**Judicial Commission of New South Wales**

# CIVIL TRIALS BENCH BOOK

**Update 54**

**December 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 54**

# Update 54, December 2023

### [2-1200] Change of venue

At **[2-1210] Transfer of proceedings between courts**, the cases *Thermasorb Pty Ltd v Rockdale Beef Pty Ltd* [2005] NSWSC 361 and *Li v Wang* [2022] NSWSC 653 have been added as examples of where proceedings may be transferred from the District Court to the Supreme Court for service of process on a resident outside Australia in the absence of statutory provision for the District Court for this purpose.

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

The decision of *Re Neil (No 5)* (2022) 110 NSWLR 197 has been added to **[2-1400] Cross-vesting** regarding the jurisdiction of the NSW Supreme Court under Commonwealth Cross-vesting legislation.

### [2-2600] Stay of pending proceedings

At **[2-2600] The Power**, **[2-2680] Abuse of process** and **[2-2690] Other grounds on which proceedings may be stayed**, the case of *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 has been added. The High Court noted that the decision whether to exercise the power in s 67 *Civil Procedure Act* is not discretionary in the sense relevant to the applicable standard of appellate review (ie the "correctness standard"): at [23]–[24] and that for proceedings for damages resulting from child abuse, the observations of Bell P in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [78]–[86] must be evaluated in the "radically new context" in which Parliament has chosen to abolish any period of limitation for the commencement of the action: at [43]–[45]. Further, the context underlying the requirement of exceptionality to enliven the power to grant a permanent stay is that the court's power to refuse exercise jursidiction operates in light of the principle that the conferral of jurisdiction imports a prima facie right in the person invoking that jurisdiction to have it exercised which is a basic element of the rule of law: at [3], [18], [21].

### [2-3900] Limitations

The case of *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 has been added at **[2-3965] Cross references to related topics.** For a person within the relevant class created by s 6A *Limitations Act* , the mere effluxion of time and the inevitable impoverishment of the evidence which the passing of time engenders, do not mean that a trial will be unfair and cannot attract the quality of exceptionality which is required to justify the extreme remedy of the grant of a permanent stay: at [50]–[53].

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

*Stoeski v State of NSW* [2023] NSWSC 926 has been added at **[2-4600] Definition** as an example where the plaintiff was granted leave *nunc pro tunc* under ss 4 and 5 of the *Felons (Civil Proceedings) Act.*

**[2-5400] Parties to proceedings and representation**

The decisions *Moussa v Camden Council (No 5)* [2023] NSWSC 1135 and *Nguyen v Rickhuss* [2023] NSWCA 24 have been added at **[2-5500] Representative proceedings in the Supreme Court** in relation to Merck Orders and the threshold of "… *a substantial common question of fact or law ...*" as that phrase is used in s 157(1)(c) of the CPA.

**[2-6600] Setting aside and variation of judgment**

The case *Maclean v Brylewski* [2023] NSWCA 173 has been added at **[2-6680] The slip rule** as an example where a 6-month delay in correcting a minor error on the face of the record did not cause prejudice to the applicant.

In new paragraph **[2-6685] Error on the face of the record,** the decision *Coal & Allied Operations Pty Ltd v Crossley* [2023] NSWCA 182, has been added, where it was noted courts are also empowered to correct obvious drafting errors in all legal documents, including primary and delegated legislation.

**[5-0800] The mining list**

His Honour Judge Neilson of the District Court of NSW has extensively reviewed and updated the Mining List chapter.

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

It is noted that the High Court of Australia unanimously dismissed an appeal from the insurer challenging the application of ss 9 and 10 of the *Trans-Tasman Proceedings Act* 2010 (Cth)**:** *Zurich Insurance Co Ltd v Koper*[2023] HCA 25.

**[5-7000] Intentional torts**

Commentary at **[5-7100] False imprisonment** has been updated.and the decision of *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 has been added at **[5-7110] What is imprisonment?**

*Lewis v Australian Capital Territory* (2020) 271 CLR 192 has been added at **[5-7115] Justification**, regarding the onus of proof for false imprisonment.

A discussion on judicial immunity for the tort of false imprisonment, from *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020, has been added in new paragraph **[5-7118] Judicial immunity.** The decision in *Burton v Babb* [2023] NSWCA 242 has been noted at **[5-7130] Proceedings initiated by the defendant**.

At **[5-7150] Some examples,** the appeal of *State of NSW v Spedding* [2023] NSWCA 180 has been added. The appeal was dismissed, however, it was held the primary judge erred in holding the DPP and various members of the ODPP liable for malicious prosecution: at [259]. The improper or unauthorised purpose of the police officers in arresting and charging the respondent, from which the judge inferred malice on their part, was never disclosed to the ODPP: at [257].

At **[5-7190] Damages including legal costs**, a discussion of exemplary damages for malicious prosecution in *State of NSW v Spedding* [2023] NSWCA 180 has been added.

An article, T Tsavdaridis and D Luo, "Immunity of administrative decisions by judicial officers" (2023) 35(2) *JOB* 14, has been added to **Further reading**.

**[7-0000] Damages**

The case of *Synergy Scaffolding Services Pty Ltd v Alelaimat* [2023] NSWCA 213 has been added to **[7-0100] The Workers Compensation Act 1987, s 157Z**. This case has detailed discussions of the provisions of s 151Z.

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**FILING INSTRUCTIONS OVERLEAF**

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# FILING INSTRUCTIONS

## Update 54

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# Unrepresented litigants and lay advisers

## [1-0800] Introduction

The rules in relation to representation in the courts are contained in the UCPR at r 7.1.

## [1-0810] The role of the court

The role of the court in cases where a party is unrepresented, and where there is a risk of that party's case not being adequately presented to the court, was discussed in *Reisner v Bratt* [2004] NSWCA 22 at [4]–[6]. It was there noted that:

(a) Parties (natural persons) are entitled to appear unrepresented in proceedings before the court: see UCPR r 7.1(1); *Judiciary Act* 1903 (Cth) s 78.

(b) The court has a duty to give such persons a fair hearing, and it may be appropriate for the court to give some assistance to such persons in order to fulfill that duty.

(c) The court hearing a case between an unrepresented litigant and another party, however, cannot give assistance to the unrepresented litigant in such a way as to conflict with its role as an impartial adjudicator.

(d) In deciding what to do when a case is not adequately presented by an unrepresented litigant, it is appropriate to take into account that such circumstance can place far greater burdens of time and costs on the other party than would be involved if both litigants had competent representation. That arises from the circumstance that the time and costs involved in trying to understand and answer claims that are not formulated so as to clearly raise relevant issues can be much greater than where relevant issues are clearly raised; that adjournments are often required because the unrepresented litigant is not ready to proceed with the case; and that when the case is actually heard, the hearing may be much longer than if both sides were represented by a lawyer. See also *Corporate Affairs Commission v Solomon* (unrep, 1/11/89, NSWCA).

(e) Where a case is brought by an unrepresented litigant, and material required for the adequate determination of that case is not available, or is not presented to the court, it is not necessarily the case that the court should itself undertake an investigation of whether such material exists, and if so, seek to have it brought before the court so that it can be considered. It may sometimes be appropriate for the court to attempt to have such material made available, particularly if the deficiency of the material is obvious and can be remedied without prejudice to the other side. Otherwise, it would generally conflict with the court's position, as an impartial adjudicator, for it to take steps to seek to improve an unrepresented litigant's case by investigating whether there is more material available to support that case than has been presented to the court, and then taking steps to obtain it.

In *Nobarani v Mariconte* (2018) 265 CLR 236, the High Court allowed an appeal and remitted the matter for a new trial as the self-represented appellant was denied procedural fairness in the sense of a "substantial wrong or miscarriage", as required by r 51.53(1) of the UCPR, because he was denied the possibility of a successful outcome. The trial judge made no directions for the taking of any steps, or filing or service of any documents by the appellant. The appellant was therefore denied the opportunity to cross-examine a significant witness, locate another witness and call an expert witness.

See further *Equality before the law Bench Book*, especially at **10.5** Sovereign citizens: further information.

## [1-0820] Permissible intervention or assistance

The extent to which a judge's assistance and intervention is permissible will depend upon the circumstances of the case, including the identity of the litigant, the nature of the case, and the

litigant's intelligence and understanding of it: *Abram v Bank of New Zealand* (1996) ATPR ¶41-507, and is incapable of precise definition: *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438. A balance needs to be struck between the need to avoid a compromise of impartiality and the need to avoid procedural or substantive injustice.

By way of guidance:

(a) It is appropriate for judges to inform unrepresented litigants of their rights so as to diminish their disadvantage, through lack of legal skills, in conducting the hearing, although without conferring upon them a positive advantage over their represented opponent, and without advising them of the way in which they should exercise their rights: *MacPherson v The Queen* (1981) 147 CLR 512 and *Rajski v Scitec Corp Pty Ltd* (unrep, 16/06/86, NSWCA). In *R v Zorad* (1990) 19 NSWLR 91, the distinction between explaining the procedural choices available to an unrepresented accused, and advising as to what decision should be made, was emphasised. The restraints upon judicial intervention stemming from the adversarial tradition are not relevantly qualified merely because one of the litigants is self-represented: *Malouf v Malouf* (2006) 65 NSWLR 449 at [94].

(b) It can be appropriate for the court to intervene and to attribute an objection to the unrepresented party where potentially inadmissible evidence is sought to be tendered: *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309.

(c) In interlocutory matters, the court will normally be slow to terminate proceedings summarily because of defective pleading by an unrepresented litigant, at least where it appears that there is a viable cause of action which, with appropriate amendment and a little assistance from the court, could result in a pleading being placed in proper form: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 536.

(d) A judge cannot permit an unrepresented litigant, even without objection, to give evidence from the bar table, without oath or affirmation: *Randwick City Council v Fuller* [1996] NSWCA 444. In most instances, it will be necessary for such a person to give evidence in chief in a narrative form, rather than by way of formal question and answer. (See also *Evidence Act* 1995 s 29.)

(e) The *Evidence Act* 1995 may require the judge to advise an unrepresented party as to the admissibility of certain categories of evidence, or of the need for leave, if evidence attracting a leave requirement is tendered: see s 192 of the *Evidence Act* 1995. Moreover, s 132 of the Act will require the judge to be satisfied that such a party is aware of the effect of those provisions of Pt 3.10 (Privilege), which would entitle that party to claim privilege or object to a question in accordance with its provisions. It will also be appropriate to alert the unrepresented party to the rules in *Browne v Dunn* (1893) 6 R 67 and *Jones v Dunkel* (1959) 101 CLR 298.

(f) While the granting of an adjournment remains a matter of discretion, it might more readily be granted to an unrepresented litigant, who has misunderstood procedural requirements and is, as a consequence, not in a position to complete the presentation of evidence, provided that no substantive or procedural injustice is done to the other party involved: *Titan v Babic* [1995] FCA 813; *R v Leicester City Justices; Ex p Barrow* [1991] 2 QB 260. See also *Kelly v Westpac Banking Corporation* [2014] NSWCA 348 at [42]–[43].

(g) It is appropriate for a judge to attempt to clarify the submissions of an unrepresented litigant, particularly where the substantive issues are being ignored or obfuscated by garrulous or misconceived advocacy: *Neil v Nott* [1994] HCA 23.

(h) It is generally appropriate for a judge to draw to the attention of an unrepresented litigant possible unfavourable consequences, including adverse cost orders, of a particular procedural step especially where the course sought to be pursued is unusual: *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367.

(i) It will also be appropriate for a judge to draw to the attention of the unrepresented litigant the potential availability of legal assistance through Legal Aid or pro bono schemes (see [1-0600]),

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*para*

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# Change of venue and transfer between New South Wales courts

## [2-1200] Change of venue

The venue for hearing is initially fixed by the plaintiff in the originating process (r 8.1(1)), and must be a venue at which the court is entitled to sit: r 8.1(2).

The court may order a change of venue on the application of either party: r 8.2(1). Its discretion in this respect is to be exercised according to the following test:

> [W]here can the case be conducted or continued most suitably, bearing in mind the interests of all the parties … and the most efficient administration of the court?: *National Mutual Holdings Pty Ltd v Sentry Corporation* (1988) 19 FCR 155 at 162.

Of particular relevance are:

- the place of residence of the parties and of the majority of the witnesses, as well as the locality where the cause of action arose: *Lehtonen v Australian Iron & Steel Pty Ltd* [1963] NSWR 323; *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44;
- the possibility that the trial of any question arising, or likely to arise, might not be fair or unprejudiced, for example, by reason of pre-trial publicity or intense local feeling, if held at the selected venue (particularly jury trials): *Cording v Trembath* [1921] VLR 163; *Mowle v Elliott* (1937) 54 WN (NSW) 104; *Kings Cross Whisper Pty Ltd v O'Neil* [1968] 2 NSWR 289;
- the fact of undue delay or expense in conducting the hearing at the selected venue: *Central West Equipment v Gardem Investments* [2002] NSWSC 607;
- the fact of hardship to the parties or witnesses by reason of the need for lengthy travel or prolonged absences from home or work if the trial is held at the selected venue.

The court may direct that the proceedings commenced at one venue, be continued at another venue where it is authorised to sit (r 8.2(2)), to allow for the convenience of witnesses. Where that occurs however, it is desirable to maintain continuity of the hearing rather than to disrupt it by ordering that the trial stand over part-heard to be re-listed at some future date which might suit the convenience of the parties or their counsel.

An application for a change of venue should be made by motion on notice supported by affidavit.

In the Common Law Division of the Supreme Court, since the abolition of fixed circuit sittings, applications to have proceedings heard (wholly or partly) outside Sydney are dealt with by the Chief Judge of the Division.

### Change of venue between Local Courts

A Local Court may make an order changing the venue of proceedings if it thinks it appropriate in the circumstances in accordance with s 55 *Local Court Act* 2007; UCPR Pt 8 and Local Court Practice Note Civ 1 (especially 10.1 – 10.9).

As a matter of practice, lengthy Local Court matters in the metropolitan area are transferred to the Downing Centre.

## [2-1210] Transfer of proceedings between courts

Last reviewed: December 2023

### Transfer to a higher court

Proceedings (including any cross-claims) pending in the District Court or in the Local Court may be transferred to the Supreme Court by order of the Supreme Court acting of its own motion or on application by a party to the proceedings: CPA s 140(1).

Proceedings pending in a Local Court (including any cross-claims) may be transferred to the District Court by order of the District Court acting of its own motion or on an application by a party to the proceedings: CPA s 140(2).

Proceedings in the District Court on a claim for damages arising from personal injury or death may only be transferred to the Supreme Court where it is satisfied of the matters set out in CPA s 140(3). For the determination of whether the likely award of damages will exceed the specified limit, the inquiry concerns the amount that the plaintiff could reasonably expect to obtain: *Delponte, Ex parte; Re Thiess Brothers Pty Ltd* [1965] NSWR 1468.

Proceedings may be transferred pursuant to s 140 CPA from the District Court to the Supreme Court to effect service of process upon a defendant resident outside Australia in the absence of statutory provision for this: see *Thermasorb Pty Ltd v Rockdale Beef Pty Ltd* [2005] NSWSC 361: *Li v Wang* [2022] NSWSC 653 at [11]–[15].

Proceedings in the Local Court may only be transferred to a higher court where the higher court is satisfied that there is sufficient reason for hearing the proceedings in the court: CPA s 140(4).

Subject to the s 140(3) limitation, the higher court has a discretionary power to order a transfer, which is to be exercised where a transfer is considered appropriate in the circumstances of the particular proceedings and matters in issue: *Dusmanovic, Ex parte; Re Dusmanovic* [1967] 2 NSWR 125 and *Sanderson Motors Pty Ltd v Kirby* [2000] NSWSC 924.

A transfer pursuant to s 140 does not confer on a transferee court additional jurisdiction that it does not otherwise have: *Rinbac Pty Ltd v Owners Corporation Strata Plan 64972* (2010) 77 NSWLR 601 (SC) at [11].

Terms may be imposed on the transfer, including the making of special costs orders to compensate for any prejudice which may be occasioned: *Delponte, Ex parte; Re Thiess Brothers Pty Ltd, above.*

Where an application for transfer has been made, but not determined, the higher court may stay the proceedings in the lower court, or the lower court may adjourn or stay the proceedings: s 142.

As to the effect of an order for transfer, see CPA ss 141 and 143.

There is further provision in CPA s 144 for the transfer of proceedings from the District Court to the Supreme Court in relation to proceedings under Subdiv 2 of Div 8 of Pt 3 (ss 133–135) of the *District Court Act* 1973, that is proceedings for possession of land, equity proceedings and proceedings under the *Frustrated Contracts Act* 1978, the *Contracts Review Act* 1980, and the *Fair Trading Act* 1987. Section 144(2) of the CPA is mandatory in its terms and is enlivened when the District Court reaches a decision that it lacks jurisdiction to deal with claims in its equitable jurisdiction but also where there is a doubt as to that matter: *Mahommed v Unicomb* [2017] NSWCA 65 at [52], [55].

**Transfer to a lower court**

The Supreme Court may order that proceedings pending in that court, including any cross-claims in the proceedings, be transferred to the District Court or a Local Court if it is satisfied that the proceedings, including any such cross-claims, could have been commenced in the District Court or a Local Court, as the case may be: s 146(1).

The District Court may order that proceedings pending in that court, including any cross-claims in the proceedings, be transferred to a Local Court if is satisfied that the proceedings, including any such cross-claims, could properly have been commenced in a Local Court: CPA s 146(2).

In considering whether any proceedings or cross-claims could properly have been brought in the lower court, the higher court must have regard to the limits of the lower court's jurisdiction when the proceedings or the cross-claims were commenced in the higher court: CPA s 146(3).

Proceedings in the Supreme Court on a claim for damages arising out of personal injury or death must be transferred to a lower court unless the conditions set out in CPA s 146(4) are satisfied.

If a matter is transferred from the Supreme Court to the District Court, the District Court has jurisdiction to hear and dispose of any proceedings transferred under CPA s 146(1), irrespective of the amount claimed: see s 44(1)(e) of the *District Court Act* 1973, and semble the same now applies to proceedings transferred to a Local Court by reason of CPA s 149.

As to the effect of an order for transfer, see CPA ss 147 and 148.

When proceedings are transferred to the District or a Local Court, it is desirable to specify the place of the court to which they are transferred.

**Transfer between Supreme Court and Land and Environment Court**

As to the transfer of proceedings between the Supreme Court and the Land and Environment Court, see CPA ss 149A–149E; and *JK Williams Staff Pty Ltd v Sydney Water Corp* [2020] NSWSC 220.

**Transfer between Small Claims Division and General Division of Local Court**

Part 2, Div 2 of the Local Court Rules 2009 provide for the transfer of proceedings from the Small Claims Division to the General Division where the jurisdictional limit of the Small Claims Division is exceeded (r 2.2) or the matters in dispute are so complex or difficult, or are of such importance, that the proceedings ought more properly to be heard in the Court's General Division: r 2.3.

## [2-1220] Sample orders

I order:

1. That proceedings no 1234 of 2006 be transferred to the District Court at Newcastle.
2. Costs of the motion to be costs in the cause (or otherwise as appropriate).

## Legislation

- CPA ss 139–149E
- *District Court Act* 1973, ss 44(1)(e), 133–135
- UCPR rr 8
- *Local Court Act* 2007, s 55
- Local Court Rules 2009, Pt 2, Div 2

**Practice Notes**

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

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# Cross-vesting legislation

## [2-1400] Cross-vesting

Last reviewed: December 2023

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

Prior to 1 September 2021, s 4 of the NSW Act conferred jurisdiction in "State matters" (as defined in s 3) on the Supreme Court of another State or Territory or the State Family Court of another State. Note that for the purposes of the Act, "State" includes the Australian Capital Territory and the Northern Territory, and those entities are excluded from the term "Territory": s 3. On 1 September 2021, s 4(1)(a) of the Cth Act was amended to replace the "Family Court" with the "Federal Circuit and Family Court of Australia (Div 1)" and therefore under the *Cth Cross-vesting Act*, the NSW Supreme Court was relevantly invested with the jurisdiction of the Division 1 Court. See *Re Neil (No 5)* (2022) 110 NSWLR 197 for a discussion of the unintended consequences of the amendments: at [6], [66]–[67], [74]–[75], for example, the Supreme Court does not have jurisdiction to make recovery orders under the *Family Law Act* 1975 as there is a difference between the jurisdiction of the former Family Court and the current Division 1 Court in relation to matters arising under Pt VII of the *Family Law Act*.

### Transfer of proceedings

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

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

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

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

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

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

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

## [2-1410] Sample order

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

## Legislation

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

**[The next page is 925]**

# Stay of pending proceedings

## [2-2600] The power

Last reviewed: December 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].

A court may order a permanent stay of proceedings if a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process or the proceedings are brought or maintained for an improper purpose. The decision whether to exercise the power in s 67 is not discretionary in the sense relevant to the applicable standard of appellate review (ie the "correctness standard"): *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [23]–[24]. 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]). For proceedings for damages resulting from child abuse, the observations of Bell P in *Moubarak* at [78]–[86] must be evaluated in the "radically new context" in which Parliament has chosen to abolish any period of limitation for the commencement of the action: *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* at [43]–[45].

## [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: December 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 as a last resort to protect the administration of justice through the operation of the adversarial system. Neither necessary unfairness nor such unfairness or oppression as to constitute an abuse of process justifying a permanent stay of proceedings depends on a mere risk that a trial might be unfair. The party seeking the permanent stay bears the onus of proving on the balance of probabilities that the trial will be unfair or will involve such unfairness or oppression as to constitute an abuse of process. The context underlying the requirement of exceptionality to enliven the power to grant a permanent stay is that the court's power to refuse to exercise jurisdiction operates in light of the principle that the conferral of jurisdiction imports a prima facie right in the person invoking that jurisdiction to have it exercised which is a basic element of the rule of law: *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*: at [3], [18], [21]. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 and *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: December 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 the party seeking the stay proves on the balance of probabilities that the trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process, a court must not permit the trial to be held: *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* at [23]. The death of the alleged perpetrator in proceedings for damages for child abuse, and the effluxion of 55 years between the alleged abuse and the proceedings, did not mean the trial would be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process for the reasons outlined in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*: at [76]–[81]. 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 a stay has been granted: *Moubarak by his tutor Coorey v Holt* at [88], [92]–[96]; [182]; [207]. 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: December 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. Section 6A(6) "does not limit" the inherent, implied, or statutory jurisdiction of courts, including to prevent abuses of process however the jurisdiction is now to be exercised in the "radically new context" created by s 6A(1). Section 6A removes any requirement or even expectation of an explanation for the passing of time between the accrual

of the cause of action and the commencement of the action: *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [40]–[45]. For a person within the relevant class created by s 6A, the mere effluxion of time and the inevitable impoverishment of the evidence which the passing of time engenders, do not mean that a trial will be unfair and attract the quality of exceptionality which is required to justify the extreme remedy of the grant of a permanent stay: *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* at [50]–[53].

- 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)<br>See [5.10.580] | |
| Actions for seamen's wages | 6 years: s 22(1), s 14(1)(a)<br>See [5.10.660] | |
| Actions on a specialty or deed | 12 years: s 16<br>See [5.10.670] | |
| Quasi-contract | 6 years: s 14(1)(a)<br>See [5.10.680] | |
| Action arising by virtue of frustration of contract | 6 years from date of frustration: s 14A<br>See [5.10.680] | |
| Actions for an account | 6 years: s 15<br>See [5.10.2070] | |
| **TORT** | | |
| Tort (other than specific cases set out below) | 6 years: s 14(1)(b)<br>See [5.10.700] | |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| Trespass | 6 years: s 14(1)(b) (general tort limitation period)<br>See [5.10.700], [5.10.720] | |
| Second or subsequent conversion | 6 years from accrual of original cause of action:<br>s 21<br>See [5.10.730] | |
| Actions for breach of statutory duty | 6 years: s 14(1)(b)<br>See [5.10.700] | |
| Defamation: Causes of action accruing before 1 January 2006 | 1 year from publication: s 14B(3) (now repealed)<br>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)<br>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)).<br>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)<br>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:<br>s 26(1)<br>See [5.10.2120] | |
| **PERSONAL INJURY** | | |
| Personal injury:<br>Causes of action accruing before<br>1 September 1990 | 6 years: s 14(1)(b) (general tort limitation period)<br>See [5.10.1050] | 1 year after material facts of decisive character within P's means of knowledge:<br>s 58(2)<br>See [5.10.1050]<br>In cases of latent injury, disease or impairment:<br>Any period, if just and reasonable:<br>s 60G, Schedule 5 Pt 1 cl 4<br>See [5.10.1080] |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| Personal injury:<br>Causes of action accruing between 1 September 1990 and 5 December 2002 | 3 years: s 18A<br>See [5.10.1060] | An additional 5 years, if just and reasonable: s 60C<br>See [5.10.1070]<br>In cases of latent injury, disease or impairment:<br>Any period, if just and reasonable:<br>s 60G, Schedule 5 Pt 1 cl 4<br>See [5.10.1080] |
| Personal injury:<br>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<br>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:<br>s 62A<br>See [5.10.1100]<br>There is a special provision for minors: s 62D<br>See [5.10.2430] |
| Dust-related conditions | No limitation period: *Dust Diseases Tribunal Act* 1989 s 12A<br>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:<br>Causes of action accruing before 1 September 1990 | 6 years from death:<br>s 19(1)(a)<br>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)<br>See [5.10.1400]<br>In cases of latent injury, disease or impairment:<br>Any period, if just and reasonable:<br>Schedule 5 Pt 1 cl 4 |
| Wrongful death actions:<br>Causes of action accruing between 1 September 1990 and 5 December 2002 | 3 years from death:<br>s 19(1)(b)<br>See [5.10.1370] | 5 years, if just and reasonable:<br>s 60D(2)<br>See [5.10.1400]<br>In cases of latent injury, disease or impairment:<br>Any period, if just and reasonable: s 60H(2)<br>See [5.10.1400] |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| Wrongful death actions:<br>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:<br>s 50C(1)<br>See [5.10.1370]<br>But no limitation period for child abuse actions:<br>s 6A(5)(a)<br>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)<br>See [5.10.1400] |
| Personal injury action surviving for benefit of estate of deceased person:<br>Causes of action accruing before 1 September 1990 | 6 years:<br>s 14(1)(b) (general tort limitation period)<br>See [5.10.2210] | 1 year after material facts of decisive character within P's means of knowledge:<br>s 59(2)<br>See [5.10.2220] |
| Personal injury action surviving for benefit of estate of deceased person:<br>Causes of action accruing between 1 September 1990 and 5 December 2002 | 3 years: s 18A(2)<br>See [5.10.2210] | Up to 5 years if just and reasonable:<br>s 60C(2)<br>See [5.10.2220] |
| Personal injury action surviving for benefit of estate of deceased person:<br>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:<br>s 50C<br>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)<br>See [5.10.2220] |
| Cause of action in tort surviving against estate of deceased person | Period same as if deceased had survived<br>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)<br>See [5.10.700]<br>See also [5.10.790] | |
| Action in respect of defective building work | 10 years from completion:<br>*Environmental Planning and Assessment Act* 1979 s 6.20(1)<br>See [5.10.790] | |
| **RELATED ACTIONS** | | |
| Actions on a judgment | 12 years from date judgment became enforceable: s 17(1)<br>See [5.10.2170] | |
| Actions to enforce an arbitral award (where agreement to arbitrate not under seal) | 6 years: s 20(2)(b)<br>Action accrues when default in observance of award first occurs: s 20(3)<br>See [5.10.2180] | |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| Actions to enforce an arbitral award (where agreement to arbitrate made under seal) | 12 years: s 20(2)(a)<br>Action accrues when default in observance of award first occurs: s 20(3)<br>See [5.10.2180] | |
| Actions to enforce a recognisance | 6 years: s 14(1)(c)<br>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)<br>See [5.10.2200] | |
| Actions to recover sum recoverable by virtue of an enactment (other than penalty or forfeiture or sum by way of penalty or forfeiture) | 6 years: s 14(1)(d)<br>See [5.10.2200] | |
| Actions to recover arrears of income | 6 years: s 24(1)<br>See [5.10.2150] | |
| **LAND** | | |
| Actions to recover land | 12 years: s 27(2)<br>See [5.10.1560] | |
| Action to recover land by holder of future interest to recover land | 12 years: s 27(2)<br>Action accrues when P becomes entitled to immediate possession, if no person in possession under interest claimed: s 31<br>See [5.10.1640] | |
| Actions by tenant entail | Entailed interests abolished<br>See [5.10.1650] | |
| Actions by the Crown to recover land | 30 years: s 27(1)<br>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)<br>See [5.10.1680] | |
| Actions to recover arrears of rent, or damages in respect of arrears | 6 years: s 24(1)<br>See [5.10.1720] | |
| **MORTGAGES** | | |
| Actions by mortgagor to redeem<br>(land and personalty) | 12 years from date mortgagee last went into possession, or last received payment of principal or interest:<br>s 41<br>See [5.10.1740] | |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| Actions by mortgagee to recover possession (land and personalty) | 12 years:<br>s 42(1)(b)<br>See [5.10.1750] | |
| Actions by mortgagee to foreclose<br>(land and personalty) | 12 years:<br>s 42(1)(c)<br>See [5.10.1760] | |
| Actions by mortgagee to recover principal money (land and personalty) | 12 years:<br>s 42(1)(a)<br>See [5.10.1770] | |
| Actions by mortgagee to recover interest | 6 years from accrual (or date prior mortgagee discontinues possession) or when limitation period for action to recover principal expires, whichever period first expires:<br>s 43(1)<br>See [5.10.1780] | |
| **TRUSTS** | | |
| Actions by a beneficiary against a trustee to recover trust property, or for breach of trust | 6 years:<br>s 48(a)<br>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:<br>s 47(1)<br>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)<br>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)<br>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:<br>*Admiralty Act* 1988 (Cth) s 37(1)<br>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:<br>*Admiralty Act* 1988 (Cth) s 37(3)<br>See [5.10.2080] |

| CAUSE OF ACTION | LIMITATION PERIOD | EXTENSION PROVISION |
|---|---|---|
| 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)<br>See [5.10.2090] | Can be extended to such extent as court thinks fit: s 22(4)<br>See [5.10.2090] |
| Actions to enforce claim or lien in respect of salvage services | 2 years from date services rendered:<br>s 22(3)<br>See [5.10.2090] | Can be extended to such extent as court thinks fit: s 22(4)<br>See [5.10.2090] |
| **MISCELLANEOUS** | | |
| Arbitrations | After expiration of limitation period fixed by *Limitation Act* for cause of action in respect of same matter:<br>s 70(2)<br>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:<br>s 73<br>[5.10.2110] |
| Actions to recover tax | 12 months after tax paid: *Recovery of Imposts Act* 1963<br>s 2(1)(b)<br>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):<br>s 51(1)<br>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

**[The next page is 1651]**

# Persons under legal incapacity

## [2-4600] Definition

Last reviewed: December 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].

Section 4 of the *Felons (Civil Proceedings) Act* 1981 (NSW) (Felons Act) provides that a person who is in custody as a result of having been convicted of, or found to have committed, a serious indictable offence may not institute any civil proceedings in any court except by leave of the Court.

For an application under s 4 of the Felons 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 were prima facie grounds for the proceedings. Such grounds must be arguable and not hopeless: *Application of Malcolm Huntley Potier* [2012] NSWCA 222 at [17], nor constitute an abuse of process: *Stoeski v State of NSW* [2023] NSWSC 926 at [9]. Leave may be sought nunc pro tunc under s 4 Felons Act if proceedings have been commenced without a grant of leave: *Stoeski v State of NSW* at [5].

## [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

**[The next page is 1825]**

# 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: December 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, commenced 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].

### 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 of law or fact* ...": s 157(1). There is no basis to construe this phrase narrowly. A question can be common even if different evidence is adduced in respect of each aspect of the claim: *Nguyen v Rickhuss* [2023] NSWCA 249 at [27].

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 representative plaintiff, or each group member, has 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 which does not include all possible claimants: 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 one or more substantial common questions of fact or law in the originating process is important. 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].

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).

**Case management of representative proceedings**

The representative proceedings are case managed by a judge 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 in *Bright v Femcare Ltd* [2002] FCAFC 243 at [160].

In circumstances where an initial hearing will not determine all claims of all group members, it is appropriate to identify, in advance of the hearing, for reasons, at least, of procedural fairness, the questions which appear to be common from a consideration of the pleadings, and, where relevant, evidence which it is intended to adduce. This procedure involves making what are known as "Merck Orders": *Merck* at [4]–[10]; *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.

When formulating questions by way of Merck Orders, it is not necessary for those questions to fall within the constraint of a "*substantial common question of fact or law*" as that phrase is used in s 157(1)(c) of the CPA: *Moussa v Camden Council (No 5)* [2023] NSWSC 1135 at [55]–[57]; see also *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238 at [409].

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].

**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], [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].

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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.

**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

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# Setting aside and variation of judgments and orders

## [2-6600] Setting aside a judgment or order given, entered or made irregularly, illegally or against good faith

A judgment or order may be set aside if given, entered or made irregularly, illegally or against good faith: r 36.15(1).

The focus of r 36.15(1) is on the judgment or order that is attacked and the question is whether it was "given, entered or made irregularly, illegally or against good faith". The focus is on an irregularity in these steps not on the merits of any decision or the irregularity of other steps in the proceedings: *Perpetual Trustees Australia Ltd v Heperu Pty Ltd (No 2)* (2009) 78 NSWLR 190 at [16].

In that case, it was observed at [17] that r 36.15(1) applies with particular force to default or consent judgments or orders and those given or made ex parte and that it can only have limited application to judgments and orders made or entered after a hearing on the merits at which all parties were represented and fully heard.

For an example of a judgment set aside if given or entered irregularly, see *Arnold v Forsythe* [2012] NSWCA 18 and *Violi v Commonwealth Bank of Australia* [2015] NSWCA 152.

For an example of a judgment set aside as entered against good faith, see *Chand v Zurich Australian Insurance Ltd* [2013] NSWSC 102.

For an unsuccessful attempt to rely upon s 63 of the CPA as giving the court power to set aside a judgment or order: see *Perpetual Trustees Australia Ltd v Heperu Pty Ltd (No 2)*, above, at [20]–[49].

## [2-6610] Setting aside a judgment or order by consent

A judgment or order may be set aside by consent order: r 36.15(2).

## [2-6620] Setting aside or varying a judgment or order before entry of the order or judgment

The court may set aside or vary a judgment or order if a notice of motion for such an order is filed before the entry of the judgment or order sought to be set aside: r 36.16(1).

Such an order is variously referred to as "recalling", "reopening", "reviewing" or "reconsidering" a judgment or order.

The following principles are extracted from the judgment of Mason CJ in *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 301–303. (His Honour dissented on the ultimate issue in the case but his statements of general principle were not questioned in the majority judgments.) The decision turned on the inherent jurisdiction of the High Court but the same principles would apply to the subrule.

1. The power is to be exercised "with great caution" in view of the public interest in the finality of legal proceedings.
2. The power may be exercised where, through no fault on the applicant's part, the applicant has not been heard on a matter decided by the court.
3. The jurisdiction also extends to cases where a court has good reason to consider it has proceeded on a misapprehension as to the facts or the law (such as a failure to recognise that a line of authority relied upon in the determination had been overruled or a mistaken assumption that certain evidence had not been given at an earlier hearing).
4. The jurisdiction is not a back door for re-arguing the case. It is not to be used for the purpose of re-agitating arguments already considered by the court or because a party has failed to present the argument in all its aspects or as well as it might have been put.

In *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, at 684, it was said that, "[g]enerally speaking, [the power to reopen] will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard." It was, however, explicitly stated in *Autodesk*, by Mason J (at 302) and by Gaudron J (at 322), that the jurisdiction to re-open is not confined to such circumstances. No other judge in *Autodesk* disagreed with those statements.

Since r 36.16(1) requires the filing of a notice of motion, it has no application to a setting aside or variation by the court of its own motion.

In *Autodesk Inc v Dyason*, above, at 302, Mason J (speaking of the High Court's inherent jurisdiction) referred specifically to the power of the court to recall a judgment or order on the judge's own initiative where the judge believed he had "erred in a material matter in his approach to the case". The Supreme Court would have the same inherent power to recall a judgment or order of the court's own motion before the judgment or order is entered.

Where an apparent error can readily be addressed without the need to resort to expensive and time-consuming appeal proceedings, that course should be permitted and encouraged: *Nominal Defendant v Livaja* [2011] NSWCA 121 at [23]. In some cases, for example where a trial judge, without the benefit of transcript, is delivering an oral judgment from handwritten notes, the public interest in the finality of litigation may carry less weight than in other circumstances: *Livaja* at [23].

It is unclear whether the District Court and the Local Court have a corresponding implied power to recall a judgment or order of the court's own motion. However, the point is unlikely to arise having regard to the provisions for the almost automatic entry of judgment in the UCPR and the terms of r 36.16(3B) dealt with below.

In *Consolidated Lawyers Ltd v Abu-Mahmoud* [2016] NSWCA 4, Macfarlan JA (Bathurst CJ and Tobias AJA agreeing) observed at [39]–[41] that where it appears that the primary judge has overlooked a significant point in formulating the court's judgment, the course that should be adopted in the absence of particular, valid reasons for not doing so, is for an application to be made to the judge pursuant to r 36.16 to set aside or vary the judgment. The ground of the application should be that the judge had not dealt with a significant submission.

For further examples relating to the power to set aside or vary a judgment or order before entry, see *Ritchie's* at [36.16.45] and [36.16.50] and *Thomson Reuters* at [r 36.16.100] and [r 36.16.120].

## [2-6625] Postponement of effect of entry

If a notice of motion for setting aside or variation of a judgment or order is filed within 14 days after the judgment or order is entered, the court may set aside or vary the judgment or order under r 36.16(1) as if the judgment or order had not been entered: r 36.16(3A). This power does not extend to a judgment or order that was not specified in the notice of motion: *Malouf v Prince (No 2)* [2010] NSWCA 51.

Further, the court may of its own motion set aside or vary a judgment or order within 14 days after entry as if it had not been entered: r 36.16(3B).

Despite r 1.12, the court may not extend the time limited by r 36.16(3A), (3B) or (3C).

There is an overlap between r 36.16(3B), and r 36.17, the slip rule (as to which, see [2-6680]).

## [2-6630] Setting aside or varying a judgment or order after it has been entered — general rule

As a general rule, apart from the exceptions which follow, judgments or orders which have been formally recorded or entered can only be varied or discharged on appeal:

> Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance … beyond recall by that court: *Bailey v Marinoff* (1971) 125 CLR 529 at 530.

See also *Grierson v The King* (1938) 60 CLR 431 at 436; *Gamser v Nominal Defendant* (1977) 136 CLR 145; *DJL v The Central Authority* (2000) 201 CLR 226 at 245; and *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146.

## [2-6640] Default judgment

Rule 36.16(2) of the UCPR provides that the court may set aside or vary a judgment or order after judgment is entered if the judgment or order is a default judgment other than a default judgment given in open court. That orders have taken effect does not extinguish these powers: *Goater v Commonwealth Bank of Australia* [2014] NSWCA 382.

The following principles are extracted from the judgment of Hope JA in *Adams v Kennick Trading (International) Ltd* (1986) 4 NSWLR 503 at 506–507:

- the court has to look at the whole of the relevant circumstances and decide whether or not sufficient cause has been shown
- the existence of a bona fide ground of defence and an adequate explanation for the default are the most relevant matters to consider
- the defendant must swear to facts which, if established at the trial, will afford a defence: *Simpson v Alexander* (1926) SR (NSW) 296 at 301
- if the judge concludes that the applicant is lying about the alleged defence and is thus dishonest in raising it, the defence is not "bona fide"
- the applicant does not necessarily fail for want of an adequate explanation for the default. It depends on the circumstances. "[I]f merits are shown, the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication": *Evans v Bartlam* [1937] AC 473 at 489,
- the absence of an explanation for the default, particularly if it is coupled with prejudice to the plaintiff, may justify the denial of relief, but only when considered with other relevant circumstances.

The importance of a defence on the merits relative to countervailing considerations (per *Evans v Bartlam*, above) has been emphasised. In *Byron v Southern Star Group Pty Ltd t/as KGC Magnetic Tapes* (1995) 123 FLR 352, Priestley JA said at 364:

> Frequently, persons have been let in to defend who have had little or no explanation for their delay but who have shown reasonable grounds of defence; in some cases such persons are put on severe terms concerning provision of security or payment into court or the like, but the court sees to it that subject to compliance with such terms, a person who has an arguable defence and wishes to have it determined on the merits, will be heard by the court before judgment.

In *Cohen v McWilliam* (1995) 38 NSWLR 476 at 480–481, Priestley JA re-affirmed what he had said in *Byron* and, by way of illustration, quoted with approval from the Full Federal Court decision in *Davies v Pagett* (1986) 10 FCR 226 at 232, as follows:

> The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed.

On the other hand, the explanation for default may be sufficient. See the passage quoted below from *Taylor v Taylor* (1979) 143 CLR 1.

## [2-6650] Absence of a party/undefended judgments

The discretionary power of the court to set aside an undefended judgment is contained in r 36.16(2)(b). This provides that the court may set aside or vary a judgment or order after judgment is entered if the judgment or order has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order. That orders have taken effect does not extinguish these powers: *Goater v Commonwealth Bank of Australia*, above.

Rule 36.16(2)(b) provides an unfettered, though judicial, discretion. It is unwise to attempt to lay down rules of universal application in the exercise of that broad discretion which necessarily involves the court in making a broad evaluative judgment. The questions posed by Jordan CJ in *Vacuum Oil v Stockdale* (1942) 42 SR (NSW) 239 about the exercise of a predecessor to this judicial discretion remain appropriate: it is necessary to consider (a) whether any useful purpose would be served by setting aside the judgment, and (b) how it came about that the applicant became bound by a judgment regularly obtained: *Northey v Bega Valley Shire Council* [2012] NSWCA 28 at [16]; *Pham v Gall* [2020] NSWCA 116 at [55]; [108], [110]. The party in default needs to explain the reason for the default and the nature of the proposed defence. Those matters inform the exercise of discretion: *Pham v Gall* at [56]. An applicant under UCPR 36.16(2)(b) must show by evidence that he or she has a reasonably arguable defence on the merits: *Ibrahim v Ayoubi* [2013] NSWCA 405; *Foundas v Arambatzis* [2020] NSWCA 47 at [14].

In the absence of urgency or some other reason, a party with an interest in the matter in question has a right to be heard, failing which the judgment or order will be set aside.

1. *Cameron Bankrupt v Cole Petitioning Creditor* (1944) 68 CLR 571 per Rich J at 589:

   > It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.

2. *Taylor v Taylor* (1979) 143 CLR 1 per Mason J at 16:

   > In my opinion the jurisdiction extends not only to the setting aside of judgments which have been obtained without service or notice to a party (*Craig v Kanssen* [[1943] KB 256 at 262]) but to the setting aside of a default or ex parte judgment obtained when the absence of the party is due to no fault on his part.

3. See also *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at [134], affirming the order made by Austin J in *Brown v DML Resources Pty Ltd No 2* (2001) 52 NSWLR 685 at [39]–[65].

The rule is in terms which empower the court to set aside an ex parte judgment or order where a party with notice has failed to attend due to accident or mistake: *Wentworth v Rogers* (unrep, 28/8/97, NSWSC) Sperling J, pp 36–37; leave to appeal refused *Wentworth v Rogers* (unrep, 12/6/97, NSWCA).

Mere absence, of itself, is insufficient to justify setting aside an order. There must be some added factor that makes it unjust for the order to stand: *Northey v Bega Valley Shire Council* [2012] NSWCA 28.

Where proceedings are by necessity heard ex parte, a high degree of candour is required, including disclosure of facts adverse to the moving party. Breach of that obligation will almost invariably result in the determination being set aside: *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 per Mahoney AP and Clarke JA at 676–677.

Rule 36.16(2)(b) and other provisions of the UCPR do not apply where the court is exercising Federal jurisdiction and the Constitution or the relevant Commonwealth law "otherwise provides". For example, in *Grant Samuel Corporate Finance Pty Limited v Fletcher* (2015) 89 ALJR 401 it was held that the rule could not enable time to be extended beyond the period provided by s 588FF of the *Corporations Act* 2001.

## [2-6660] In the case of possession of land, absence of a person ordered to be joined

Rule 36.16(2)(c) provides that, in the case of proceedings for the possession of land, the court may set aside or vary a judgment or order after the judgment or order has been entered if the judgment or order has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.

## [2-6670] Interlocutory order

Rule 36.16(3) provides that, without limiting subrules 36.16(1) and (2), the court may set aside or vary any order except so far as it determines a claim for relief or a question arising on a claim for relief or determines part of a claim for relief.

Orders relating to practice and procedure will be freely reviewed in the light of changing circumstances but not otherwise: *DPP (Cth) v Geraghty* [2000] NSWSC 228; *Hillston v Bar-Mordecai* [2002] NSWSC 477.

## [2-6680] The slip rule

Last reviewed: December 2023

The court may, on application or of its own motion, correct a clerical mistake or an error arising from an accidental slip in a judgment, order or certificate: r 36.17. A "party" in this rule means any person who has an interest in the proceedings and is not limited to persons formally joined as parties to the proceedings: *JP Morgan Chase Bank, National Association v Fletcher* (2014) 85 NSWLR 644 at [100]–[147], [149], [162]–[164].

By reason of the overriding objective in s 56 of the CPA (to facilitate the just, quick and cheap resolution of the real issues in the proceedings), words such as "error" and "correct" in the slip rule should not be given a narrow interpretation: *Newmont Yandal Operations Pty Ltd v The J Aron Corp & The Goldman Sachs Group, Inc* (2007) 70 NSWLR 411 at [116]. Some earlier authorities should now be treated with caution: *Newmont Yandal*, above, at [117].

Commonplace applications of the rule include correcting an arithmetical mistake in the calculation of interest or a wrong figure or date in an order.

The rule extends to matters overlooked, such as specifying a date for compliance with an order (*Re Walsh* (1983) 83 ATC 4147), or adding an amount for interest to the judgment (*L Shaddock and Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590), or where the judge has misunderstood the evidence (*Hall v Harris* (1900) 25 VLR 455 at 457); or counsel's submissions: *Yore Contractors Pty Ltd v Holcon Pty Ltd* (unrep, 17/7/89, NSWSC).

The rule also extends to a correction made in order to carry into effect the actual intention of the judge and/or to ensure that the order does not have a consequence which the judge intended to avoid adjudicating upon: *Newmont Yandal*, above, at [114], [116], [185], [194].

The rule does not extend to correcting a deliberate decision (*Expo Aluminium (NSW) Pty Ltd v Pateman Pty Ltd (No 2)* (unrep, 29/4/91, NSWCA)) or to making further orders on a point not in issue at the hearing: *Lauer v Briggs (No 2)* (1928) 28 SR (NSW) 389; *D'Angola v Rio Pioneer Gravel Co Pty Ltd* [1977] 2 NSWLR 227.

In the Supreme Court at least, the inherent jurisdiction of the court extends to correcting a duly entered judgment where the orders do not truly represent what the court intended: *Newmont Yandal* at [74], [79], [83], [185], [194].

The court has power to make an order for restitution of an overpayment made in consequence of the error corrected under the rule: *Prestige Residential Marketing Pty Ltd v Depune Pty Ltd (No 2)* [2008] NSWCA 341 at [9].

The judge who made the orders is not disqualified from correcting them under the slip rule and should not recuse himself or herself: *Newmont Yandal*, per Spigelman CJ at [181] and Handley JA at [195], [196].

For an example of refusal to make an order on the ground of delay, see *Georgouras v Bombardier Investments (No 2) Pty Ltd* [2013] NSWSC 1549. See also *Maclean v Brylewski* [2023] NSWCA 173 at [34] where the court held that the correction of orders made in December 2022 and not corrected until June 2023 was appropriately made and obvious on the face of the orders and did not in any way prejudice the applicant or cause serious delay.

The court is not always obliged to give notice to the parties before exercising its powers of its own motion under UCPR r 36.17 to correct a mistake/error: see *Decision Restricted* [2018] NSWSC 4 at [32]. Consideration must be given to whether procedural fairness requires notice to be given to the parties: *Decision Restricted,* above, at [33]–[42].

## [2-6685] Error on the face of the record

Last reviewed: December 2023

Courts are empowered to correct obvious drafting errors in all legal documents, including primary and delegated legislation: *Coal & Allied Operations Pty Ltd v Crossley* [2023] NSWCA 182 at [43]–[54]; *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627. In *Coal & Allied Operations Pty Ltd v Crossley*, the Court of Appeal was not required to quash the decision and remit the matter but was empowered to correct an obvious drafting error by reading $36 as $3 per scanned page in the scale of costs: at [69].

## [2-6690] Varying a judgment or order against a person under an unregistered business name

A judgment or order against a person under a business name may be varied to make it a judgment or order in the person's own name: r 36.18.

## [2-6700] Denial of procedural fairness

An appeal in criminal proceedings may be re-opened, notwithstanding that judgment on appeal has been entered, if there has been a denial of procedural fairness, for example, where it is found that the appeal has not been determined on the relevant evidence: *R v Burrell* [2007] NSWCCA 79 at [41]. The rationale is that, in such a case, there has been no hearing on the merits and, accordingly, the matter has not been finally determined: *Burrell* at [22] and [41].

In relation to civil proceedings the same principle applies: *DJL v The Central Authority*, above, per Callinan J, at [189]; *Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd* (2008) 71 NSWLR 262 at [85]–[87]. But with the qualification that different considerations may arise in civil proceedings, as where questions of status or the rights of third parties are involved: *R v Lapa (No 2)* (1995) 80 A Crim R 398 at 403, cited in *Burrell* at [25].

Regarding denial of procedural fairness by failure to disclose judicial reasoning, see *Lichaa v Boutros* [2021] NSWCA 322 at [48]–[50]. See also *Williams v Harrison* [2021] NSWSC 1488, where a self-represented plaintiff was denied procedural fairness because he was not heard when he had a right to be heard and, as well, the magistrate failed to give reasons when obliged to do so: at [28].

## [2-6710] Fraud

That the judgment was obtained by fraud is a further exception to the general rule: *DJL*, per Callinan J at [189]. However, in this instance, the judgment should be impeached in independent proceedings: *DJL*, n 258 at p 291.

## [2-6720] Liberty to apply

The principles as to the usual scope of liberty to apply were stated in *Abigroup v Abignano* (1992) 112 ALR 497 at 509 as follows (per Lockhart, Morling and Gummow JJ):

> The reservation of liberty to all parties to apply to a court is a provision directed essentially to questions of machinery which may arise from the implementation of a court's orders. They include cases where a court may need to supervise the enforcement of orders after they have been made.

Their Honours went on to cite with approval the following passage in *Ritchie's* at [36.16.65]:

> Liberty to apply in relation to a final order, is limited to matters concerning the implementation of the earlier order: *Dowdle v Hillier* (1949) 66 WN (NSW) 155; *Cristel v Cristel* [1951] 2 KB 725 at 730; *Re Porteous* [1949] VLR 383. It does not extend to the substantive amendment of the judgment or orders in respect of which the liberty to apply was granted (*Wentworth v Woollahra Municipal Council* (CA (NSW), 31 March 1983, unreported).

## [2-6730] Self-executing orders

A self-executing order consists of an order that a party take a specified step in the proceedings by a certain date and that, failing compliance, a specified final order (such as for the entry of judgment or that the proceedings stand dismissed) will come into effect.

Earlier authorities held that the courts had no power to circumvent such an order once it came into effect, for example, *Whistler v Hancock* (1878) 3 QBD 83; *Bailey v Marinoff* (1971) 125 CLR 529. These authorities should now be disregarded. The court has power to extend the time for compliance with a self-executing order notwithstanding that the time for compliance has passed and the order has come into effect: *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268.

## [2-6735] Consent orders

The Supreme Court may in the exercise of its inherent jurisdiction set aside consent orders if the underlying agreement upon which they were based is void or voidable: *The Owners Strata Plan No 57164 v Yau* [2017] NSWCA 341 at [72], [76], [80], [195] and [226]. Such relief is discretionary even if some basis for setting aside the order has been established: *The Owners Strata Plan No 57164 v Yau*, above, at [81]–[83], [195], [226].

## [2-6740] Setting aside or varying a judgment or order ostensibly implementing a compromise or settlement

Section 73 of the CPA provides that the court may resolve any dispute as to whether and on what terms proceedings have been compromised or settled, and may make such orders as it considers appropriate to give effect to such a determination.

A consequential order giving effect to such a determination could include an order setting aside or varying the order or judgment ostensibly implementing a compromise or settlement.

For examples of the application of s 73, see *Yule v Smith* [2012] NSWCA 191 and *Mills v Futhem Pty Ltd* (2011) 81 NSWLR 538 at [42]–[43].

### Legislation

- CPA ss 56, 63, 73

### Rules

- UCPR rr 36.15(1), (2), 36.16(1), (2), (3), (3A), (3B), (3C), 36.17, 36.18

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*para*

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**[The next page is 5051]**

# Mining List

*Acknowledgement: the following material was originally prepared by Her Honour Judge L Ashford of the District Court of NSW. It has been reviewed and updated by his Honour Judge Neilson of the District Court of NSW.*

## [5-0800] The compensation jurisdiction of the District Court

Last reviewed: December 2023

When the Compensation Court of NSW was abolished on 1 January 2004, the District Court was vested with its remaining jurisdiction. This jurisdiction is divided into two lists, the Coal Miners' Workers Compensation List ("the Mining List") and the Special Statutory Compensation List: see [5-1000] and ff. The governing provisions are *District Court Act* 1973, Pt 3 Div 8A (ss 142E–142P) and UCPR Sch 9 (Assignment of Business in the District Court) and Sch 11 (Provisions regarding procedure in certain lists in the District Court).

## [5-0810] The Mining List

Last reviewed: December 2023

The Mining List existed for many decades before 1 January 2004, in the Compensation Court. The Mining List hears and determines all claims for workers compensation for those injured, or allegedly injured, "in or about a [coal] mine". Originally, northern mining claims were heard in Newcastle, Western Mining claims were heard in Lithgow or Katoomba, and southern mining claims were heard in Wollongong. Currently, northern and part of the western mining claims are heard in Newcastle and the other part of the western mining and the southern mining claims are heard in Sydney. The Court currently sits for 12 weeks each year in Newcastle (roughly one week each month) and for three weeks each year in Sydney. Arrangements are often made for a judge to hear a redemption application at other times in Sydney.

## [5-0820] Commencement of proceedings

Last reviewed: December 2023

Proceedings are usually commenced by statement of claim (UCPR, Sch 11 Pt 2 cl 3), but certain types of proceedings are commenced by summons (Sch 11 Pt 2 cl 7). The initiating process can be filed in the Registry in either Newcastle or Sydney. The initiating process is required to bear the heading "Coal Miners' Workers Compensation List" (UCPR, Sch 11 Pt 2 cl 4). In order to comply with certain statutory restrictions on the commencement of proceedings under the Workers Compensation Legislation, an initiating process may need to have filed with it a certificate of compliance (Sch 11, Pt 2 cl 6).

## [5-0830] Conciliation procedures

Last reviewed: December 2023

Schedule 11 Pt 2 Div 2 of the UCPR provides for conciliation of coal miners' claims, the conciliator being an officer or employee of the District Court nominated by the Registrar to carry out such conciliation. All such claims are referred for conciliation no later than three months after the claim is filed: Sch 11 Pt 2 cl 25.

Conciliation conferences are held in Katoomba/Lithgow, Newcastle, Sydney and Wollongong/ Port Kembla during the year.

The primary purpose of the conciliation conference is to explore the possibility of settlement. However, even if settlement is unlikely, the conference provides an opportunity to seek concessions, narrow the issues and make application for directions to enhance readiness for hearing.

Matters are listed before the Registrar approximately three months after filing, to assess readiness for conciliation. Matters are listed for conciliation by the conciliator in four lists: Wollongong, Western Mining, Newcastle, and Sydney.

Once a matter is ready for conciliation it joins the conciliation pending list and matters are listed in order of date of filing and date of readiness. At the moment, most of the solicitors on the Coal Mines Insurance panel have Sydney based offices. Matters are grouped where possible so that practitioners are not travelling for single matters.

## [5-0840] The substantive law

Last reviewed: December 2023

The substantive law is often difficult to ascertain. Those entitled to make a claim for "coal miner benefits" have kept many rights that other workers have lost. For example, such claimants have kept the following rights:

(a) to obtain compensation as if they were totally incapacitated, if the employer fails provide suitable employment during a period of partial incapacity;

(b) to obtain a lump sum settlement ("redemption");

(c) to bring an action for damages against the employer at common law, with only minor restrictions of benefits.

To find the applicable law it is sometimes necessary to have recourse to repealed Acts and repealed Regulations. A necessary starting point is the *Workers Compensation Act* 1987 ("the 1987 Act**"**) Sch 6 Pt 18 and subsequent transitional provisions as amendments were made to the 1987 Act. Counsel will often be able to identify the relevant provision(s).

## [5-0850] Who is entitled to make a claim

Last reviewed: December 2023

A plaintiff is required to prove that he was a "worker employed in or about a mine", the terminology used in Sch 6 Pt 18 of the 1987 Act. Section 3(1) of that Act defines the word "mine":

> "mine" means a mine within the meaning of the *Coal Mines Regulation Act* 1982 as in force immediately before its repeal by the *Coal Mine Health and Safety Act* 2002, but does not include any place that, in accordance with section 8(1) of the *Coal Mine Health and Safety Act* 2002, is a place to which that Act does not apply.

A plaintiff does not need to be employed as a coal miner by a colliery company. A person who is injured whilst working "in or about a mine" is entitled to coal miner benefits. The relevant case law is: *Roberts v Fuchs Lubricants (A'asia) Pty Ltd* (2002) 24 NSWCCR 135; *Pilgrim v Ellevate Engineering Pty Ltd* (2003) 25 NSWCCR 521; *Ellevate Engineering Pty Ltd v Pilgrim* [2005] NSWCA 272; *Fenton v ATF Mining Electrics Pty Ltd* (2004) 1 DDCR 744; *Badior v Muswellbrook Crane Service Pty Ltd* (2004) 2 DDCR 177; *Select Civil (Kiama) Pty Ltd v Kearney* [2012] NSWCA 320; *Baggs v Waratah Engineering Pty Ltd* [2014] HCA Trans 108; *Butt v Liebherr Aust Pty Ltd* [2015] NSWDC 3.

The earlier authorities have been collected and discussed in Butt v Liebherr Aust Pty Ltd, above.

## [5-0860] Entitling event

Last reviewed: December 2023

A plaintiff must have received an "injury" as defined in s 4 of the *Workplace Injury Management and Workers Compensation Act* 1998 ("the 1988 Act"), not as defined in s 4 of the 1987 Act. A

plaintiff does not have to prove that his employment was either a substantial contributing factor to his injury or disease or the main contributing factor to his injury or disease, nor do the "heart attack or stroke" provisions (s 9B, 1987 Act ) apply to such plaintiffs: Sch 6.

## [5-0870] Injuries and disease

Last reviewed: December 2023

**Psychological injury**

By contrast, however, s 11A of the 1987 Act does apply to plaintiffs in this list. The original s 11A applies from 1 January 1996. The current version of s 11A commenced on 1 August 1998.

**Disease provisions**

The definition of injury includes a disease contracted in the course of employment where the employment was a contributing factor to the disease (ie, a temporal and causal connection) and the aggravation, acceleration, exacerbation or deterioration of any disease where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration (a causal connection). These provisions are often relied upon by plaintiffs in this List. For example, a miner may have reported many back injuries over a period of, say, 40 years, but many of those injuries appear to be self-limiting (the worker returned to normal duties after a period off work) but eventually, they become unable to work because of back complaints: the diagnosis could be degenerative disc disease of the lumbar spine or lumbar spondylosis. This will be alleged to be a disease of gradual onset or the aggravation etc of a disease of gradual onset. This argument can be applied to degenerative conditions of the back, neck and pelvis and body joints: shoulders, elbows, hips, knees and ankles: see *Kelly v Glenroc Pastoral Coy Pty Ltd* (1994) 10 NSWCCR 178 (CA); *Crisp v Chapman* (1994) 10 NSWCCR 492 (CA); *Australian Padding Co Pty Ltd v Zarb* (1996) 13 NSWCCR 365 (CA). This is often pleaded as "nature and conditions of employment". That is not a term of art and has been criticised, but is apt to invoke the disease provisions: *Davids Holdings Pty Ltd v Mirkovic* (1995) 11 NSWCCR 656. If an underlying disease is work-related, it does not matter that a period of incapacity was caused by a non-compensable aggravation or the like; compensation is still recoverable: *Calman v Commissioner of Police* [1999] HCA 60. As to the meaning of the word "disease", see *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244 at [61]; *Rail Corporation NSW v Hunt* (2012) 11 DDCR 143 at [46]–[50].

**Journey injuries**

See *Butt v Liebherr Australia Pty Ltd* [2015] NSWDC 3 at [15]–[17].

## [5-0880] Total incapacity

Last reviewed: December 2023

Total incapacity is compensated under s 9 of *Workers Compensation Act* 1926 ("1926 Act"). During the first 26 weeks of incapacity the plaintiff is entitled to the Current Weekly Wage Rate ("CWWR"), being the award rate for a standard week (usually 38 hrs) without any shift or other loadings. After the first 26 weeks, the plaintiff is compensated at the statutory rates under the 1926 Act which are still indexed and may be found in *Mills Workers Compensation NSW*, Benefits Guide. As at 1 April 2023 that rate was $469.50, plus $107.30 for a dependent spouse, plus $63.90 for each dependent child, but the total of such sums cannot exceed the CWWR.

## [5-0890] Partial incapacity

Last reviewed: December 2023

Partial incapacity is compensated under s 11(1) of the 1926 Act. The compensation cannot exceed the maximum payable for total incapacity.

## [5-0900] Deemed total incapacity

Last reviewed: December 2023

This is governed by s 11(2) of the 1926 Act. An employer is required to provide his injured employee with suitable employment during his partial incapacity. A failure to do so results in the payment of compensation at the rate prescribed for total incapacity. In practice, a partially incapacitated worker draws his employer's attention to his partial incapacity by requesting suitable employment, or "light duties". A failure to provide such duties renders the employer liable to pay compensation as if the worker were totally incapacitated. The worker, however, must be "ready, willing and able" to perform the selected duties, which are usually certified by his treating doctor or rehabilitation provider.

## [5-0910] Cessation of payments at age 67+ pursuant to s 52(4) of the Workers Compensation Act 1987

Last reviewed: December 2023

If injury was sustained before 30 June 1985, s 52(4) does not apply. If an award of weekly payments of compensation is made in respect of incapacity due to injury, both before and after 30 June 1985, this provision comes into operation: *Rizk v Royal North Shore Hospital* (1994) 10 NSWCCR 427.

## [5-0920] Hospital, medical and similar expenses

Last reviewed: December 2023

These are governed by s 60 of the 1987 Act. Usually only a general order is sought ("that the defendant pay the plaintiff's expenses under s 60"). Sometimes there is a dispute as to whether expenses actually incurred by a plaintiff are compensable. The statutory test is whether incurring such expenses was "reasonably necessary as a result of an injury": s 60(1), not "reasonable and necessary". On occasions a plaintiff may seek a declaration that proposed medical treatment (eg.. total hip or knee replacement surgery) is reasonably necessary as a result of injury. As to the power of the Court to make such a declaration, see *Perrin v SAS Trustee Corporation* [2014] NSWDC 203 at [24]–[30]. Ultimately, the Court made a conditional finding: *Perrin v SAS Trustee Corporation (No. 2)* [2015] NSWDC 345, which was the subject of a successful appeal, but the Court's power to make such a declaration or finding was not challenged: *State Super SAS Trustee Corporation Ltd v Perrin* [2016] NSWCA 232.

## [5-0930] Lump sum compensation

Last reviewed: December 2023

If a loss occurs solely as a result of an injury occurring before 30 June 1987, lump sum compensation is governed by s 16 of the 1926 Act. Otherwise, ss 66 and 67 of the 1987 Act apply, unaffected by the Workers Compensation Amending Acts of 2001. Section 66 is the "Table of Maims" and s 67 provides for the payment of a lump sum for "actual pain, or anxiety or distress" resulting from any lump sums payable which exceed the statutory threshold of 10%. The quantum of the maximum payable was frozen from further indexation on 1 October 1995. The maximum amount payable for individual losses or impairment was fixed at that time at $132,300. The maximum amount payable for multiple losses or impairments was fixed at $160,950. The maximum amount payable under s 67 was fixed at $66,150.

An example may assist. A plaintiff stops working with a back complaint after 1 October 1995. The plaintiff claims a lump sum for permanent impairment of his or her back. The maximum payable for impairment of the back is 60% of $132,300, ie. $79,380. If the impairment of the back is 15%, he or she is entitled to 15% of $79,380 ie. $11,907, which is less than 10% of $132,300, so he or she cannot make a claim under s 67. If, however, the impairment of the back is 20%, then he or she

is entitled to $15,876 which exceeds to 10% threshold so he or she is entitled to make a claim under s 67. The maximum payable under s 67 is payable only "in a most extreme case and the amount payable in any other case shall be reasonably proportionate to that maximum amount having regard to the degree and quantum of pain and suffering and the severity of the loss or losses": s 67(3).

The effect(s) of any non-compensable injury or condition must be deducted from the lump sum compensation payable under s 66. For example, after many injuries to his right knee in underground mining, a plaintiff has a total knee replacement. This usually leaves a person with about 40% loss of efficient use of the right leg at or above the knee. If, however, before taking up mining, he had a medial meniscal injury as a result of playing football in his teenage years, he may have lost 10% of the efficient use of his right leg at or above the knee. Compensation is payable only for 30% loss. A very common argument is that a loss or impairment results solely from a constitutional, genetic or intrinsic degenerative condition such as osteo-arthritis or degenerative disc disease of the spine. Some medical practitioners will say that the total loss or impairment is not so caused, others will say it is wholly traumatic and others will concede an underlying constitutional condition which has been made worse by the type of work the plaintiff has done over many years. A relevant provision of the 1987 Act which still applies to coal miners is that if evidence is wanting on such an issue or it would be difficult or costly to ascertain what "deductible proportion" there might be, the "deductible proportion" is assumed to be 10% of the loss, ie. a loss of 20% of a thing is reduced to an 18% loss.

A loss of a leg at or above the knee includes the loss of a leg below the knee, and the loss of leg below the knee includes a loss of the foot. Similarly, a loss of an arm at or above the elbow includes the loss of an arm below the elbow, and the loss of an arm below the elbow includes the hand. See *Stokes v Brambles Holdings Ltd* (1994) 10 NSWCCR 515; *Summerson v Alcom Australia Ltd* (1994) 10 NSWCCR 571; *KB Hutcherson Pty Ltd v Correia* (1995) 183 CLR 50.

The sacro-ilic joints and the coccyx are part of the pelvis, not the back: see *De Gracia v State of NSW* (1993) 13 NSWCCR 73; *Clymer v RTA* (1996) 13 NSWCCR 187.

Loss of efficient use of sexual organs is often claimed by those with a "bad back". See: *Malcolm v RTA* (1995) 12 NSWCCR 258; *RTA v Malcolm*(1996) 13 NSWCCR 272 (re penis); *Waugh v Newcastle Mater Madericordiae Hospital* (1996) 13 NSWCCR 598 (female sexual organs).

## [5-0940] Redemptions

Last reviewed: December 2023

Redemptions under s 15 of the 1926 Act were not continued under the 1987 Act which replaced them with "commutations" under s 51 of that Act, but that provision was repealed by Act No 61 of 2001 commencing 1 January 2002, which replaced it with a more limited right to commutation under Pt 3 Div 9 of the 1987 Act. However, coal miners kept their right to have their settlements ("redemptions" under s 15 of the 1926 Act) approved by the Court.

All redemption applications under s 15 of the former Act are made by the employer following agreement having been reached with the worker as to a redemption sum.

This constitutes a full and final settlement of the worker's rights to compensation in respect of the particular injuries/incapacities as set out in the statement of claim filed, or may be the result of separate negotiation between the parties without any statement of claim having previously been filed. The redemption application includes any right or further right to lump sum payments for loss of any limb or function: s 66. For an example of the effect of a redemption on a latent injury, see *Mount Thorley Operations Pty Ltd v Farrugia* [2020] NSWDC 798.

It is necessary for the worker to give evidence, in appropriate circumstances by affidavit, in respect of any injuries and ongoing incapacity which are included in the redemption application and in respect of any payments of compensation which have been made, including evidence in respect of medical expenses paid or unpaid.

It is the responsibility of the judge to determine if the sum offered in redemption is adequate following consideration of matters such as:

- the likelihood of further medical treatment;
- the prospects of future employment; and
- the reasons as to why the worker would prefer a lump sum in settlement of the claim acknowledging that in accepting a lump sum the worker is aware of potential rights for the future which are being forgone.

It is necessary for the worker to advise the court of consent to the redemption and a signed consent form is handed to the judge for inclusion on the file along with the tender of Short Minutes setting out the payment details in respect of the redemption.

Often the redemption amount will be part of a common law settlement and the parties will advise the judge accordingly.

It is always within the discretion of the judge hearing the application to determine if the amount is adequate and in the best interests of the worker. If the judge decides the amount is not adequate, then generally the application will be rejected.

Any redemption takes effect from the date of the application being approved. It is prudent to check that the worker is aware of any deductions by way of Health Insurance Commission payments which can be deducted from any sum redeemed or of any Centrelink benefits outstanding which will also be deducted as these sums obviously have a bearing on whether the amount approved is an adequate one. As well, the worker should be aware of any preclusion period to be served prior to an ability to access Centrelink benefits in the future.

If a worker is in receipt of voluntary payments or is subject to an award of compensation of the court it is relevant to note that those payments cease on the day of the approval of the redemption. Medical expenses should be paid up to that date. It is not appropriate there should be any deduction from the redemption sum to pay any outstanding medical/treatment expenses.

See Sch 6 Pt 4 cl 6 of the 1987 Act.

## [5-0950] Costs of redemption applications

Last reviewed: December 2023

The usual order is that the employer bears the costs of the application even if the worker withdraws his consent on the day of or prior to the application being heard by the judge, or if the judge refuses to approve the application. Costs orders are not made against a worker unless the court is satisfied an application was frivolous, vexatious or without proper justification, and of course the application in redemptions is made by the employer: *Workplace Injury Management and Workers Compensation Act* 1998, s 112.

## [5-0960] Costs

Last reviewed: December 2023

Costs are governed by s 112 of the *Workplace Injury Management Workers Compensation Act* 1998.

## Legislation

- *Workers' Compensation Act* 1926 (as amended)
- *Workers Compensation Act* 1987 (as amended). Access the current Act and then select the "Historical versions" option from the menu at the top of the screen
- *Workplace Injury Management and Workers Compensation Act* 1998

## Rules

- Uniform Civil Procedure Rules 2005 Sch 11 Pts 1, 2, 3, 5

## Forms

- The forms for the Compensation jurisdiction are available on the District Court website.

## Further references

- Practice Note DC (Civil) No 12 "Coal Miners' Workers Compensation List"
- LexisNexis, Mills Workers Compensation Practice (NSW)

**[The next page is 5251]**

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

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

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

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

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

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

Last reviewed: May 2023

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

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

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

There is no reported case law.

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

Last reviewed: December 2023

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

Part 2 of the Act applies to "firefighters" defined in s 5 to extend to all volunteer fire fighters and Rural Fire Service ("official fire fighters"). Relevant events giving rise to compensable injuries are defined in ss 7, 8, 9 and 17. The cover provided for "official fire fighters" is much greater than merely fighting bush fires. It extends to most things that a member of a bush fire brigade does. The *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation* 2023 extends the cover to fundraising: cl 9. The Act is administered by and claims are heard by the Self Insurance Corporation: s 16. Appeal lies to the District Court: s 16(4).

Part 3 of the Act applies to:

(a) members of the State Emergency Service

(b) members of the NSW Volunteer Rescue Association

(c) members of Surf Life Saving NSW

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

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

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

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

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

Last reviewed: May 2023

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

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

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

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

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

Subsection 7(4) provides:

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

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

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

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

## Legislation

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

## Rules

- UCPR r 1.27, Sch 11 Pts 4–5

## Further references

Butterworths, Mills Workers Compensation Practice (NSW)

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

**[The next page is 5301]**

# Trans-Tasman proceedings

## [5-3500] Introduction

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

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

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

Last reviewed: December 2023

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

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

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

The note to s 9(2)(b) provides that it is not necessary for the Australian court to be satisfied that there is a connection between the proceeding and Australia. Section 10 provides that service under s 9 has the same effect and gives rise to the same proceedings as if the initiating document had been served in the place of issue. Sections 9 and 10 are not to be read down so as to apply only to service of process involving the exercise of federal jurisdiction, and are not otherwise invalid: *Zurich Insurance PLC v Koper* (2022) NSWLR 380 at [55]. This decision was unanimously upheld by the High Court of Australia: *Zurich Insurance Co Ltd v Koper* [2023] HCA 25 which held at [6] that ss 9 and 10 validly apply in accordance with their terms to any initiating document issued by a State court relating to any civil proceeding in that court. That is so irrespective of whether the proceeding is in a matter in federal jurisdiction or in a matter in State jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

## [5-3530] Restraint of proceedings

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

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

## [5-3540] Suspension of limitation periods

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

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

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

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

## [5-3560] Subpoenas

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

Division 3 of the UCPR provides for related procedures.

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

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

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

## [5-3570] Remote appearances

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

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

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

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

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

A registrable New Zealand judgment is defined in s 66.

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

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

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

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

## [5-3620] Setting aside registration

An Australian court, on appropriate application, must set aside the registration if it is satisfied that enforcement would be contrary to public policy in Australia, or the judgment was registered in contravention of the Act, or if the judgment was given in a proceeding of which the subject matter

was immovable property or was given in a proceeding, in which the subject matter was movable property and that property was, at the time of the proceeding in the original court or tribunal not situated in New Zealand: s 72(1).

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

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

## [5-3630] Notice of registration

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

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

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

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

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

## [5-3660] Other matters

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

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

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

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

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

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

## [5-3680] UCPR Part 32

UCPR Pt 32, amongst other things, provides for:

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

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

## Legislation

- *Trans-Tasman Proceedings Act* 2010 (Cth), ss 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 25, 26, 65, 66, 67, 68, 72, 73, 74, 75, 76, 77, 78, 79, Pts 2, 3, 5, 6
- *Evidence and Procedure (New Zealand) Act* 1994 (Cth)

## Rules

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

**[The next page is 5601]**

# Intentional torts

*Acknowledgement: the Honourable A Whealy QC, former judge of the Supreme Court of NSW, prepared the following material. Commission staff are responsible for updating it.*

## [5-7000] Trespass to the person — the intentional torts

This chapter is concerned with the torts of assault, battery, false imprisonment and intimidation. Closely allied with these is a further tortious action, namely proceedings to recover damages for malicious prosecution.

The three torts that emerged from the concept of trespass to the person — assault, battery and false imprisonment are actionable per se — that is without proof of damage (although if the wrongful act, does result in injury, damages can be recovered for that injury as well). In malicious prosecution proceedings, however, it is necessary to assert and prove damage.

## [5-7010] Assault

An assault is any direct and intentional threat made by a person that places the plaintiff in reasonable apprehension of an imminent contact with the plaintiff's person, either by the defendant or by some person or thing within the defendant's control: K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011 at 44 ("Barker et al").

The gist of assault has been stated in J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998 ("Fleming") as focusing on the apprehension of impending contact. Thus, the effect on the victim's mind created by the threat is the crux, not whether the defendant actually had the intention or means to follow it up. The intent required for the tort of assault is the desire to arouse an apprehension of physical contact, not necessarily an intention to inflict actual harm.

In *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, the plaintiff was an excluded gambler who had unlawfully returned to the casino to play roulette. Employees of the casino saw him and identified him as an excluded person. He was approached and accompanied to an "interview room" where he was required to remain until police arrived sometime later. Mr Rixon unsuccessfully sued for damages for assault, battery and false imprisonment. In relation to the assault issue, the facts were that a casino employee had placed his hand on the plaintiff's shoulder and, when he turned around, asked him: "Are you Brian Rixon?". These actions were central to the question as to whether Mr Rixon had been the victim of an assault and, in addition, a battery.

Sheller JA (with whom Priestley and Heydon JJ agreed) stressed the distinction referred to in Fleming set out above. His Honour said that, on the facts of the case, the primary judge had been correct to find that the employee did not have the intention to create in Mr Rixon's mind the apprehension of imminent harmful conduct. Moreover, the employee's placement of his hand on the plaintiff's shoulder did not constitute a battery. On the false imprisonment claim, the court found that the *Casino Control Act* 1992 and its regulations justified the plaintiff's detention for a short period of time until the arrival of the police.

In *State of NSW v Ibbett* (2005) 65 NSWLR 168 the Court of Appeal upheld the trial judge's factual findings while increasing the damages awarded. The circumstances of the case were that two policemen gave chase to Mr Ibbett, in the township of Foster, suspecting that he may have been involved in a criminal offence. They pursued him to a house where he lived with his mother, Mrs Ibbett. Without legal justification, one of the policemen entered the property and arrested Mr Ibbett. His mother came into the garage where these events occurred. The police officer produced a gun and pointed it at Mrs Ibbett saying, "Open the bloody door and let my mate in". Mrs Ibbett, who was an elderly woman, had never seen a gun before and was, not unnaturally, petrified.

The trial judge held that both police officers had been on the property without unlawful justification and, additionally, the confrontation between the police officer and Mrs Ibbett was more than sufficient to justify the requirements of an immediate apprehension of harm on her part, so as to amount to an assault. The Court of Appeal agreed with the trial judge as later did the High Court. See also Clarke JA in *Cowell v Corrective Services Commission (NSW)* (1988)13 NSWLR 714.

## [5-7020] Conduct constituting a threat

Although threats that amount to an assault normally encompass words, they will not always do so. For example, actions may suffice if they place the plaintiff in reasonable apprehension of receiving a battery. As to words, in *Barton v Armstrong* [1969] 2 NSWR 451 a politician made threats over the telephone and these were held to be capable of constituting an assault. Given the explosion of modern methods of media communication, there is no reason why threats made in emails, text messages or on Facebook (so long as they satisfy the legal test) could not qualify. Importantly, the reasonable apprehension must relate to an imminent attack.

**Note:** the requirement is for an imminent battery, not an immediate one.

## [5-7030] Reasonable apprehension

This requirement means that an assault cannot be proved if the plaintiff is not aware of the threat. Moreover, the apprehension must be a reasonable one. Thus, if an unloaded gun or a toy pistol is pointed at the plaintiff, the defendant will not be liable where the plaintiff knows or has reason to believe that the gun is not loaded or is a toy: *Logdon v DPP* [1976] Crim LR 121.

## [5-7040] Battery

Last reviewed: December 2023

A defendant who directly causes physical contact with a plaintiff (including by using an instrument) will commit a battery unless the defendant proves the absence of intent and negligence on their part, that is, that the defendant was "utterly without fault": *Croucher v Cachia* (2016) 95 NSWLR 117. This case is also authority for the proposition that ss 3B(1)(a) and 21 of the *Civil Liability Act* 2002 (NSW) do not operate upon the particular cause of action pleaded, but instead upon the particular act which gives rise to the civil liability and the intent of the person doing that act. It is necessary to look at the character of the underlying conduct, rather than whether the claim is in respect of an "intentional tort".

Battery cases (sometimes wrongly referred to as "assault cases" — although the two often go hand in hand) often involve difficult factual disputes requiring the resolution of widely conflicting versions as to what happened during a particular occasion or event, whether domestic or otherwise.

The requisite intention for battery is simply this: the defendant must have intended the consequence of the contact with the plaintiff. The defendant need not know the contact is unlawful. He or she need not intend to cause harm or damage as a result of the contact.

A person who pulls the trigger of a rifle believing it to be unloaded may be found to be negligent, but will not be liable in trespass, because they did not intend that the bullet from the rifle should strike the injured plaintiff. The requisite intention will have been absent.

In most cases, it will be apparent that an intention to make contact can simply be inferred from the nature and circumstances of the striking. If I strike someone with an axe, it will be apparent, except in the most unusual circumstances, that I intended to make contact with the injured person.

## [5-7050] Contact with the person of the plaintiff

Contact, as has been pointed out by academic writers (Barker et al at p 41), can take a variety of forms. Thus, spitting on a person, forcibly taking blood or taking finger prints would be regarded as contact. Similarly, shining a light into a person's eyes will be regarded as contact: *Walker v Hamm* [2008] VSC 596 at [307].

The modern position, however, is that hostile intent or angry state of mind are not necessary to establish battery: *Rixon v Star City Pty Ltd*, above, at [52]. It is for that reason that a medical procedure carried out without the patient's consent may be a battery.

On the other hand, it is not every contact that will be taken to be a battery. People come into physical contact on a daily basis. For example it is impossible to avoid contact with other persons in a crowded train or at a popular sporting or concert event. The inevitable "jostling" that occurs in these incidents in every day life is simply not actionable as a battery: *Rixon* at [53]–[54]; *Colins v Wilcock* [1984] 3 All ER 374 per Robert Goff LJ.

## [5-7060] Defences

Defences to the trespass torts include necessity, for example, in the case of a medical emergency where a patient's life is at risk and the obtaining of consent is not possible (*Hunter New England Area Health Service v A* (2009) 74 NSWLR 88); self-defence (*Fontin v Katapodis* (1962) 108 CLR 177); and consent.

In the case of self-defence in NSW, however, see Pt 7 of the *Civil Liability Act* 2002. This applies to any kind of civil liability for personal injury. The legislation places a restriction on the damages which can be awarded for disproportionate acts of self-defence. Reasonable acts of self-defence against unlawful acts will not be actionable at all.

In *State of NSW v McMaster* [2015] NSWCA 228, the NSW Court of Appeal affirmed the availability of self-defence in the civil context. It will be made out if the defendant believed on reasonable grounds that what he did was necessary for the protection of himself, or another. The defendant's response to the threat is a factor to be taken into account but is not inherently determinative.

The court also held that the term "unlawful" in s 52 *Civil Liability Act* extends to tortious conduct such that the section may apply as a defence to liability for actions done in self-defence against the commission of a tort.

## [5-7070] Consent

An interference or injury to which a person has consented cannot be wrongful. It is the responsibility of the defendant, however, to raise a defence of consent and to prove it: *Hart v Herron* [1984] Aust Torts Reports 80–201 at 67,814. If the defendant proves that the plaintiff has consented to the acts in question then a claim in assault, battery (or false imprisonment) will not succeed.

## [5-7080] Medical cases

Medical practitioners must obtain consent from the patient to any medical or surgical procedure. Absent the patient's consent, the practitioner who performs a procedure will have committed a battery and trespass to the person. However, consent to one procedure does not imply consent to another. Subject to any possible defence of necessity, the carrying out of a medical procedure that is not the procedure, the subject of a consent, will constitute a battery.

In *Dean v Phung* [2012] NSWCA 223, the plaintiff was injured at work when a piece of timber struck him on the chin causing minor injuries to his front teeth. His employer arranged for him to see the defendant, a dental surgeon. Over a 12-month period, the defendant carried out root-canal

therapy and fitted crowns on all the plaintiff's teeth at a cost of $73,640. In proceedings between the plaintiff and the dentist, the latter admitted liability but asserted that the damages were to be assessed in accordance with the *Civil Liability Act* 2002 (NSW). The trial judge accepted that submission, noting that the dentist had admitted liability in negligence but had denied liability for trespass to the person. Accordingly, damages were calculated in accordance with the formula in the *Civil Liability Act* 2002.

On appeal, the plaintiff claimed the primary judge had not adequately addressed the issue of trespass to person. His case was that the dental treatment had been completely unnecessary to address the problem with his teeth; and the dentist must have known that when embarking on the treatment. Advice that the treatment was necessary must have been fraudulent, consequently the fraud vitiated any consent given to the procedure. Accordingly, the plaintiff argued, the dentist was liable for battery in treating him without a valid consent. The *Civil Liability Act* 2002 s 3B excludes "civil liability … in respect of an intentional act that is done … with intent to cause injury".

Basten JA (with whom Beazley JA agreed) held that "…the dentist probably did not believe at the time that he carried out the treatment that it was necessary…". His Honour conducted a detailed examination of consent to medical treatment, including consideration as to who bore the burden of negativing consent. Basten JA at [61]–[64] expressed four principles supported by the authorities he had examined:

1. Consent is validly given in respect of medical treatment where the patient has been given basic information as the nature of the proposed procedure. If however, it could be demonstrated objectively that a procedure of the nature carried out was not capable of addressing the patient's problem, there would be no valid consent.
2. It is necessary to distinguish between core elements of the procedure and peripheral elements, including risks of adverse outcomes. Wrong advice about the latter may involve negligence but will not vitiate consent.
3. The motive of the practitioner in seeking consent will be relevant to the question whether there is a valid consent.
4. Burden of proof will lie on the practitioner to establish the existence of a valid consent where that is in issue.

Applying these principles, Basten JA held that the dentist's concessions were sufficient to show that the appellant did not consent to the treatment because it was not necessary for his particular condition. As a result, the treatment constituted a trespass to the person and s 3B operated to exclude the defendant's liability from the operation of the Act.

If, however, some kind of fraud were required to vitiate consent, Basten JA considered that the dentist at the least had been reckless as to whether the treatment was either appropriate or necessary. Consequently, on either basis, the plaintiff was entitled to have his damages re-assessed and, in the circumstances, increased.

Macfarlan JA differed from Basten JA in only one respect. His Honour did not accept that the dentist's concessions that the treatments were unnecessary indicated of themselves that the treatment constituted a trespass to the person. However, Macfarlan JA accepted that the dentist had acted fraudulently in the sense that he was reckless as to whether the treatment was either appropriate or necessary. The practitioner had performed the treatment to generate income for himself. This enabled a conclusion that consent was vitiated and a trespass had occurred.

In *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 the court was confronted with a difficult choice. A young man — only a few months away from his 18th birthday — had refused to receive his own treated blood products. The treatment was necessary to preserve his life. He had provided cogent reasons for his refusal, based on his religious beliefs. His refusal was fully supported by his parents who were of the same religious persuasion.

The court, exercising its "parens patriae" jurisdiction, essentially overrode these genuine beliefs, holding that the welfare of the patient required that the primary judge make the order permitting the treatment. The court acknowledged that, without the order, the proposed treatment would have constituted a battery upon the young man. The order was made, notwithstanding that in a few months time, the appellant would be, as an adult, entitled to refuse any further treatment for his condition.

## [5-7100] False imprisonment

Last reviewed: December 2023

The tort of false imprisonment is a form of trespass to the person. It is committed when there is a total deprivation of a person's liberty, which is caused by the defendant's voluntary and unlawful conduct. Whether the plaintiff has been imprisoned is a question of fact and it is not necessary to consider whether there may be detention or imprisonment in circumstances where the complainant is unaware of the restraint on his or her liberty: *State of NSW v Le* [2017] NSWCA 290 at [7]. It is irrelevant whether the defendant intended to act unlawfully or to cause injury. In *Ruddock v Taylor* (2005) 222 CLR 612 at [140], Kirby J (in dissent, but not on this point) described unlawful imprisonment as a "tort of strict liability".

For example, where a prisoner is held in detention beyond the terms of their sentence as a consequence of an honest mistake, the defendant will nonetheless be liable for false imprisonment: *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714.

## [5-7110] What is imprisonment?

Last reviewed: December 2023

Traditionally the notion of false imprisonment related to arrest by police officers or other authorities. This is still a feature of the reported cases but the potential areas of "detention" have expanded. The following cases provide a range of illustrations of this contemporary enlargement of the notion of "imprisonment".

**Watson v Marshall and Cade:** In *Watson v Marshall and Cade* (1971) 124 CLR 621, a police officer asked the plaintiff to accompany him to a psychiatric hospital. The plaintiff believed he would have been compelled to go along if he had refused. The High Court held that the plaintiff had a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go with the defendant. This restraint thereby imposed on the plaintiff amounted to imprisonment (per Walsh J at 625).

**Whitbread v Rail Corporation of NSW:** In *Whitbread v Rail Corporation of NSW* [2011] NSWCA 130, two brothers who were intoxicated and belligerent, attempted to travel from Gosford railway station in the early hours of the morning without tickets. There was an altercation between the two brothers and state rail transit officers. One of the transit officers was convicted of a criminal assault on one of the brothers. This assault occurred immediately before the officers made a so-called "citizen's arrest", the brothers were restrained by handcuffing and pinned to the ground until police arrived. The Court of Appeal agreed with the trial judge that the transit officers were entitled to "arrest" the brothers and that the degree of force used, and the duration of their being restrained, was not unreasonable. The brothers had been validly arrested and restrained because of their failure to comply with the transit officers' lawful directions to leave the railway station. See also *Nasr v State of NSW* (2007) 170 A Crim R 78 where the Court of Appeal examined the issue of the duration of detention.

**Darcy v State of NSW:** *Darcy v State of NSW* [2011] NSWCA 413 demonstrates the width of the concept of imprisonment. The plaintiff was a young woman with severe developmental disabilities. She lived in the community but in circumstances where she had been in trouble with the police on occasions. Ultimately, the Local Court ordered that she be taken to Kanangra, a residential centre which accommodates and treats persons with intellectual and other disabilities, located in Morisett.

The order required Ms Darcy to be taken there "for assessment and treatment". The Department of Community Services intended that Ms Darcy should be returned to the community but difficulties of a bureaucratic and funding nature prevented this happening. Her case was an unusual one and, in the situation which developed, she remained at Kanangra for some six years before residential accommodation was arranged for her. The primary issue was whether the circumstances of her stay at Kanangra amounted to imprisonment. The secondary issue was whether the Public Guardian had consented to her remaining at the institution.

The Court of Appeal held that Ms Darcy had been detained at Kanangra. She did not wish to stay there and, while she had a relatively wide degree of freedom within the property, she was required to return there after any absence. The degree of latitude she had in being able to leave the premises, for example to visit her mother, was offset by the fact that she could only do so with permission, and on condition that she returned to the institute.

The court explored the issue of lawful justification for her detention at Kanangra. In this regard, the court, while acknowledging that the Public Guardian did not consent to Ms Darcy staying at the premises on a permanent basis, nevertheless consented tacitly to her remaining there while attempts were made to find her appropriate accommodation.

**State of SA v Lampard-Trevorrow:** In *State of SA v Lampard-Trevorrow* (2010) 106 SASR 331, the Full Court of the South Australian Supreme Court gave consideration to whether a member of the stolen generation, Bruce Trevorrow, had been falsely imprisoned. The circumstances were that, when he was about a year old, he was taken from hospital by an officer of the Aborigines Protection Board and later placed in long-term foster care without his parents knowing of the removal or the fostering. There was no maltreatment or issue of neglect or any other matter which justified the removal of the plaintiff from his family. The plaintiff lived in foster care until he was 10 years old. The Full Court unanimously held that, while neither the plaintiff nor his parents had consented to his foster placement, he was not falsely imprisoned during the period of his foster care. The fact that the plaintiff was an infant and needed care and nurture spoke against any finding of restraint. Any element of restraint, whilst he grew as a young child, was solely attributable to the obligation of his foster parents to care for him and also attributable to his immaturity. The court said:

> We do not think it realistic to describe the care and protection given by the carer of a child a restraint on the child, in the relevant sense of the term.

It is significant however that the plaintiff's claim of negligence against the State was upheld by the appeal court.

**State of NSW v TD:** In *State of NSW v TD* (2013) 83 NSWLR 566, the respondent was charged with robbery and assault with intent to rob. Her fitness to be tried was in doubt and a special hearing under the mental health legislation in New South Wales was held. A District Court judge found, on the limited evidence available, that she had committed the offence of assault with intent to rob. His Honour set a "limiting term" of 20 months and ordered that she be detained at Mulawa Correctional Centre. The Mental Health Review Tribunal determined that the respondent was suffering from mental illness. Accordingly, the District Court judge then ordered that the respondent be taken to and detained in a hospital. Contrary to this order, for some 16 days, the appellant was detained in a cell at Long Bay Gaol in an area which was not gazetted as a hospital.

The Court of Appeal had to determine whether she was entitled to damages for unlawful imprisonment. The court held that, as a consequence of the second order made, it became the only lawful authority for the continued detention of the respondent. In these circumstances, the State could not justify her detention in the particular area of Long Bay Gaol where she had been held. The order required her to be detained in a hospital and this was the only relevant order which determined her place of detention. The mere fact that she could and should have been detained in another place did not prevent the detention being unlawful. Consequently, the necessary elements of the claim were established.

This decision may be contrasted with the decision of the House of Lords in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58. In that case, the House of Lords decided that prisoners lawfully committed to prison under the relevant legislation did not have a residual liberty which would entitle them to sue the Secretary of State for the Home Department or a governor of the prison if the prisoners were unlawfully confined in a particular area of the prison. However, in *State of NSW v TD*, the Court of Appeal held that the House of Lords' decision was principally based on the terms of the legislation under consideration.

**State of NSW v Kable:** In *State of NSW v Kable* (2013) 252 CLR 118, the High Court of Australia held that a detention order which had been made by the Supreme Court (but under legislation which was later held invalid) provided lawful authority for Mr Kable's detention. The trial judge had held that the detention order was valid until it was set aside. The High Court agreed that the original detention order provided lawful authority for the respondent's detention and allowed the appeal by the State against the orders made in the New South Wales Court of Appeal.

**Hyder v Commonwealth of Australia:** In *Hyder v Commonwealth of Australia* [2012] NSWCA 336, the judgment of McColl JA contains a valuable discussion of the meaning to be given to the phrase "an honest belief on reasonable grounds". The appellant had bought proceedings against the Commonwealth of Australia alleging that a federal police agent had arrested him without lawful justification and thereby falsely imprisoned him. There was no doubt that the police officer honestly believed that the respondent was a particular person of dubious background and that he had committed an offence for the purposes of the *Crimes Act* 1914 (Cth) s 3W. The critical issue at trial was whether the officer held this honest belief "on reasonable grounds". Basten JA did not agree with McColl JA's conclusion. However, Hoeben JA, the third member of the court, agreed with McColl JA that the officer's belief was held on reasonable grounds. See also **[5-7115] Justification**.

The critical question turned upon the evaluation of the complex and thorough material obtained by the Australian Tax Office. The police officer relied on this information to form his belief that the respondent had been engaged in a fraudulent scheme. Hoeben JA also placed reliance on the surrounding circumstances and the source of information on which the officer had relied. His Honour agreed that the primary judge had not erred in concluding that the officer had reasonable grounds for his belief for the purposes of the *Crimes Act* 1914 s 3W(1).

**Haskins v The Commonwealth:** In *Haskins v The Commonwealth* (2011) 244 CLR 22, the High Court held that a member of the defence force who had been convicted by a military court of disciplinary offences and sentenced to punishment, including detention, could not succeed in a claim for false imprisonment. This was so notwithstanding that the relevant provisions of the *Defence Force Discipline Act* 1982 subsequently had been held to be invalid. A majority of the High Court held that while serving members of the defence forces retained the rights and duties of the civilians, it did not follow that an action for false imprisonment would lie as between service members in respect of the "bona fide execution of a form of military punishment that could be lawfully imposed": at [57]. This is one of those rare cases where the court considered matters of public policy in deciding whether a cause of action for this tort would be available. The court said at [67]:

> To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force.

**State of NSW v Le:** In *State of NSW v Le* [2017] NSWCA 290 the respondent was stopped by transport police at Liverpool railway station and asked to produce his Opal card. The card bore the endorsement "senior/pensioner". He produced a pensioner concession card but could not supply any photo ID when asked. There was a brief interlude during which the officer checked the details over the radio. Mr Le was then told he was free to go. The respondent commenced proceedings in the District Court claiming damages for assault and false imprisonment. He was successful and the State sought leave to appeal in the Court of Appeal. The court held that all that was involved was "a brief

interruption of the respondent's intended progress … a temporary detention". In this situation, the court's task is to "assess what a reasonable person … would have inferred from the conduct of the officer." In the circumstances, the court held that the officer was justified in detaining the respondent while the necessary checks were made. The appeal was upheld.

**State of NSW v Exton:** In *State of NSW v Exton* [2017] NSWCA 294, the issue related to a police officer directing a young Aboriginal man to exit a motor vehicle. Eventually the young man was arrested and charged with assault and resist arrest. The trial judge awarded damages to the respondent, relying in particular on the police officer's direction "to exit the vehicle". The Court of Appeal disagreed with the trial judge's finding that the direction, without more, constituted the arrest of the respondent. In the circumstances, this finding was not open and should not have been made.

**Lewis v ACT:** In *Lewis v ACT* (2020) 271 CLR 192, the appellant was convicted and sentenced for recklessly or intentionally inflicting actual bodily harm, to be served by periodic detention rather than full-time imprisonment. The Supreme Court of the ACT found that he was unlawfully imprisoned in full-time detention for 82 days by reason of an invalid decision of the Sentence Administration Board to cancel his periodic detention after he failed to report on numerous occasions. He sought substantial damages to compensate him or "vindicatory damages". The primary judge assessed damages at $100,000 but ordered that only $1 be paid because the periodic detention order would have been inevitably cancelled. The Supreme Court and the High Court dismissed an appeal. Despite the unlawful detention, it was decided since the same imprisonment would have occurred lawfully even if the Board had not made an invalid decision, there was no loss for which to compensate the appellant. Two justices (Kiefel CJ and Keane J) considered that this particular appeal failed at a point anterior to the application of the compensatory principle because the appellant's right to be at liberty was already so qualified and attenuated, due to his sentence of imprisonment together with the operation of the Act, that he suffered no real loss. In separate reasons, Gageler, Gordon and Edelman JJ agreed that while the imprisonment was unlawful, the appellant was not entitled to compensation. The court also held there is no basis in principle or practice for the development of a new head of "vindicatory damages" separate from compensatory damages.

**Stradford (a pseudonym) v Judge Vasta:** In *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020, the applicant established against the judge all the elements of the tort of false imprisonment. The applicant was imprisoned for contempt as a result of an imprisonment order made, and warrant issued, by the judge in a family law matter. The applicant's imprisonment was not lawfully justified because the imprisonment order and warrant were infected by manifest jurisdictional error.

## [5-7115] Justification

Last reviewed: December 2023

In proceedings for false imprisonment, it is necessary to consider first whether the plaintiff was detained; and second, if so, whether there was a justification for the detention. The two issues need to be addressed separately. The applicant must first show that the imprisonment had occurred. If that is established, the onus then shifts to the respondent to show that the imprisonment had some lawful justification : *Lewis v ACT* (2020) 271 CLR 192 at [140]; *Darcy v State of NSW* [2011] NSWCA 413 at [141]–[148].

Where there is a requirement for a detaining officer or person to have "reasonable grounds" for suspicion or belief, there must be facts sufficient to induce that state of mind in a reasonable person: *George v Rockett* (1990) 170 CLR 104 at [112]. In addition, there must be some factual basis for either the suspicion or belief. The state of mind may be based on hearsay materials or materials which may otherwise be inadmissible in evidence. "[T]he assent of belief is given on more slender evidence than proof": *George v Rockett* at [112].

What constitutes reasonable grounds for forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor*

(2005) 222 CLR 612 at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ. In that sense, the criterion has an objective element to it: *Anderson v Judges of the District Court of NSW* (1992) 27 NSWLR 701 at 714.

The question of identifying the material sufficient to support an objective finding that an arresting officer had reasonable grounds for his or her belief has to be approached with practical considerations as to the nature of criminal investigations in mind: *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571 at [18]–[19] per McColl JA.

An example of wrongful arrest appears in *State of NSW v Smith* (2017) 95 NSWLR 662. Two police officers had arrested the respondent at his home, asserting that he had committed a "domestic incident". The respondent was taken to the police station and retained there until his release on bail.

The State of NSW relied on two critical defences. The Court of Appeal agreed with the trial judge that neither of these defences had been made out. The first issue related to the police officer's failure to state adequately the reason for the arrest. To describe the reason as "a domestic incident" was insufficient. This constituted a breach of *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) s 201.

The second issue concerned a breach of s 99(3) LEPRA, as it then was, which required the police officer to suspect "on reasonable grounds" that it was necessary to arrest the person to achieve the purposes listed in s 99(3). There had been no basis to suspect, on reasonable grounds, that the arrest was necessary. In this regard the court accepted that the police officer's decision to arrest the respondent was made essentially — for reasons of "administrative convenience" — namely to facilitate the process of issuing an AVO.

In *State of NSW v Robinson* [2016] NSWCA 334, the Court of Appeal held that for an arrest to be lawful, a police officer must have honestly believed the arrest was necessary for one of purposes in s 99(3) (repealed) and the decision to arrest must have been made on reasonable grounds: at [27], [44]. The word "necessary" means "needed to be done", "required" in the sense of "requisite", or something "that cannot be dispensed with": at [43]. Although s 99(3) has since been repealed, the primary judge misconstrued important legislation which governs the circumstances in which people are lawfully arrested.

In construing s 99 LEPRA as it now stands, see *New South Wales v Robinson* [2019] HCA 46. In confirming the Court of Appeal's decision (*Robinson v State of NSW* (2018) 100 NSWLR 782), the High Court held by majority, that an arrest under s 99 of LEPRA can only be for the purpose, as soon as reasonably practicable, of taking the arrested person before a magistrate and that the arrest in this case was unlawful. The arresting officer must form an intention at the time of the arrest to charge the arrested person. The majority in *Robinson* held that arrest cannot be justified where it is merely for the purpose of questioning. An arrest can only be for the purpose of taking the arrested person before a magistrate or other authorised officer to be dealt with according to law to answer a charge for an offence and nothing in LEPRA or any previous legislative amendment displaces that single criterion: at [63], [92]–[94], [109]–[111], [114]. See also *Owlstara v State of NSW* [2020] NSWCA 217 at [8], [65], [122].

At common law, a ship's captain has the power to detain or confine a passenger if he or she has reasonable cause to believe, and does in fact believe, that confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or of persons or property on board: *Hook v Cunard Steamship Co* [1953] 1 WLR 682. The existence of a subjective belief that confinement is necessary is an essential element of the master's authority at common law to detain or confine: *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 at [24]–[35]; [115]. In this case the respondent, who was on a cruise, was detained by the ship's captain because he was accused of assaulting another passenger. The respondent claimed damages for wrongful detention and false imprisonment.

The Court of Appeal held that it is a correct statement of the Australian common law with respect to a master's power or authority to detain that it must be established that the master has reasonable

cause to believe, and does in fact believe, that the relevant detention or confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board: at [35]. The court held that the justification defence was made out for the whole of the relevant period in which the respondent was detained: at [112].

## [5-7118] Judicial immunity

Last reviewed: December 2023

At common law, it is well established that a superior court judge is not liable for anything he or she does while acting judicially, which is generally taken to mean when acting bona fide in the exercise of his or her office and under the belief that he or she has jurisdiction.

There is also authority to the effect that "judges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly (unless the excess of jurisdiction was caused by an error of fact in circumstances where the court had no knowledge of or means of knowing the relevant facts ...)": *Wentworth v Wentworth* [2000] NSWCA 350 at [195].

In NSW and most other jurisdictions, judicial immunity is also conferred on judges and magistrates by statute: see ss 44A-44C of *Judicial Officers Act* 1986.

In *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020**,** it was admitted that the judge, in the particular circumstances of the case, made an order that he lacked the power to make. As he was a judge of an inferior court with no statutory immunity, he therefore acted without or in excess of his jurisdiction and was found liable for any loss or damage arising out of the unlawful imprisonment. The gross and obvious irregularity of procedure that infected the judge's purported exercise of his contempt powers meant that he acted without or in excess of his jurisdiction in the requisite sense: at [358], [361], [368].

## [5-7120] Malicious prosecution

The tort of malicious prosecution is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another. At the heart of the tort is the notion that the institution of proceedings for an improper purpose is a "perversion of the machinery of justice": *Mohamed Amin v Jogendra Bannerjee* [1947] AC 322.

The tort is, in forensic terms, quite difficult to prove. Its constituent elements were stated by the plurality of the High Court in an extensive decision on the topic in *A v State of NSW* (2007) 230 CLR 500 at [1]. These were succinctly reformulated by the High Court in *Beckett v NSW* (2013) 248 CLR 432 at [4] as follows:

> …the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.

*Beckett*, above, has laid to rest an anomaly which had existed in Australian law since 1924. In *Davis v Gell* (1924) 35 CLR 275, the High Court stated that where proceedings have been brought to a close by the Attorney-General's entry of a nolle prosequi, the plaintiff in a subsequent malicious prosecution case, is required to prove his or her innocence. The High Court, in *Beckett*, refused to follow *Davis*. The result is that, in all malicious prosecution cases, the plaintiff's guilt or innocence of the criminal charge is not now an issue. All that must be shown is that the proceedings terminated favourably to the plaintiff, for example, where proceedings were terminated by the entry of a nolle prosequi or by a direction from the Director of Public Prosecutions under his statutory powers.

It might be noted that in *Clavel v Savage* [2013] NSWSC 775, Rothman J held that where a charge had been dismissed, without conviction, under the *Crimes (Sentencing Procedure) Act* 1999 s 10, this did not constitute a "termination of proceedings favourably to the plaintiff". This was because the ultimate order had been preceded by a finding of guilt. See also *Young v RSPCA NSW* [2020]

NSWCA 360, where it was found a s 32 order under the *Mental Health (Forensic Provisions) Act* 1990 (now repealed) did not constitute a finding that the charges were proven. A plaintiff must show the prosecution ended in favour of the plaintiff. If it did, it does not matter how that came about: at [76]. It is sufficient if the plaintiff can demonstrate the absence of any judicial determination of his or her guilt: at [77].

In *HD v State of NSW* [2016] NSWCA 85, the CA had under consideration a case where an interim ADVO was obtained by police against a father on behalf of his daughter. The evidence of a physical assault was reported to a friend, to a school teacher and the daughter was taken to hospital by ambulance and treated by doctors and social workers. Later she attended the local police station but denied she had been hit by her father. Nevertheless, the police initiated a serious assault charge against the father. The charge was dismissed in the Local Court, whereupon the father instituted proceedings for unlawful arrest and malicious prosecution. The trial judge dismissed all the father's claims.

This decision was upheld by the CA. The prosecution was not activated by malice. Indeed the prosecution had no personal interest in the outcome and had been exercising a public duty. Secondly the trial judge had not erred in finding that the investigating police honestly concluded that the evidence warranted the institution of proceedings against the father. Thirdly, the whole of the circumstances demonstrated that this was not a case where there was an absence of reasonable and probable cause. This was not a case where a reasonable prosecutor would have concluded that the prosecution could not succeed. Reference was made to Gyles AJA's decision in *Thomas v State of NSW* (2008) 74 NSWLR 34 which emphasised that a reasonable basis for a decision by an investigating officer to lay a charge is not to be equated with a magistrate's decision or a judge's ruling. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law.

In 2008 Gordon Woods was convicted of the murder of Caroline Byrne. He served a number of years in prison before the NSW Court of Appeal acquitted him on the murder charge. The court found that the verdict had been unreasonable. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown's expert witness.

The plaintiff brought proceedings for damages on the basis of malicious prosecution. (See *Wood v State of NSW* [2018] NSWSC 1247.) He argued that the proceedings had been maintained without reasonable and probable cause and that the prosecution had been brought "with malice for an ulterior purpose". The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor.

Fullerton J agreed with the plaintiff's contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause.

Central to the Crown case had been the expert witnesses' evidence that the deceased must have been thrown from the cliff to land where her body had been located. However, the theory and conclusion had been fundamentally flawed and left open the reasonable possibility of suicide. After an exhaustive analysis, Fullerton J concluded that neither the lead detective nor the expert witness could properly be categorised as "prosecutors".

The primary judge was trenchantly critical of the Crown Prosecutor. She found that he had a profound lack of insight into the flawed approach he took to the plaintiff's prosecution and that this caused great unfairness in the trial. Nevertheless, she dismissed the plaintiff's case on the basis that the prosecutor's failures, extensive though they were, were not driven by malice. An appeal to the Court of Appeal was dismissed: see *Wood v State of NSW* [2019] NSWCA 313.

## [5-7130] Proceedings initiated by the defendant

Last reviewed: December 2023

**Who is the prosecutor?** Identification, for the purposes of the first element of the tort, of the proper defendant ("the prosecutor") in a suit for malicious prosecution is not always straightforward.

It is necessary that the plaintiff show that the named defendant played "an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion": *A v State of NSW* (2007) 230 CLR 500 at [34]: *Stanizzo v Fregnan* [2021] NSWCA 195 at [170]. Neither providing a statement in corroboration of events nor providing a witness statement (of itself) is playing an active role in the conduct of proceedings. Significantly more than that is required: *Stanizzo v Fregnan* at [224]. See further *Burton v Babb* [2023] NSWCA 242 at [37]–[40].

In *A v State of NSW*, the plurality of the High Court gave a detailed and historical narrative of the development of the tort of malicious prosecution. In the past, informations were laid privately, whereas in modern times prosecutions are generally in the hands of the police and subsequent prosecuting authorities, such as the Director of Public Prosecutions.

There is a "large question" as to whether the tort of malicious prosecution extends to the commencement and carrying on of civil proceedings. In *A v State of NSW*, above, the High Court expressed the first element of the tort as being "that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant". See also *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2019] NSWCA 10 at [16] in which an appeal against the dismissal of an action for malicious prosecution in civil proceedings was refused.

The present position may be best comprehended by contrasting the situation in that case (*A v State of NSW*) with the facts in *Coles Myer Ltd v Webster* [2009] NSWCA 299 (although the latter case was concerned with wrongful imprisonment). In *A v State of NSW*, as is most often the case, it was a police officer who was the informant who laid charges against the defendant. It was his conduct and his state of mind at the relevant time that formed the basis of the plaintiff's case against the State. On the other hand, in the *Coles Myer* case, the police had acted lawfully in detaining two men identified by a store manager as acting fraudulently in a department store. It was held that the store manager, however, had acted maliciously and had, without reasonable cause, procured, and brought about the arrest by involving the police. (See also *Martin v Watson* [1996] AC 74 at 86–7.) Consequently, the manager's employer was vicariously responsible for the wrongful detention.

Generally, however, a person who provides the police with information, believing it to be true, will be held not to have initiated the proceedings. Rather, the proceedings will be regarded as instituted by and at the discretion of an independent prosecuting authority: *Commonwealth Life Assurance Society Limited v Brain* (1935) 53 CLR 343, at 379 per Dixon J.

A number of cases have held, or at least assumed, that an application for an ADVO is in the class of civil proceedings that may found a claim for malicious prosecution: *HD v State of NSW* [2016] NSWCA 85 at [69]; *Rock v Henderson* [2021] NSWCA 155 at [34]; [110]. See also *Li v Deng (No 2)* [2012] NSWSC 1245 at [169]; *Clavel v Savage* [2013] NSWSC 775 at [43]–[45].

## [5-7140] Absence of reasonable and probable cause

This, together with the concept of malice, are the components of the tort most difficult to prove. This is especially so where a member of the public has given apparently credible information to the police and the police have then charged the plaintiff with a criminal offence. The question arises: how does a plaintiff go about establishing the negative — an absence of reasonable and probable cause?

Prior to illustrating the answer to this question by reference to decided cases, it is necessary to emphasise the High Court's general strictures on the subject (*A v State of NSW* (2007) 230 CLR 500):

- the question of reasonable and probable cause has both a subjective and an objective element
- if the defendant did not subjectively believe the prosecution was warranted — assuming that could be proved on the probabilities — the plaintiff will have established the negative proposition,
- however, even when the prosecutor did believe the prosecution was justified, the plaintiff may yet succeed if it can be shown that, objectively, there were no reasonable grounds for the prosecution.

As has been pointed out (Barker et al p 91) there is an important temporal element in determining whether the defendant commenced or maintained the proceeding without reasonable or probable cause. This will first focus on the matters known at the time of institution of the proceedings, and then subsequently on fresh matters known as the proceedings continue. A prosecutor who learns of facts only after the institution of proceedings which show that the prosecution is baseless may be liable in malicious prosecution for continuing the proceedings: *Hathaway v State of NSW* [2009] NSWSC 116 at [118] (overruled on appeal [2010] NSWCA 184, but not on this point); *State of NSW v Zreika* [2012] NSWCA 37 at [28]–[32].

## [5-7150] Some examples

Last reviewed: December 2023

**State of NSW v Zreika:** In *State of NSW v Zreika*, above, the plaintiff succeeded in assault, wrongful arrest and malicious imprisonment claims against police. There had been a shooting at a home unit in Parramatta. Shortly after the shooting, the plaintiff was reported as having made some bizarre remarks at a nearby service station. The police officer investigating the shooting, when informed of this, became convinced that the plaintiff was the shooter and, five days later, arranged for his arrest and charging. However, a description of the shooter and his vehicle could not conceivably have matched the plaintiff. After the arrest, police learned the plaintiff had a credible alibi and that a witness had taken part in a "photo array" but had not identified the plaintiff. Despite all this, the plaintiff was refused bail (on the application of the police) and remained in custody for two months before the Director of Public Prosecutions withdrew all charges against him.

**A v State of NSW:** In *A v State of NSW*, above, the plaintiff had been arrested and charged with sexual offences against his two stepsons. The High Court agreed with the trial judge that the evidence demonstrated that the plaintiff had shown an absence of probable belief in the case of the charge relating to the younger child but had failed to do so in the case of the older boy. In the first situation, the police officer did not form the view that the material he possessed warranted laying the charge; or, alternatively, if he had in fact formed that view, there was no sufficient basis for his doing so. The evidence suggested a strong possibility that the younger boy was "making up" a story to support his older brother in circumstances where there was substantial animosity on the part of the older boy towards the plaintiff.

Finally, as the High Court pointed out in *A v State of NSW*, there is a need for the court to decide "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause." (*Commonwealth Life Assurance Society Limited v Brain*, above, at 74 per Dixon J.)

This may often require the court to consider the proper response of the "ordinarily prudent and cautious man, placed in the position of the accuser," to the conclusion that the person charged was probably guilty. The enquiry is to an "objective standard of sufficiency".

In this regard, it is not enough to show the prosecutor could have made further or different enquiries. His duty is "not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution": *Herniman v Smith* [1938] AC 305 at 319 per Lord Atkin.

**Spedding v NSW:** In *Spedding v NSW* [2022] NSWSC 1627, the plaintiff successfully claimed damages for malicious prosecution and related torts of misfeasance in public office and collateral abuse of process and was awarded $1,484,292 in damages plus interest and costs. The defendant was held to be vicariously liable for the conduct of three police officers in respect of all the torts, and for the conduct of the Office of the Director of Public Prosecutions (ODPP) in respect of the malicious prosecution tort.The plaintiff had become a suspect in the William Tyrrell case as a result of having visited the home where the child was last seen, but his alibi had been "unreasonably and inexplicably ignored" by investigators (at [199]) and he was placed in a cell with a known offender in order to obtain evidence about the child's disappearance (none was forthcoming).

A subsequent appeal was dismissed: *State of NSW v Spedding* [2023] NSWCA 180. However, it was held the primary judge erred in holding the DPP and various members of the ODPP liable for malicious prosecution: at [259]. The improper or unauthorised purpose of the police officers in arresting and charging the respondent, from which the judge inferred malice on their part, was never disclosed to the ODPP: at [257]. Further, the fact that, by the time of the trial, it was clear that the case against the respondent was "doomed to fail" does not establish malice on the part of the DPP. As it was not pleaded that malice could be inferred from the absence of reasonable and probable cause for maintaining the prosecution, it would be unfair to infer this on appeal: [258]. However, the judge was correct to conclude the police officers lacked a reasonable and probable basis for arresting and charging the respondent with the child sexual abuse offences. The investigation was far from complete. The arrest and charging were rushed due to the officers' anxiety to further their investigation into the child's disappearance, subject the respondent to covert surveillance while in custody, and increase pressure on him and his wife. The officers were aware of earlier Family Court proceedings (in which unsubstantiated allegations of sexual assault were made against the appellant) but had not explored them and had also not contacted relevant witnesses: at [238]. See further **[5-7190] Damages for malicious prosecution**.

## [5-7160] Malice

Last reviewed: December 2023

In *A v State of NSW*, the plurality examined the types of "extraneous purpose" that will suffice to show malice in malicious prosecution proceedings. They approved a general statement in Fleming at 685:

> At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.

The plurality instanced cases of spite and ill-will; and cases where the dominant motive was to punish the alleged offender. Generally, there must be shown a purpose other than a proper purpose. However, strict proof will be required, not conjecture nor mere suspicion. The tort "is available only upon proof of absence of reasonable and probable cause and pursuit by the prosecutor of some illegitimate or oblique motive": *A v State of NSW* at [95].

The plaintiff succeeded in *A v State of NSW* (on the malice issue) because he was able to show that the proceedings were instituted by the police officer essentially because he had been under extreme pressure from his superiors to do so, not because he wished to bring an offender to justice. In *State of New South Wales v Zreika*, the police officer was motivated by an irrational obsession with the guilt of the plaintiff, despite all the objective evidence pointing to his innocence.

However, it is necessary to stress that the presence of malice will not of itself be sufficient to establish the tort, there must also be an absence of reasonable and probable cause. See also, *HD v State of NSW* [2016] NSWCA 85 at [5-7120].

In *Spedding v NSW*, above, the inference of malice could be more readily drawn in circumstances where the then Director and/or his delegates involved in the prosecution had not provided evidence addressing the allegation of malice, or any allegation for that matter: at [204]. On appeal, (in *State of NSW v Spedding* [2023] NSWCA 180), the Court held that the Office of the Director of Public Prosecutions, although found to be one of the "prosecutors" for the purposes of the tort of malicious prosecution, did not have the requisite malice, the improper purpose being confined to the police officers who had commenced proceedings.

**Note:** a comprehensive and practical summary of all the relevant legal principles stated in *A v State of NSW* is to be found in the judgment of Tobias AJA in *State of NSW v Quirk* [2012] NSWCA 216 at [69]–[70].

## [5-7180] Intimidation

The elements of the tort of Intimidation were identified in *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assoc of Australia* [1971] 1 NSWLR 760. These were identified as:

1. A intends to injure C
2. A gives effect to his intention by threatening B that A will commit an unlawful act as against B
3. The unlawful act is threatened, unless B refrains from exercising his legal right to deal with C, and
4. B is thereby induced to refrain from exercising his legal right to deal with C.

In *Uber BV v Howarth* [2017] NSWSC 54, Slattery J issued a permanent injunction to restrain a litigant in person who had engaged in the unusual tort of intimidation. His actions were made against Uber and consisted of a series of "citizens arrests".

## [5-7185] Collateral abuse of process

Last reviewed: December 2023

The tort of collateral abuse of process was discussed by the High Court in *Williams v Spautz* (1992) 174 CLR 509. The tort has not established a large foothold in the jurisprudence of Australia or England, and examples of parties succeeding on the basis of the tort are rare: see *Williams v Spautz* at 553 for examples and the discussion in *Burton v Office of DPP* (2019) 100 NSWLR 734 at [14]–[42]; [48]–[49], [60]; [124]. The exact shape of the tort remains uncertain and even its existence has been viewed with scepticism: A Burrows, *Oxford Principles of English Law: English Private Law*, 2nd edn, cited in *Burton v DPP* [2019] NSWCA 245 at [17].

The tort was established in *Grainger v Hill* (1838) 132 ER 769. That case "has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution": *Willers v Joyce* [2018] AC 779 at [25]. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: a) that the initial proceedings has terminated in his or her favour; and b) want of reasonable and probable cause for institution of the initial proceedings. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. While an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process: *Williams v Spautz*, above at 520, 522-523 citing *Grainger v Hill*. See also *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 123.

The majority in *Burton v Office of DPP*, above, found it unnecessary to decide on an authoritative formulation of the elements of the tort (cf Bell P at [42]) in what was an appeal from the summary dismissal of proceedings seeking damages for breach of the tort. The matter was remitted to the District Court as the appellant's claim ought not to have been summarily dismissed because it was arguable he had an underlying cause of action, albeit one that has not been sufficiently pleaded. However, in *NSW v Spedding* [2023] NSWCA 180, the Court of Appeal in a joint judgment upheld the trial judge's finding of collateral abuse of process. The Court found that central to the establishment of this tort was the finding that the proceedings had been commenced for the dominant purpose which was outside the scope of the criminal process invoked: at [278]. The State was vicariously liable for the police officers' conduct: at [276]. It was open to the Court to infer that the police officers shared the collateral and improper purpose in the commencement of proceedings, and that this was the dominant reason for the commencement of proceedings: at [274].

## [5-7188] Misfeasance in public office

The tort of misfeasance in public office has a "tangled" history and its limits are undefined and unsettled. Aronson suggests that what has emerged over the last 50 or so years is in reality nothing less than a new tort to meet the needs of people living in an administrative State. Most of the modern changes to the tort have occurred through a series of cases in which judges have diluted the requirement of malice at the same time as they have expressed confidence that their changes leave sufficient protection for public officials against liability to an indeterminate class to an indeterminate extent: M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427.

Only public officers can commit the tort, and only when they are misusing their public power or position. It is an intentional tort: it is not enough to prove gross incompetence, neglect, or breach of duty.

In *Northern Territory v Mengel* (1995) 185 CLR 307, Deane J summarised the elements of the tort as:

(i) an invalid or unauthorised Act;

(ii) done maliciously;

(iii) by a public officer;

(iv) in the purported discharge of his or her public duties;

(v) which causes loss or damage to the plaintiff.

The authorities to date have not elucidated the boundaries of Deane J's fourth element of the tort: *Ea v Diaconu* [2020] NSWCA 127 per Simpson JA at [147], [153].

The principles regarding the tort emerge from a number of decisions from Australia, the UK and New Zealand; see particularly: *Northern Territory v Mengel*, above; *Sanders v Snell* (1998) 196 CLR 329; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263; *Sanders v Snell* (2003) 130 FCR 149 ("*Sanders No 2*"); *Commonwealth of Australia v Fernando* (2012) 200 FCR 1; *Emanuele v Hedley* (1998) 179 FCR 290; *Nyoni v Shire of Kellerberrin (No 6)* (2017) 248 FCR 311: *Hamilton v State of NSW* [2020] NSWSC 700.

Regarding the meaning of a "public officer" for the purpose of misfeasance, Bathurst CJ stated in *Obeid v Lockley* (2018) 98 NSWLR 258 at [103]:

> The review of the Australian authorities demonstrates two matters. First, the tortfeasor must be a "holder of a public office". Second, the act complained of must be the exercise of a public power. However, the cases provide no clear statement of what constitutes the "holding of a public office", or whether the power exercised has to be "attached" to the public office, or whether it is sufficient that the public officer by virtue of their position is entitled or empowered to perform the public acts in question. However, in my view, the power does not have to be expressly attached to the office.

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

In *Ea v Diaconu* [2020] NSWCA 127, the applicant claimed the first respondent (an officer of the Australian Federal Police) committed misfeasance in public office by reason of her conduct in the court public gallery in view of the jury during his trial, including laughing, gesturing, rolling her eyes and grinning, which attempted to influence the outcome of the proceedings. As White JA held in *Ea v Diaconu*, the respondent's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she

had, by virtue of her office, to influence the jury by her reactions to submissions and evidence: at [76]. It is arguable that the abuse of de facto powers, ie the capacity to act, derived from the conferral of powers that make the office a public office, are within the scope of the tort: at [127].

Further, as *Mengel* made clear, the tort is one for which a public officer is personally liable. Before one reaches the issue of the vicarious liability of the State, it is necessary for the plaintiff to identify which individual officer or officers performed the unauthorised act: *Doueihi v State of NSW* [2020] NSWSC 1065 at [32]. Damage is an essential element of the tort. It may be reputational harm as in *Obeid v Lockley* at [153]; *Cornwall v Rowan* (2004) 90 SASR 269 at [729]–[734]; *Spedding v NSW*, above, at [213]–[214]. Psychological injury is enough: *De Reus v Gray* (2003) 9 VR 432; *Spedding v NSW*, above, at [213].

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

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

## [5-7190] Damages including legal costs

Last reviewed: December 2023

### Proof of damages

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

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

In *Lewis v ACT* [2020] HCA 26, regarding a claim for false imprisonment, the High Court held that an independent species of "vindicatory damages", or substantial damages merely for the infringement of a right, and not for other purposes including to rectify the wrongful act or

compensate for loss, is unsupported by authority or principle. The notion that "vindicatory damages" is a species of damages that stands separately from compensatory damages draws no support from the authorities and is insupportable as a matter of principle: at [2]; [22]; [51]; [98].

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

**Damages for malicious prosecution**

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

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

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

In *State of NSW v Spedding* [2023] NSWCA 180, the State challenged an award of $300,000 exemplary damages as excessive and "double counting". The Court of Appeal dismissed the appeal, finding "the egregiousness of the conduct for which the State is vicariously liable also 'beyond compare'" and had "no relevant comparator in the reported cases in New South Wales. One can only hope that its standing as the worst case is never repeated and is never superseded by conduct that is even worse": at [319].

**Damages for sexual assault**

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

**Legal costs**

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

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

**Damages may not be reduced on account of contributory negligence**

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

**Legislation**

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

**Further References**

- M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427
- J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998
- T Tsavdaridis and D Luo, "Immunity of administrative decisions by judicial officers" (2023) 35(2) *JOB* 14.
- K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011

**[The next page is 5901]**

# 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

Last reviewed: December 2023

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.

See *Synergy Scaffolding Services Pty Ltd v Alelaimat* [2023] NSWCA 213 for a detailed explanation of the provisions of s 151Z, especially at [91], [134]–[140], [170].

**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)

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