

[The next page is 5501]

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: August 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 $955 per week (as at 1/4/2023). 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 $2395.30 (as at 1/4/2023).[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 $891,100 (as at 1/4/2023), 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

Last reviewed: August 2023

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 $398,750 (as at 1/4/2023); and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $328.90 per week (as at 1/4/2023),[31] which continues until re-marriage or the commencement of a de facto relationship,[32] or until the death of the spouse; and [33]
- a weekly payment to each surviving dependent child, currently payable at $166.20 per week (as at 1/4/2023),[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

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) 229 CLR 498, 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

Last reviewed: August 2023

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.

The court must determine whether s 50 is engaged where there is an issue about intoxication and an allegation of contributory negligence. The section applies where it is established that the capacity of a plaintiff to exercise reasonable care and skill is impaired by intoxication: s 50(1). No damages are to be awarded unless the court is satisfied that the damage is likely to have occurred even if the injured party had not been intoxicated: s 50(2). If satisfied, contributory negligence is presumed unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage: s 50(3). 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. If s 50(2) is satisfied and the party seeking damages demonstrates that the relevant person's intoxication did not contribute in any way to the cause of death, injury or damage (s 50(3)) then s 50 has no further role to play. In that event, any allegation of contributory negligence falls to be resolved by applying the balance of the provisions of the *Civil Liability Act* and s 9 *Law Reform (Miscellaneous Provisions) Act* 1965. The issues of causation in s 50 and whether the test in s 50(2) is objective or subjective was ventilated without deciding in *Payne (t/as Sussex Inlet Pontoons) v Liccardy* [2023] NSWCA 73 at [43]–[55] (Beech-Jones JA). Note, several Court of Appeal judgments have opined that ss 50(2) and 50(3) are not easily reconciled: *Jackson v Lithgow City Council* [2008] NSWCA 312 at [103]; *NSW v Ouhammi* (2019) 101 NSWLR 160 at [41], [126]; *Payne (t/as Sussex Inlet Pontoons) v Liccardy* at [45].

Section 50 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": at [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] HCA 34. 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] HCA 52, 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 JA 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

Last reviewed: August 2023

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. See also *Chen v Kmart Australia Ltd* [2023] NSWCA 96 where the eight-year-old plaintiff was awarded $5,000 as a buffer sum for loss of future earning capacity, the primary judge acknowledging the possibility of "some limitation of career choices" due to some degree of inhibition or diminished self esteem and an only slight chance of rejection or disapproval by others in the workforce on account of her scarring. In this case, where the assessment of the likely future economic loss of the child plaintiff was a "matter of intuition, or guesswork", the scope for appellate intervention was limited: at [51]. However, in *Clancy v Plaintiffs A, B, C and D* [2022] NSWCA 119 at [274]–[278], the court found the primary judge's assessment of C's damages for future economic loss in the sum of $111,000, by way of a buffer, could not be sustained. Not only was it non-compliant with the requirements of s 13 of the *Civil Liability Act*, which are directed to supplying some meaningful and transparent basis for the award of damages for future economic loss, but the fact the damages awarded for this head of loss were identical to those awarded to plaintiff A reinforced the perception that the figure of $111,000 was not calculated by reference to the particular circumstances of C.

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 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.

See also *Penrith City Council v Parks* [2004] NSWCA 201 at [5], [10], [58] (where the Court held that s 13 did not preclude the granting of a buffer for future economic loss when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine) and *Chen v Kmart Australia Ltd* [2023] NSWCA 96 (where a modest buffer was awarded to an eight-year-old plaintiff).

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) 264 CLR 505 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) 90 NSWLR 1 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) 253 CLR 531, 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) 253 CLR 660 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

Last reviewed: August 2023

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].

It should not be accepted that simply by making a claim for costs against a solicitor, a burden of proof is placed on the solicitor to deny misconduct: *Gokani v Visvalingam Pty Ltd* [2023] NSWCA 80 at [56].

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]. Both Sch 2, cl 5 LPULAA and s 99 CPA rely on an objective test. A finding that a solicitor took a step in litigation without a belief as to reasonable prospects of success is an extremely serious finding. The relevant factor is the practitioner's belief in a fact, rather than the fact itself; it is no part of a legal practitioner's role in litigation to form concluded views as to the existence of facts or the outcome of proceedings. The precise question to be addressed is the solicitor's state of knowledge: *Gokani v*

Visvalingam Pty Ltd at [43], [52], [54]. 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)
- JP Hamilton, G Lindsay,and C Webster, General Editors, *NSW Civil Procedure Handbook* 2023, Lawbook Co, 2023
- MJ Beazley, "Calderbank offers 2", paper delivered at the "'Without prejudice' offers and offers of compromise" NSW Young Lawyers Civil Litigation Committee Seminar, 26/9/2012
- MJ Beazley, "Calderbank offers", paper delivered at the Australian Lawyers Alliance Hunter Valley Conference, 14–15 March 2008
- JP Hamilton, "Containment of costs: litigation and arbitration", 1/6/2007
- Costs Assessment Rules Committee, "Guideline: costs payable between parties under court orders", Supreme Court of New South Wales website, 25/5/2023.

[The next page is 9001]

Contempt in the face of the court

Acknowledgement: the following material was originally prepared by Mr David Norris of the Crown Solicitor's Office, NSW and is updated by Judicial Commission staff.

Jurisdiction to deal with contempt in the face of the court

[10-0000] Supreme Court

The power to punish contempt in the face of the court is part of the inherent jurisdiction of the Supreme Court: *The King v Metal Trades Employers Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 241–243.

Proceedings for contempt in the face or hearing of the Supreme Court 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)(i), 53(3)(a).

SCR Pt 55 sets out the procedure to be followed by the Supreme Court in prosecuting contempts of the court or of any other court.

[10-0010] District Court

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.

[10-0020] Dust Diseases Tribunal

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: s 26 of the *Dust Diseases Tribunal Act* 1989.

[10-0030] Local Court

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).

[10-0040] Meaning of contempt in the face of the court

There is a divergence of views (all obiter) as to the meaning of "contempt in the face of the Court … or in the hearing of the Court".

The narrow view is that the jurisdiction is restricted to conduct seen or heard by the judge: see, for example, *Fraser v R* [1984] 3 NSWLR 212 per Kirby P and McHugh JA. The wider view is that it extends to conduct, without geographic boundaries, "… which is sufficiently proximate in time and space to the trial of proceedings then in progress or imminent so as to provide a present confrontation to the trial": *Court of Appeal, Registrar of the v Collins* [1982] 1 NSWLR 682 at 684. Either view would appear to be open: *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 per Priestley JA at 463.

[10-0050] Alternative ways of dealing with contempt in the face of the court

Where the judge has formed the view that there has been a contempt in the face or hearing of the court, he or she should consider the following alternatives to a summary charge, bearing in mind the seriousness of the conduct and the degree of urgency involved, namely:

- whether a warning or reprimand would be sufficient
- whether, in cases of disruption of proceedings, the person should be excluded from the court

- whether, if the conduct involves a legal practitioner, the conduct should be made the subject of a complaint under Pt 5.2 *Legal Profession Uniform Law* (NSW)
- whether the matter should be referred to the DPP for consideration if a statutory offence has been committed; for example, perjury where the conduct consists of a constructive refusal to answer questions by an alleged inability to remember (see *Commissioner for the Police Integrity Commission v Walker (No 2)* [2006] NSWSC 696) or offences involving the threatening of judicial officers, witnesses or jurors: *Crimes Act* 1900 ss 320–326, or
- whether, in the case of disrespectful behaviour in court, the matter should be referred to the Attorney General for prosecution of a statutory offence under SCA s 131, *Land and Environment Court Act* 1979 s 67A, DCA s 200A, LCA s 24A or *Coroners Act* 2009 s 103A,
- whether the registrar should be directed to commence proceedings under SCR Pt 55 r 11(1) or whether the matter may be referred to the Supreme Court under DCA s 203 or LCA s 24(4), as applicable.

The summary jurisdiction of the court to punish for contempt is exceptional and should be exercised with restraint and only in a clear and serious case, in which it is necessary to act immediately: *Keeley v Brooking* (1979) 143 CLR 162 at 173.

An important consideration for a judge in determining whether to use the summary procedure is whether the subject conduct has involved the judge personally in some way: *Attorney-General v Davis and Weldon* (unrep, 23/7/80, NSWCA) at 11. Giving a direction under SCR Pt 55 r 11(1) or referring a matter to the Supreme Court under DCA s 203 or LCA s 24(4) or (5) may be preferable in such cases. It will also overcome any jurisdictional doubt as to whether the conduct was in the face or hearing of the court.

A judge may alternatively refer a possible contempt to the Attorney General for consideration of contempt proceedings.

Procedure for dealing with contempt in the face of the court

[10-0060] Summary hearing before trial judge

SCR Pt 55 Div 2 and s 199 of the DCA set out the procedure for dealing with a summary charge of contempt by the trial judge. The same procedures apply to the Dust Diseases Tribunal (see s 26 of the *Dust Diseases Tribunal Act*) and to the Local Court: LCA s 24. Suggested steps for dealing with such a matter are as follows.

[10-0070] Initial steps

1. Where appropriate, the contemnor should be warned of the risk that the conduct, if persisted in, may constitute contempt, and that the possible penalty may be a fine or imprisonment.
2. The contemnor should be provided an opportunity to apologise and, where possible, (particularly in relation to a refusal to be sworn or to give evidence) an opportunity to reflect and to obtain legal advice.
3. If the contemnor is not present, an oral order should be made directing that the contemnor be brought before the court or, if necessary, a warrant issued for the contemnor's arrest: SCR Pt 55 r 2; DCA s 199(2).
4. If an alleged contempt arises during a jury trial, the jury should be sent out to avoid a risk of prejudice to the accused. In such circumstances, the media should be requested not to report that part of the proceedings conducted in the absence of the jury and warned that to do so may be a contempt.

[10-0080] The charge

5. The contemnor should be orally charged with contempt by the trial judge: SCR Pt 55 r 3; DCA s 199(3)(a). The charge or "gist of the accusation" should be distinctly stated: *Coward v Stapleton* (1953) 90 CLR 573 at 579, 580; *Macgroarty v Clauson* (1989) 167 CLR 251 at 255.[1]

Sample charge

[*Name*], you are hereby charged with contempt of court in that on [*date*] in the [*court*] at [*place*] in proceedings before me between [*names of parties*] [*set out conduct — eg when the witness AB was passing near you on the way to the witness box for the purpose of giving evidence, you loudly said words to the effect "you're fucked"*] and you did thereby conduct yourself in a manner that had a real tendency to interfere with the administration of justice.

[10-0090] Adjournment for defence to charge

6. The contemnor must be permitted an adequate opportunity (which may require an adjournment) to make a defence to the charge: SCR Pt 55 r 3; DCA s 199(3)(b). See *Fraser v R* [1984] 3 NSWLR 212 at 223. A short "cooling off" period may, in any case, permit the contempt to be purged.

7. When adjourning a matter, a contemnor should be informed that, if he or she is eligible, legal aid may be available from the Legal Aid Commission.

8. If the trial judge wishes to obtain the assistance of an amicus curiae for the conduct of the summary hearing, the Crown Solicitor should be contacted for this purpose. The Crown Solicitor will then invite the Attorney General to nominate the Crown Advocate or other counsel to seek leave to appear in this capacity. See, for example, *In the Matter of Reece George Barnes* [2016] NSWSC 133.

9. Pending disposal of the charge, the court may direct that the contemnor be kept in custody or that the contemnor be released subject to conditions such as the giving of security: SCR Pt 55 r 4; DCA s 199(4) and (5). See also s 90 of the *Bail Act* 2013.

[10-0100] Conduct of summary hearing

10. A trial judge may rely upon his or her own observations of the conduct, and upon hearsay evidence. The contemnor has no right of unrestricted cross-examination: *Fraser v R*, above, at 227. It is appropriate, however, that the judge inform the contemnor of such observations. It may also be possible to call witnesses to give evidence of their observations so that they may be cross-examined. This may be done by counsel appearing as amicus curiae.

11. In dealing with a summary charge of contempt, the person accused must be allowed a reasonable opportunity of being heard in his or her own defence, ie of placing before the court any explanation or relevant submission of fact or law: *Coward v Stapleton*, above, at 580.

12. In "requiring" a contemnor to make a defence to the charge, it should be made clear that the contemnor is not obliged to give evidence: *Court of Appeal, Registrar of the v Maniam (No 1)* (1991) 25 NSWLR 459.

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1 This case is cited as *Macgroarty v Clauson* in CLR and HCA reports, though the respondent was in fact the Attorney General. The ALR report cites the case as *Macgroarty v Attorney-General (Qld)*.

13. At common law, a contemnor was entitled to make a defence by way of an unsworn statement. Quaere whether s 31 of the *Criminal Procedure Act* 1986 removed this right.

14. After hearing the contemnor, the court determines the matter of the charge and makes an order for the punishment or discharge of the contemnor: SCR Pt 55 r 3; DCA s 199(3)(d).

[10-0110] Appeal from summary conviction

An appeal from summary conviction for contempt in the Supreme Court lies to the Court of Appeal under SCA s 101(5). The appropriate respondent is the Queen: *Fraser v R* at 219.

As to an appeal from a summary conviction by the District Court or a Local Court, see DCA s 201 and LCA s 24(3)(c), respectively.

[10-0120] Supreme Court and Dust Diseases Tribunal — Direction to Registrar

A trial judge may, as an alternative to proceeding on the judge's own motion, direct the registrar to take proceedings for criminal contempt: SCR Pt 55 r 11(1). The court may obtain advice from the Crown Solicitor before giving such a direction, see *In the matter of the Compensation Court of NSW* (unrep, 20/12/1985, NSWCA).

An order under SCR Pt 55 r 11(1) is executive and not judicial in character, and it has been held that there is no right for a contemnor to be heard on whether a direction should be given under r 11(1): *Killen v Lane* [1983] 1 NSWLR 171 at 179 (cf a referral by the District Court under DCA s 203 or by the Local Court under LCA s 24. In *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277 the Court of Appeal held that there was an obligation to afford procedural fairness in such cases, but distinguished *Killen*, above, as to directions under SCR Pt 55 r 11(1)). However, it is suggested that the contemnor be given such an opportunity. There is no right to make a formal application for a direction, eg by notice of motion, and no appeal is available: *Killen* at 177, 179.

For examples of contempt in the face of the court dealt with by way of direction under r 11(1), see *Prothonotary v Wilson* [1999] NSWSC 1148 (and on appeal *Wilson v The Prothonotary* [2000] NSWCA 23); *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *Prothonotary v Hall* [2008] NSWSC 994; *Prothonotary of the Supreme Court of NSW v Coren* [2017] NSWSC 754.

Under SCR Pt 55 r 6, proceedings may be commenced either by motion in the proceedings or by summons as an independent proceeding.

As to the scope of when a contempt is committed "in connection with proceedings in the Court" for the purposes of SCR Pt 55 r 6, see *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 at 564 and the cases there cited.

There appears to be no power to detain a contemnor in custody pending the commencement of proceedings by the registrar. Once proceedings have been commenced, the contemnor may be arrested and detained if "… it appears to the court that the contemnor is likely to abscond or withdraw … from the jurisdiction of the Court": SCR Pt 55 r 10 and see *Schnabel v Lui* (2002) 56 NSWLR 119. As to the power to detain a contemnor following arrest, see *ASIC v Michalik & Ors (No 2)* (2004) 62 NSWLR 115, in which Palmer J also sets out the form of warrant used.

The registrar's summons will not, of its own force, compel the attendance of the contemnor on hearing. An order may be made to compel the attendance of a contemnor on hearing: see *Court of Appeal, Registrar v Ritter* (1985) 34 NSWLR 641 at 651, 653; *Scott v O'Riley* [2007] NSWSC 560; *Prothonotary of NSW v Russell Alan Jarvie* [2016] NSWSC 1249. A warrant may be issued under s 97 of the CPA if the contemnor fails to attend in answer to the order: *Mirembe Pty Ltd v Dangar* [2009] NSWSC 94.

Sample order directing proceedings for contempt

Pursuant to Pt 55 r 11(1) of the Supreme Court Rules, I make an order directing the Prothonotary to commence proceedings for contempt of court against [*name*] in respect of his conduct in [*eg having been duly sworn, refusing to answer material questions put to him in cross examination*] in proceedings before me in the Supreme Court on [*date*]. I further order that the charges against [*name*] may be framed and particularised as the Prothonotary may be advised by the Crown Solicitor or by counsel briefed by the Crown Solicitor.

[10-0130] District Court and Local Court — Referral to the Supreme Court

As an alternative to proceeding under s 199 of the DCA, or where jurisdiction under that section is not available, is doubtful or is undesirable, an apprehended contempt may be referred to the Supreme Court for determination: DCA s 203; LCA s 24(4). Such proceedings are assigned to the Common Law Division of the Supreme Court: SCA s 53(4). Such a reference may be made where:

- it is alleged to the court, or
- it appears to the court on its own view,

that a person is guilty of contempt of court, whether committed in the face or hearing of the court or not.

The power to make a reference is executive and not judicial in nature. There is no right in a party or any other person to make a formal application for such a reference: cf SCR Pt 55 r 11(1); *Killen v Lane*, above, see [10-0110]). No appeal is available from a decision under s 203: *Johnston v Nationwide News Pty Ltd* (2005) 62 NSWLR 309.

Before exercising its power of referral in either form, the referring court must afford procedural fairness to a proposed contemnor: *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277; *Prothonotary of the Supreme Court of NSW v Chan (No 23)* [2017] NSWSC 535. Failing to do so may render subsequent proceedings in the Supreme Court a nullity: *Dangerfield* at [49]; *Chan* at [64].

This is because (at least where the prospective contempt is in the face or hearing of the referring court) the referral power involves potential prejudice to the proposed contemnor, as the penalty which can be imposed by the Supreme Court is greater than that which the District Court or Local Court can impose if it decides to deal with the contempt itself: *Dangerfield* at [56]; *Chan* at [29].

Exercising the power of referral for an apparent contempt requires the court to make two decisions:

1. whether it appears to the court on its own view that the person is guilty of contempt of court, and
2. whether the court should refer the matter to the Supreme Court for determination: *Dangerfield* at [52].

Before referring an apparent contempt, the referring court should make findings of fact in relation to the conduct and determine that it is capable of amounting to contempt: *Mohareb v Palmer* [2017] NSWCA 281 per Basten JA, with whom Sackville AJA agreed, at [17] ff.

The suggested approach (see *Dangerfield* at [51]ff and *Chan* at [59]–[61]):

In addition to the initial steps referred to earlier (warnings, the opportunity to apologise and/or purge the contempt, and to obtain legal advice), see [10-0070].

1. identify, with sufficient particularity, the conduct in question;
2. invite submissions as to whether the court should form a view that it is capable of amounting to contempt;
3. if the court has power to deal with the contempt by way of a summary hearing (ie if it is in the face or hearing of the court) explain the two procedural options available and their consequences (including in relation to penalty);
4. invite submissions as to what course the court should adopt, ie:
    - deal with the matter itself by way of summary hearing (if jurisdiction is available), or
    - refer the matter to the Supreme Court, or
    - exercise a discretion to take no further action.
5. provide an adjournment, if necessary, to enable the putative contemnor to obtain advice and/or representation for the purpose of making submissions; and
6. consider whether to provide a party raising an allegation of contempt with the opportunity to respond to any submissions.

A reference is made by forwarding a report of the matter to the prothonotary. The report should identify the contemnor and the relevant conduct. It should specify whether the reference is made on the basis of an alleged contempt or whether the court has formed a view that it is capable of amounting to contempt.

There is no need to charge a contemnor for the purposes of a reference under s 203 or s 24(4): *Court of Appeal, Registrar of the v Maniam (No 1)*, above.

In instances where the referring court comes to its own view that conduct is capable of amounting to contempt, the referral of the matter to the Supreme Court requires proceedings to be commenced by the prothonotary without any further direction by the Supreme Court: SCR Pt 55 r 11(3). Referrals of alleged contempts require consideration by the Supreme Court of exercising its power to direct a prosecution, under SCR Pt 55 r 11(1). SCR Pt 55 r 11(6) cannot be engaged in such a situation: *Chan* at [54].

Sample orders

(a) *where the referring court has formed a view that conduct has occurred that is capable of constituting a contempt, and wishes to engage SCR Pt 55 r 11(3):*

> On [*date*] in proceedings between [*names of parties*] in the [*court*] at [*place*], [*name of contemnor*] [*describe conduct — eg refused to answer material questions put to him/her in cross examination, as indicated in the attached transcript*]. I have formed the view that this conduct is capable of amounting to a contempt of court. Pursuant to s 203 of the *District Court Act* 1973, I refer this matter to the Supreme Court for determination in accordance with Pt 55 r 11(3) of the Supreme Court Rules.

(b) *where the referring court wishes to report an alleged contempt to be dealt with under SCR Pt 55 r 11(1):*

> It has been alleged that on [*date*] in proceedings between [*names of parties*] in the [*court*] at [*place*], [*identify contemnor and describe conduct — eg when the witness AB was passing near XY on the way to the witness box for the purpose of giving evidence, XY loudly said words to the effect "you're fucked"*]. Pursuant to s 203 of the *District Court Act* 1973, I refer this alleged contempt of court to the Supreme Court for consideration of giving a direction under Pt 55 r 11(1) of the Supreme Court Rules.

[10-0140] Standing of other persons to commence proceedings

The right of any other person to commence proceedings for contempt is preserved: SCR Pt 55 r 11(2). A person with an interest in proceedings will have standing to bring proceedings for contempt: *European Asian Bank AG v Wentworth*, above, per Kirby P at 459. Indeed, "prima facie any person can bring proceedings for contempt in relation to proceedings in a State Court": *Public Prosecutions, Director of v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 595.

Penalty

[10-0150] General

Last reviewed: August 2023

Contempt of court is a common law offence and there is no maximum penalty, subject to the Bill of Rights 1688: *R v Smith* (1991) 25 NSWLR 1 at 13 et seq; SCR Pt 55 r 13. However, where the District Court or a Local Court is exercising its jurisdiction under s 199 of the DCA, the maximum penalty which may be imposed is a fine of 20 penalty units or imprisonment for 28 days. Imprisonment is a punishment of last resort: *He v Sun* (2021) 104 NSWLR 518 at [68].

SCR Pt 55 is declaratory of the Supreme Court's power of punishment and does not exhaust it: *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314. The *Crimes (Sentencing Procedure) Act* 1999 applies in sentencing for contempt: *Principal Registrar of the Supreme Court of New South Wales v Jando* (2001) 53 NSWLR 527.

As to matters relevant to penalty, see *Maniam (No 2)*, above, at 314–315; *Wilson v The Prothonotary*, above; *Jando*, above, and *Live Group Pty Ltd v Rabbi Ulman* [2018] NSWSC 393. For a list of factors to be considered by the court on the question of an appropriate penalty, see *Matthews v ASIC* [2009] NSWCA 155 at [129], citing with approval the primary judge.

Note the effect of s 47(1) of the *Crimes (Sentencing Procedure) Act* 1999, providing a sentence commences once it is imposed, particularly if sentencing a contemnor in his or her absence: *Kus v Ronowska* [2013] NSWCA 387.

[10-0160] Refusal to give evidence

Relevant authorities in relation to sentence for refusal to be sworn or to give evidence and in relation to reprisals against judges (in this case throwing a container of water at the presiding judge) are collected in *Principal Registrar of Supreme Court of NSW v Drollet* [2002] NSWSC 490.

As for matters relevant to penalty in relation to contempt by refusal to be sworn or to give evidence, see *Registrar of the Court of Appeal v Gilby* (unrep, 20/8/91, NSWCA) at 26–29; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393 (which attaches a schedule of comparable sentences for contempts of that type); *Prothonotary of the Supreme Court of NSW v Jalalabadi* [2008] NSWSC 811; *In the matter of Steven Smith (No 2)* [2015] NSWSC 1141 and *Prothonotary of the Supreme Court of NSW v A* [2017] NSWSC 495.

Legislation

- *Bail Act* 2013 s 90
- *Coroners Act* 2009 s 103A
- *Crimes Act* 1900 ss 320–326
- *Criminal Procedure Act* 1986 s 31
- DCA ss 199, 199(3)(d), 199(4), 199(5), 200A, 203
- *Dust Diseases Tribunal Act* 1989 s 26
- *Land and Environment Court Act* 1979 s 67A
- *Legal Profession Uniform Law* (NSW) Pt 5.2
- LCA ss 24(1), 24(3)(c), 24(4), 24A, 25(5)
- SCA ss 48(2)(i), 53(3)(a), 53(4), 101(5), 131

Rules

- SCR Pt 55 rr 2, 3, 4, 11(1), (3), (6), 13

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