Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 55

March 2024

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 55

Update 55, March 2024

[2-0200] Adjournment

A cross-reference to **[2-2690] Other grounds on which proceedings may be stayed** has been made at **[2-0280] Concurrent civil and criminal proceedings**.

[2-2600] Stay of pending proceedings

At **[2-2690] Other grounds on which proceedings may be stayed**, the cases of *National Australia Bank Ltd v Human Group Pty Ltd* [2019] NSWSC 1404 and *Western Freight Management Pty Ltd v Hyde* [2023] NSWSC 1247 have been added. *Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc) (No 2)* [2023] FCA 1234 has been added as an example of where a stay was refused despite concurrent criminal proceedings.

[2-4100] Freezing orders

Firmtech Aluminium Pty Ltd v Xie (No 2) [2022] NSWSC 1142 in relation to UCPR r 25.12 and *MTH v Croft* [2020] NSWSC 986 regarding UCPR r 25.13 have both been added at **[2-4260] Ancillary orders**. Ancillary to a freezing or search order, the court may make a "passport order" requiring the delivery up of the defendant's passport and restraining them from departing the jurisdiction: see *Madsen v Darmali* [2024] NSWSC 76 at [8]–[11].

[2-5900] Security for costs

The cases *Re Estate Condon; Battenberg v Phillips* [2017] NSWSC 1813 and *Estate of Guamani; Guamani v De Cruzado* [2023] NSWSC 502 have been added at **[2-5900] The general rule**. These decisions consider the question of principle regarding the practice of the court in relation to whether an order for security for costs ought to be made in relation to probate proceedings.

[4-0600] Opinion

At **[4-0630] Exception: opinions based in specialised knowledge — s 79(1),** the High Court decision of *Lang v The Queen* [2023] HCA 29 has been added where the Court found that no expert evidence was based exclusively on the expert's training, study, or experience. All fields of specialised knowledge assume "observations and knowledge of everyday affairs and events, and departures from them" it being the "added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give [their] opinion".

[4-1600] Discretionary and mandatory exclusions

The recent High Court decision of *McNamara v The King* [2023] HCA 36, which found that the word "party" in s 135(a) extends to and includes a co-accused in a joint criminal trial has been added at **[4-1610] General discretion to exclude evidence — s 135**.

[5-0200] Appeals except to the Court of Appeal

An article by the Honourable Justice Robert Beech-Jones, "The Constitution and State Tribunals" (2023) 1 *Judicial Quarterly Review* 41, has been added to **Further references**.

[5-3000] Equitable jurisdiction of the District Court

The decision of *Bushby v Dixon Homes du Pont Pty Ltd* (2010) 78 NSWLR 111 regarding promissory estoppel has been added at **[5-3020] Specific equitable jurisdiction under s 134 of the Act.**

[5-8000] Child care appeals

As a result of the implementation of some recommendations from the *Family is Culture Report* in the form of *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act* 2022, several amendments have been made throughout the chapter.

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

The figures in this chapter have been updated and are current as at 1 October 2023. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act* 1987, Div 6–6B, Pt 3.

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FILING INSTRUCTIONS

Update 55

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Adjournment

[2-0200] Court's power of adjournment

The court has both an inherent power: *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 252; and a specific statutory power under s 66 of the CPA, to adjourn the hearing of any matter in appropriate circumstances.

This power must be exercised in accordance with the overriding purpose of the CPA and the UCPR of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s 56(1)); in accordance with the dictates of justice: s 58 and the importance of elimination of delay: s 59 of the CPA.

[2-0210] General principles

In determining whether an adjournment should be granted, the court is not confined to applying the general traditional view that regard is only to be had to the interests of the litigants in the particular case, but should also take into account the effect of an adjournment on court resources; the competing claims of litigants in other cases awaiting hearing in the particular list; the working of the listing system of the particular court or list; and the importance in the proper working of that system of adherence to dates fixed for hearing.

In *Sali v SPC Ltd* (1993) 67 ALJR 841, the majority of the High Court observed (at 843–844):

> In *Maxwell v Keun*, [[1928] 1 KB 645] English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition: an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action. However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become.
>
> In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources, the competing claims by litigants in other cases awaiting hearing in the court as well as interests of other parties … What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

A similar approach was expressed by Gleeson CJ in *State Pollution Control Commission v Australian Iron and Steel Pty Ltd* (1992) 29 NSWLR 487 at 493–494:

> The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase in the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an ever increasing responsibility on the part of the judges to have regard, in controlling their lists and the cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs.

See also the views of Toohey and Gaudron JJ in *Sali v SPC Ltd* at 849 above; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716.

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

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

However in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 Spigelman CJ, with whom Basten and Campbell JJA agreed, observed that, while *State of Queensland v J L Holdings Pty Ltd* remained binding authority with respect to applicable common law principles, those principles could be and had been modified by statute both directly and via statutory authority for rules of court: [28].

The Chief Justice said at [29]:

> In this State *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act* 2005, which requires the Court in mandatory terms — "must seek" — to give effect to the overriding purpose — to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" — when exercising any power under the Act or Rules. That duty constitutes a significant qualification of the power to grant leave to amend a pleading under s 64 of the *Civil Procedure Act*.

The duty referred to applies to the exercise of the power of adjournment.

Subsequent to *Dennis* the High Court held that the statement from *J L Holdings* set out above is not authoritative and is not to be followed: *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175 French CJ at [6]; Gummow, Hayne, Crennan, Kiefel and Bell JJ at [111]; Heydon J at [133].

The statements in *Sali v SPC Ltd* and *Frugtniet v State Bank of New South Wales* [1999] NSWCA 458 that it is only in extraordinary circumstances that an adjournment will be refused where the practical effect of the refusal will be to terminate proceedings adversely to the applicant for adjournment are qualified by the above referred to changes. For an example of the refusal of an adjournment on case management principles see *Szczygiel v Peeku Holdings Pty Ltd* [2006] NSWSC 73 and see *Hans Pet Construction v Cassar* [2009] NSWCA 230.

Matters which may justify an adjournment include that the applicant is taken by surprise: *Collier Garland (Properties) Pty Ltd v Northern Transport Co Pty Ltd* [1964–5] NSWR 1414; *Biro v Lloyd* [1964–5] NSWR 1059 at 1062; and insufficient time to deal with affidavit material: *Scott v Handley* (1999) 58 ALD 373. See also *Kelly v Westpac Banking Corporation* [2014] NSWCA 348.

[2-0220] Short adjournments

A short adjournment, for example, for a matter of hours or until the following day, should normally be allowed: *Carryer v Kelly* [1969] 2 NSWR 769; *Petrovic v Taara Formwork (Canberra) Pty Ltd* (1982) 62 FLR 451.

[2-0230] Unavailability of party or witness

That a party or a material witness is unavailable will usually be a sufficient ground for an adjournment, provided such unavailability is not the fault of the party whose interests will be prejudiced by the refusal of the adjournment or of his or her solicitor: *Walker v Walker* [1967] 1 WLR 327; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497; *Petrovic v Taara Form Work (Canberra) Pty Ltd* (1982) 62 FLR 451. Cf *Bloch v Bloch* (1981) 180 CLR 390.

In *Ellis v Marshall* [2006] NSWSC 89, Campbell J, refused a plaintiff's application to vacate a hearing date, where after the date was fixed, but before being notified, she had booked an overseas holiday, referred to ss 56 and 57 of the CPA.

[2-0240] Legal aid appeals

Where an applicant for legal aid is dissatisfied with the determination of such application and has appealed or intends to appeal, s 57 of the *Legal Aid Commission Act* 1979 applies. Section 57 provides:

> Where it appears to a court or tribunal, on any information before it:
>
> (a) that a party to any proceedings before the court or tribunal:
>
> (i) has appealed, in accordance with section 56, to a Legal Aid Review Committee and that the appeal has not been determined, or
>
> (ii) intends to appeal, in accordance with section 56, to a Legal Aid Review Committee and that such an appeal is competent,
>
> (b) that the appeal or intention to appeal is bona fide and not frivolous or vexatious or otherwise intended to improperly hinder or improperly delay the conduct of the proceedings, and
>
> (c) that there are no special circumstances that prevent it from doing so,
>
> the court or tribunal shall adjourn the proceedings to such date on such terms and conditions as it thinks fit.

See generally *Friends of the Glenreagh Dorrigo Line Inc v Jones* (unrep, 30/3/94, NSWCA).

[2-0250] Consent adjournments

The fact that both parties consent to the adjournment is not decisive and does not mean that it must be granted: *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246. It is for the court, not the parties, to decide whether the case should be adjourned.

[2-0260] Apprehended change in legislation

It is not proper to grant an adjournment because of an apprehended change in legislation, even if such apprehended change has been announced by the relevant Minister: *Sydney City Council v Ke-Su Investments Pty Ltd*, above; *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 WLR 213 at 215–216; *R v Whiteway; Ex parte Stephenson* [1961] VR 168 at 171; *Meggitt Overseas Ltd v Grdovic* (1998) 43 NSWLR 527.

A possible exception may be in cases seeking discretionary relief, for example, prerogative orders or injunctions, where the proposed changes may render any orders futile: *Meggitt Overseas Ltd v Grdovic*, above.

[2-0265] Pending appeal in other litigation

Generally speaking a possible change in the law, whether judicial or legislative, is not treated as justification for failing to hear a case fixed and ready for trial: *Geelong Football Club Ltd v Clifford* [2002] VSCA 212; *Meggitt Overseas Ltd v Grdovic*, above.

However, a court in exercising its discretion as to adjournment, may properly have regard to an appeal brought by parties in another case seeking to test a relevant proposition established in that case: *Meggitt Overseas Ltd v Grdovic*, above, at 534–535.

An application for leave to appeal in such a case will not, generally at least, afford an adequate basis to grant an adjournment: *City of Sydney Council v Satara* [2007] NSWCA 148.

[2-0267] Adjournment of motions on a procedural question

It is inconsistent with the statutory framework in the *Civil Procedure Act* 2005, ss 56–60, to adjourn motions without sufficient reason. For example, an applicant for interlocutory relief in

connection with an appeal should anticipate being required to argue the motion on the first return date, particularly where the respondents have filed their evidence in opposition to the motion and are ready to argue the motion. The referrals list operates on the basis that motions are disposed of expeditiously and without delay: *Zong v Lin* [2021] NSWCA 209 at [6], [11].

[2-0270] Failure to comply with directions

As to applications for adjournment where there has been a failure to comply with directions, see *Ritchie's* at [s 66.25].

[2-0280] Concurrent civil and criminal proceedings

Last reviewed: March 2024

Whether a party to civil litigation, who is facing criminal proceedings in relation to the same subject matter, should be granted a stay or an adjournment depends upon the necessity to ensure that the ordinary procedures of the court do not cause injustice to a party to that litigation.

> The Court must balance the prejudice claimed by the defendant to be created by the continuation of the litigation against the interference which would be caused to the plaintiff's right … to have his claim heard without delay in the ordinary course of the court's business … Three matters of prejudice have been envisaged in the cases: the premature disclosure of the defendant's case in the criminal prosecution; the possibility of interference with the defendant's witnesses prior to the trial of that prosecution; and the effect of publicity given to the civil litigation upon jurors in the criminal trial: *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382 at 386, 387.

See also *McMahon-Winter v Larcombe* [1978] 2 NSWLR 155; *Ceasar v Sommer* [1980] 2 NSWLR 929 and *McMahon v Gould* (1982) 7 ACLR 202. See also [2-2690] **Other grounds on which proceedings may be stayed.**

[2-0290] Felonious tort rule

It would appear that the felonious tort rule, also known as the rule in *Smith v Selwyn* [1914] 3 KB 98, that is, that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted, no longer applies in New South Wales as a separate principle. Cases where it would formerly have applied should be dealt with under the principles set out for concurrent criminal proceedings at [2-0280]: *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26.

[2-0300] Judge's control of trial

Often, at least in cases without a jury, when an adjournment is sought on account of some procedural defect of the other side, for example late service of amended particulars or additional medical reports, an adjournment can be avoided by reserving the rights of the party not in default; as the case proceeds, the adjournment often becomes unnecessary.

There is a need to take into account, in considering the effect of a refusal to grant an adjournment, "the control which the judge will enjoy over the action when it comes on for trial including, particularly in a case such as the present where no jury is involved, the power to deal with any particular applications for adjournments which may subsequently be made": *Squire v Rogers* (1979) 39 FLR 106 at 114.

[2-0310] Costs

When an adjournment is granted, the parties whose conduct is responsible for the adjournment is usually ordered to pay the additional costs incurred by the other party as a result of the adjournment.

However, as to an order for costs as a panacea, the traditional view that such an order is adequate compensation for delay occasioned by the grant of an adjournment (or amendment) is no longer regarded as sound: *GSA Industries Pty Ltd v NT Gas Ltd*, above, at 716 per Samuels JA; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 465 per Toohey J.

[2-0320] Adjournment only to "specified day"

Section 66 of the CPA only permits the adjournment of proceedings to a "specified day" and proceedings should not be stood over generally in the exercise of any inherent power of the court. It would not ordinarily be proper to adjourn possession proceedings indefinitely merely for the purpose of allowing the mortgagor to pay the secured debt by instalments: *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 and *Mobil Oil Co Ltd v Rawlinson* (1982) 43 P & CR 221.

[2-0330] Procedure

When an adjournment is granted, directions should be given to ensure, as far as possible, that the matter be ready to proceed when next listed.

As to the listing of applications for adjournments and the practice of the particular courts or divisions, see the relevant Practice Notes, namely:

- Supreme Court, Common Law Division: SC CL 1, cll 25, 33–36
- Supreme Court, Possession List, SC CL 6, cll 18, 43–45
- District Court, General List: Practice Note DC (Civil) No 1, cl 13
- District Court, Case Management in Country Sittings, DC No 1A, cl 13
- Local Court, Case Management of Civil Proceedings in the Local Court: Practice Note Civ 1, cl 5, 44.2

[2-0340] Sample orders

1. I order that the [*proceedings, matter, application*] be stood out of today's list.
2. I direct that the [*proceedings, matter, application*] be listed before the [*List Judge, Registrar, etc*] on [*date*] at [*time*] to fix a fresh hearing date.
3. I direct that [*directions relating to filing and/or service of affidavits, further particulars, experts' reports, service of subpoenas, interrogatories, etc, inspection of documents, etc*].
4. Further directions relating to joint conferences of experts or otherwise as appropriate.
5. I order that the costs of today [*or the costs occasioned by the adjournment, as appropriate*] be paid by the [.....] [*or be costs in the cause, or plaintiff's/defendant's costs in the cause, as appropriate*].

Legislation

- CPA ss 56–60, 66
- *Legal Aid Commission Act* 1979 ss 56, 57

Practice Notes

- Supreme Court Common Law Division — General SC CL 1
- Supreme Court Equity Division — Case Management SC Eq 1
- District Court, General List: Practice Note DC (Civil) No 1
- District Court, Commercial List: Practice Note DC (Civil) No 2
- Local Court, Case Management of Civil Proceedings in the Local Court: Practice Note Civ 1

[The next page is 655]

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: March 2024

- 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: a court will not grant a stay of a civil proceeding merely because related charges have been brought against an accused and criminal proceedings are pending. A stay of the civil proceeding may be warranted if it is apparent the accused is at risk of prejudice in the conduct of their defence in the criminal trial: *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46 at [35]. The risk of prejudice must be real and must be weighed against the prejudice that a stay of the civil proceeding would occasion: *CFMEU v ACCC* [2016] FCAFC 97 at [22]. For a list of factors which have been recognised as to possible prejudice to the accused, see *National Australia Bank Ltd v Human Group Pty Ltd*

[2019] NSWSC 1404 at [37]. Conditions may be imposed pursuant to a stay order: see for example, *Western Freight Management Pty Ltd v Hyde* [2023] NSWSC 1247. An application to stay interlocutory civil proceedings when criminal proceedings were concurrent was dismissed in *Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.) (No 2)* [2023] FCA 1234 as active case management would ameliorate the risks to the applicant during the pendency of the criminal trial. See also [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]

Freezing orders

Acknowledgement: This chapter was originally prepared by the Honourable Justice P Biscoe of the Land and Environment Court of NSW and updated by his Honour Judge M Dicker SC of the District Court of NSW.

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

[2-4100] Introduction

Last reviewed: March 2024

Freezing orders are governed by UCPR Pt 25 which applies in the Supreme Court and District Court (UCPR 25.1), and by Supreme Court practice note SC Gen 14. The practice note is also applied generally in the District Court.

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

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

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

[2-4110] Freezing orders

Last reviewed: March 2024

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

A freezing order is normally obtained ex parte without notice to the respondent, before service of the originating process, because notice or service may prompt the feared dissipation or dealing with assets. However a freezing order made ex parte is an exceptional remedy and one that should not be granted lightly: *Frigo v Culhaci* [1998] NSWCA 88, approved in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [51]; *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141 at [57].

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

An applicant for a freezing order should:

- prove that judgment has been given in its favour or that it has a good arguable case on an accrued or prospective cause of action: r 25.14(1),
- prove that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the judgment debtor, prospective judgment debtor or another person might

abscond, or the assets of the judgment debtor, prospective judgment debtor or another person might be removed from wherever they are, or might be disposed of, dealt with or diminished in value: r 25.14(4),

- where an order is sought against a third party, prove that there is a danger that its judgment or prospective judgment will be wholly or partly unsatisfied because (a) the third party holds or is using, or is exercising a power of disposition over assets of the judgment debtor or prospective judgment debtor; or (b) the third party is in possession of, or in a position of control or influence concerning, assets of the judgment debtor or prospective judgment debtor; or (c) there is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, a process whereby the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment: r 25.14(5),
- address discretionary considerations,
- address the form of the order, including the value of the frozen assets; exclusion of dealings with the assets for living, legal and business expenses and pre-order contractual obligations; the duration of the order; and liberty to apply,
- provide an undertaking as to damages or indicate why no undertaking as to damages is proffered,
- provide any other appropriate undertakings, and
- on an ex parte application, make full disclosure of all material facts: see Rees J in *Madsen v Darmali* [2024] NSWSC 76 at [12]–[15].

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

[2-4120] Strength of case

Last reviewed: August 2023

The threshold condition is that the applicant has a judgment or a good arguable case on an accrued or prospective cause of action. A good arguable cause is "one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes would have a better than 50 per cent chance of success": *Ninemia Maritime Corp v Trave GmbH & Co KG ("The Niedersachsen")* [1984] 1 All ER 398 at 404 per Mustill J; *Samimi v Seyedabadi* [2013] NSWCA 279 at [69]. It is a less stringent test than requiring proof on the balance of probabilities: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 per Gleeson CJ; *Frigo v Culhaci* [1998] NSWCA 88.

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

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

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

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

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

Last reviewed: May 2023

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

The existence of the danger may be a matter of inference. The type of evidence from which the court can infer the danger was addressed in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at 671–672: there must be facts from which "a prudent, sensible commercial man, can properly infer a danger of default". A prima facie case of fraudulent misappropriation of assets or serious wrongdoing readily supports the inference that the respondent would not preserve its assets: *Patterson*, above, at 321–322 per Gleeson CJ, approved by the NSW Court of Appeal in *Frigo v Culhaci*, above. Mere assertions that the defendant is likely to put assets beyond the plaintiff's reach will not be enough: *Patterson*, above, at 325 per Gleeson CJ. In *Bennett v NSW* [2022] NSWSC 1406 for example, the plaintiff's notice of motion seeking a freezing order was unsuccessful as the judge was not persuaded there were substantial reasons for making the order. The plaintiff failed to demonstrate not only that there had been steps taken to dispose of the property, but also failed to demonstrate that there was any real risk of this occurring: at [23], [33].

[2-4140] The form of order

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

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

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

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

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

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

[2-4170] Sample orders

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

Exceptions to this order

This order does not prohibit you from:

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

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

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

(d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.

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

[2-4180] Liberty to apply

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

[2-4190] Sample orders

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

The Court orders

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

[2-4200] Duration of the order

Last reviewed: May 2023

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

[2-4210] Undertaking as to damages

Last reviewed: March 2024

The applicant is normally required to give the usual undertaking as to damages: PN 14 at [16]: *Frigo v Culhaci*, above; *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 311; including with the continuation of Freezing and Disclosure orders: *Blue Mirror Pty Ltd v Pegasus Australia Developments Pty Ltd* [2021] NSWSC 961. An undertaking as to damages is normally an incident of an interlocutory order of this nature because in its absence if the proceedings fail, the respondent will be left without remedy. The undertaking as to damages in the PN 14 example form Sch A [1] provides:

[2-4220] Sample orders

Last reviewed: March 2024

See Sch A in PN 14: Undertakings given to the Court by the applicant

[2-4230] Other undertakings

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

[2-4240] Full disclosure on ex parte application

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

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

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

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

[2-4260] Ancillary orders

Last reviewed: March 2024

Rules 25.12 and 25.13 deal with ancillary orders including orders ancillary to a "prospective" freezing order. Robb J said in *Firmtech Aluminium Pty Ltd v Xie (No 2)* [2022] NSWSC 1142 at [81]–[82] that insofar as UCPR r 25.12 … authorises the Court to make orders that are ancillary to a freezing order or prospective freezing order, the better view is that the ground for making an ancillary order is insufficient if the circumstances would only justify the making of a freezing order by the Court, but such order has not been made and the plaintiff has ceased to apply for the order to be made. The order for disclosure would not then be "ancillary" in the sense required by the rule. Regarding r 25.13, see *MTH v Croft* [2020] NSWSC 986 at [21]–[26], as an example where properties had been transferred to a related person not the subject of the litigation. In that case, more limited freezing orders were proposed.

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

- a disclosure of assets order
- an order for the cross-examination of a respondent about his or her assets disclosure
- an order requiring the delivery of specified assets
- an order that a respondent direct its bank to disclose information to the applicant
- an order that a respondent restore or pay money to a designated account or into court
- an order restraining the respondent from leaving the jurisdiction for a period, or else handing over their passport: see *Madsen v Darmali* [2024] NSWSC 76 at [8]–[11].
- an order appointing a receiver to the respondent's assets
- an order for the transfer of assets from one foreign jurisdiction to another
- a Norwich order (*Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133), or
- a search order.

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

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

[2-4270] Cross-examination

It has been said that the touchstone for determining whether leave should be given to cross-examine a deponent on an assets disclosure affidavit is if it would render the freezing order more efficacious

and that a relevant consideration is whether there has been failure to disclose assets completely or promptly: *Universal Music Pty Ltd v Sharman License Holdings*, above, at [28]. This has been quoted with approval: *Hathway (Liquidator) Re Tightrope Retail Pty Ltd (in Liq) v Tripolitis* [2015] FCA 1003.

[2-4280] Third parties

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

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

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

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

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

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

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

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

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

[2-4290] Transnational freezing orders

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

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

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

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

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

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

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

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

Even prior to introduction of the current rules, it had been held that the court has implied or inherent jurisdiction to make an order in aid of the enforcement of a foreign judgment, whether or

not that judgment had yet been obtained: *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742, per Campbell J; *Celtic Resources Holdings PLC v Arduina Holding BV* (2006) 32 WAR 276, per Hasluck J.

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

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

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

> *Guideline 1*: The principle applying to the grant of permission to enforce a WFO [worldwide freezing order] abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.
>
> *Guideline 2*: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.
>
> *Guideline 3*: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
>
> *Guideline 4*: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.
>
> *Guideline 5*: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.
>
> *Guideline 6*: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.
>
> *Guideline 7*: There must be evidence of a risk of dissipation of the assets in question.
>
> *Guideline 8*: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

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

Rules

- UCPR rr 25.10–25.17

Further references

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

Practice Note

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

[The next page is 1765]

Security for costs

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

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

[2-5900] The general rule

Last reviewed: March 2024

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

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

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

Note that in probate proceedings, applications for security for costs are rare. In *Re Estate Condon; Battenberg v Phillips* [2017] NSWSC 1813 an order was made for a plaintiff ordinarily resident outside Australia to provide security for the costs of probate proceedings. Lindsay J outlined factors peculiar to probate proceedings to be taken into account in such an application at [87]–[103]. See also *Estate of Guamani; Guamani v De Cruzado* [2023] NSWSC 502 where the applicant in probate proceedings unsuccessfully sought an order for security for costs against the respondents.

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

Last reviewed: May 2023

The sources of the court's power to order a party to provide security or pay money into court are "many and varied": *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11] per Lindsay J, listing (at [11]–[13]) not only the Supreme Court's inherent and statutory powers, but examples where money may be paid into court where no order for security for costs has been made: see also *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [34]; *Ward v Westpac Banking Corporation Ltd* [2023] NSWCA 11.

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

[2-5920] Exercising the discretion to order security

The power to order security for costs is discretionary and the order will not be automatic: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [20], [56]–[57] and [60]–[62]. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent": *Oshlack v Richmond River Council*, above, at [22]. Exercise of the power requires consideration of the particular facts of the case: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502. Although r 42.21(1A) now provides a list of factors, these are not exhaustive; the factors that may be taken into account are unrestricted, provided they are relevant: *Morris v Hanley*, above; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed: *Acohs Pty Ltd v Ucorp Pty Ltd* [2006] FCA 1279 at [12].

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

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The relevant factors are set out by Beazley ACJ in *Treloar Constructions Pty Ltd v McMillan* [2016] NSWCA 302 at [9]–[15] (see also *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [26]–[35]). The NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 led to amendment to the rules: Uniform Civil Procedure Rules (Amendment No 61) 2013 (NSW).

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

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

A consideration of the plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at an early stage of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [39].

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

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

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

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

The court must first consider the threshold question of whether there is credible testimony to establish that the plaintiff will be unable to pay the defendant's costs if the defendant is

ultimately successful: *Idoport Pty Ltd v National Australia Bank Ltd* at [2], [35] and [60]. The issue of the admissibility of unaudited financial statements, in the context of security for costs applications, has arisen in a number of cases including *Strategic Financial and Project Services Pty Ltd v Bank of China Limited* [2009] FCA 604 at [35]; nevertheless, in the case of a small company not required to have audited financial statements, such evidence may be permitted: *A40 Construction and Maintenance Group Pty Ltd v Smith (No 2)* [2022] VSC 72 at [26]–[31].

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

While "mere impecuniosity" does not justify an order for security for costs in itself, impecuniosity when combined with other factors led to an order for security for costs in *Levy v Bablis* [2011] NSWCA 411 at [9], although payment was adjusted to be made in two tranches (at [11], [13] ff). Particular note should be taken of UCPR r 42.21(1B). Where the plaintiff is a natural person, an order cannot be made because of mere impecuniosity.

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

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

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

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

It is appropriate to examine whether the impecunious plaintiff is, in reality, the defender in the proceedings, and not the attacker: *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 488 ALR 63 at 67–8.Where a plaintiff has been obliged to commence proceedings, and is effectively in the position of a defendant, security may not be ordered: *Hyland v Burbidge* (unrep, 23/10/92, NSWSC). Each case will turn on its facts. In *Hyland v Burbidge*, the claim that an overseas plaintiff was effectively in the position of a defendant and should not be ordered to provide security was dismissed. However, in *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* [2009] NSWSC 1095 at [13]–[15] the court held that the plaintiff's principal claim was a defence to the defendant's claims of forfeiture of a lease and the retaking of possession. The plaintiff was effectively in the position of a defendant, and the application for security dismissed.

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

Where the effect of an order for security would be to stifle the plaintiff's claim, this is an important consideration to be weighed, particularly in light of the poverty rule: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [72]; *Staff Development & Training Centre Pty Ltd*

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

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

If the proceedings raise matters of general public importance, this may be a factor relevant to the discretion. This may be the case where the area of law involved requires clarification for the benefit of a wider group than the particular plaintiff: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* at [31]; *Soh v Commonwealth of Australia* [2006] FCA 575 at [26].

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

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

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

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

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

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

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

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

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

Applications for security should be brought promptly. Delay by a defendant is a relevant factor in the exercise of the discretion: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [68].

A corporate plaintiff is expected to know its position "at the outset", before it embarks to any real extent on its litigation: *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 309.

The passage of time is only one item in the list of factors to be taken into account in the balancing exercise: *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 123 ff; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [25]–[26]; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826. The delay must be weighed not only in terms of prejudice, but also in terms of the factors that have led to the delay: *Acohs Pty Ltd v Ucorp Pty Ltd* [2006] FCA 1279 at [61] ff; *Re GAP Constructions Pty Ltd* [2013] NSWSC 822 at [14]–[15] (order for security made notwithstanding the delay).

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

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

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

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

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

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

The non-exhaustive nature of the list

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd* [1981] FCA 43. This ground overlaps the inherent jurisdiction and is discussed more fully below in the section on "Nominal plaintiffs".

The discretion is more likely to be exercised where the nominal plaintiff has insufficient assets within the jurisdiction: *Bellgrove v Marine & General Insurance Services Pty Ltd* (1996) 5 Tas R 409. See [2-5950] below, "Nominal plaintiffs".

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

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

[2-5950] Nominal plaintiffs

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

The poverty rule must be qualified in circumstances where the claim is put forward on behalf of others: *Grizonic v Suttor* [2006] NSWSC 1359 at [20]. See also *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [79].

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

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

[2-5960] Corporations

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

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

A corporation which seeks to rely on the stultification factor must also demonstrate that those standing behind it, likely to benefit from the litigation (such as shareholders and creditors) are also without means to satisfy an adverse costs order: *Re Staway Pty Ltd (in liq)(rec and mgrs appted)* [2013] NSWSC 819 at [57]–[60] (application for security deferred due to merits of corporation's claim). It is not for the party seeking security to raise such issues: *Thalanga Copper Mines Pty Ltd v*

Brandrill Ltd, above, at [12]–[18]; *Acohs Pty Ltd v Ucorp Pty Ltd* at [42] ff. The same is the case where there is a third party funder: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*, above, at [51].

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

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

[2-5965] Ordering security in appeals

The differences in principle between security for costs at trial level and on appeal have been noted and explained in *Tait v Bindal People* [2002] FCA 332 at [3]; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247 at [18]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [13]–[28]; and *Swift v McLeary* [2013] NSWCA 173 at [27]–[30]. Under UCPR r 51.50(1), the court may, *in special circumstances*, order that such security as the court thinks fit be given for the costs of an appeal. Rule 51.50 (3) provides that r 51.50(1) does not affect the powers of the court under UCPR r 42.21. There are no fixed rules for determining what will amount to special circumstances: *Zong v Wang* [2021] NSWCA 214 at [45], and the question of what constitutes special circumstances should not be fettered by any general rule of practice. Impecuniosity, without more, is normally insufficient to satisfy the requirement for special circumstances: *Zong v Wang* at [17].

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

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

In *Porter v Gordian Runoff Ltd* [2004] NSWCA 69 at [41], Hodgson JA considered a factor in favour of an order for security to be that the appellant's legal advisors were owed substantial amounts of money giving them a "large stake" in the success of the appeal. The relevance of that factor is

that lawyers with such an interest may reasonably be expected to provide some financial support for the prosecution of the appeal. See also *Porter v Gordian Runoff Ltd* [2004] NSWCA 171 at [32] (application to discharge the order dismissed) and *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust*, above, at [34]. In the latter case, in the unlikely event that the appeal succeeded, the appellants stood to recover their costs incurred at first instance and the beneficiaries of their doing so were their lawyers and others whose fees at first instance remain unpaid.

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

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

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

The order should not provide a complete indemnity for costs: *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 at 175. Fixing the amount to be provided by way of security is part of the exercise of the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [132]. The court will therefore require evidence by which it might estimate the defendant's probable recoverable costs: see, for example, the evidence adduced in such cases as *Fiduciary Ltd v Morningstar Research Pty Ltd*; *Idoport Pty Ltd v National Australia Bank Ltd*; and *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 1131; *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601.

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

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

[2-5980] Practical considerations when applying for security

1. **Timing of an application**
   It is important to foreshadow any application in correspondence*: Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68 at 71. The court will exercise care when assessing the proportionate strength of the cases of the parties at the early stages of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [39].

2. **Multiple parties**
   Difficulties arise where there are two or more plaintiffs, including one or more individuals and one or more corporations, or where one or more of the plaintiffs resides overseas; or where the

prospects of success vary as amongst the co-plaintiffs: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [54] ff. Similarly, when only one of several defendants applies for security: *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992.

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

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

The court has power to dismiss proceedings where the plaintiff fails to comply with an order to give security: r 42.21(3): *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377 at [36]. Relevant circumstances to be taken into account are discussed in *Idoport v National Australia Bank Ltd* [2002] NSWCA 271 at [24] ff and [69] ff and in *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235. UCPR r 50.8 has been amended to enable a court to which Pt 50 applies to dismiss an appeal or cross-appeal for failure to provide security for costs. UCPR r 51.50 has similarly been amended to enable the NSW Court of Appeal to dismiss appeals or cross-appeals for failure to comply with security for costs orders.

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

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

[2-5995] Extensions of security for costs applications

Last reviewed: May 2023

Applications for further security may be brought at any time: *Welzel v Francis* [2011] NSWSC 477; *Welzel v Francis (No 2)* [2011] NSWSC 648; *Welzel v Francis (No 3)* [2011] NSWSC 858. There is no express power in the UCPR for the setting aside or varying of security for costs orders, but the general power of the court to set aside or vary orders may be relied upon: *Levy v Bablis* [2012] NSWCA 128; *Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468; [2006] 1 WLR 596.

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

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

[2-5997] Applications for release of security

Last reviewed: May 2023

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

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

[2-6000] Sample orders

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

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

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

Legislation

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

Rules

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

Further references

- G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018
- NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, accessed 24/4/23
- P Blazey and P Gillies, "Recognition and Enforcement of Foreign Judgments in China", *International Journal of Private Law*, Macquarie University, 2008, (cited in *Chen v Keddie* [2009] NSWSC 762 at [18]).

[The next page is 2011]

Opinion

Evidence Act 1995, Pt 3.3 (ss 76–80)

[4-0600] The opinion rule — s 76

The opinion rule is stated in s 76. Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. The starting point in determining the admissibility of evidence of opinion is relevance: the opinion rule is expressed as it is to direct attention to why the party tendering the evidence says it is relevant. Particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [31].

The specific exceptions to the opinion rule are listed in the Note to the text of s 76, and include lay opinion (s 78), Aboriginal and Torres Strait Islander traditional laws and customs (s 78A), expert opinion (s 79) and admissions (s 81).

The term "opinion" is not defined in the statute. In the context of the general law of evidence, "opinion" has been defined as "an inference from observed and communicable data"; the text writers accepting that definition are identified by Lindgren J, and the definition is applied to the *Evidence Act*, in *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 136 ALR 627 at 629. This decision has been accepted as correct by the Full Federal Court, in *Bank of Valletta PLC v National Crime Authority* (1999) 165 ALR 60 at [20], when upholding (at [22]) a ruling that a statement that the NCA had not obtained "any further information which identifies any relevant offence or any suspect" was a statement of negative fact and not an inference from observed and communicable data. The definition has now been accepted by the NSW Court of Appeal as applicable to the *Evidence Act*, in *Seltsam Pty Ltd v McNeill* [2006] NSWCA 158 at [118]–[122]. The many difficulties in the application of such a test are discussed, but not resolved, in *R v Smith* (1999) 47 NSWLR 419 at [15] et seq. The High Court has, however, referred to the definition of an opinion as "an inference from observed and communicable data" as sufficient for its purpose in *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [10].

It has been held that the state of a person's mind is a fact and remains a fact whether what is under discussion is an actual state of mind, or the state in which a person's mind would be in some contingency which has not happened, and thus it does not fall within s 76: *Seltsam Pty Ltd v McNeill*, above, at [123].

Recognition evidence: In *R v Smith*, above, Sheller JA said (at [22]), with the concurrence of the other two judges of the Court of Criminal Appeal, that an identification of a person from a photograph by another person who knows the first person well enough to recognise that person on sight involves no more inference than seeing that person and recognising him in the street. In *R v Leung* (1999) 47 NSWLR 405, Simpson J, in the course of dealing with the admissibility of the evidence of an ad hoc expert on voice recognition (see s 79), made the same point (at [43]), with the concurrence of the other two members of the court, when discussing the line to be drawn between opinion evidence and evidence of fact.

R v Smith was reversed in the High Court on the ground that the evidence of recognition from a photograph, given by two police officers who were not witnesses to the crime, could not rationally affect the jury's assessment of the issue, and was therefore irrelevant, as they were in no better position than the jury to determine the issue: *Smith v The Queen* (2001) 206 CLR 650 at [10]–[12]. However, the majority of the court did (at [9], [11], [14]–[15]) leave open the possibility that such recognition may be relevant where there was some distinctive feature concerning the person depicted known to the police officers that would not be apparent to the jury. See, for example, *R v Robinson* [2007] QCA 99 at [20]. Kirby J, who dissented on the issue of relevance in *Smith v The Queen*, above, accepted (at [54]) the statement made by Sheller JA, but said (at [57]–[58]) that the dangers of mistakes inherent in the processes of identification and recognition make it unsurprising that

evidence such as that given by the police officers has normally been classified as opinion rather than factual evidence. It has since been held, following the views of Kirby J, that, where the recognition evidence becomes relevant and thus admissible in accordance with the majority judgment, but where the photographs are of poor quality, or provide only an unusual angle or obscure part of the person in question, it is more appropriate to classify evidence of recognition as opinion evidence rather than evidence of fact: *R v Drollett* [2005] NSWCCA 356 at [41]–[44].

Where there has been no process of deduction rather than recognition, and no real risk of the recognition being wrong — because, for example, the familiarity the witness has with the person in question — it may still be appropriate to accept the evidence of recognition as evidence of fact rather than opinion: *R v Marsh* [2005] NSWCCA 331 at [18], [31]; *R v Drollett*, above, at [60]. See also *Nguyen v R* (2007) 180 A Crim R 267, discussed under s 78 (Exception: lay opinions).

In *Haidari v R* [2015] NSWCCA 126, Johnson J (with whom the other members of the court agreed) considered an identification issue in a trial concerning a detention centre riot. The issue was whether a client service officer at the Villawood Detention Centre had permissibly identified the appellant as a person taking part in the riot. The officer without objection purported to identify the appellant from his own observations and in an ABC film clip taken on the night. He knew the appellant from his professional dealings with him. Johnson J rejected the argument that the identification was opinion evidence. His Honour, at [76], distinguished *R v Drollett*, making the important point that there is no bright line between opinion and fact. He described it as "a blurred boundary", to be determined by a close examination of the circumstances in each case. The court held that there had been no miscarriage of justice: at [78].

Hearsay evidence of opinion: The admissibility of hearsay evidence of an opinion which falls within an exception to the hearsay rule is still governed by Pt 3.3 (ss 76–80) of the *Evidence Act*: *R v Whyte* [2006] NSWCCA 75 at [36], [51]. The evidence in that case was of the complainant (in a prosecution of the appellant for detaining her with intent to have sexual intercourse with her) that she had told her mother that the accused had tried to rape her. It was admissible on the issues of credit and absence of consent, and as opinion evidence pursuant to s 78 (lay opinion). It should be noted that the two judges who dealt with this issue did not agree as to the basis for its admissibility under Pt 3.3, but they were agreed that Pt 3.3 applied. The decision does not appear to have been the subject of further judicial examination.

[4-0610] Exception: evidence relevant otherwise as opinion evidence — s 77

The Reports of the Australian Law Reform Commission did not discuss this provision. It is suggested by S Odgers, *Uniform Evidence Law* (13th edn) at [EA.77.60], that the intention of s 77 is the same as that of s 60 — to overcome the unrealistic distinctions the common law drew in relation to hearsay evidence. Odgers analyses the facts of *R v Whyte*, above, to suggest that s 77 could have been applied in that case — the evidence was sought to be used, not to prove (in the words of s 77) "the existence of a fact [the appellant intended to have sexual intercourse with her] about the existence of which the opinion was expressed", but to establish her credibility, so that s 77 excludes the opinion rule, and the evidence therefore becomes evidence of the truth of that fact.

Only minimal judicial exegesis of this section can be found. In most of the cases where s 77 was raised, the evidence was held to be factual rather than opinion evidence, and the proper interpretation of the provision was not attempted.

In *ACCC v Real Estate Institute of Western Australia Inc* [1999] FCA 675, the ACCC alleged contravention of prohibitions imposed and regulation by the *Trade Practices Act* 1974 of certain franchise agreements and rules governing solicitation and advertising (described at [2]). Evidence was to be given by witnesses in which general observations were made about the markets in which they operated and the competitive processes in those markets (described at [6]). The evidence of such perceptions and practices was put forward by the ACCC as relevant even if based on hearsay or opinion, not because it established the truth of the facts perceived but because it was to establish

the perception of experienced market participants whose competitive decisions are driven by such perceptions (see [6]). The evidence was objected to on the basis that it consisted of statements of opinion and of conclusion and opinion, and that it was at too high a level of generalisation (see [8]). French J held (at [10]) that, to the extent the evidence was relied on as evidence of perception or as explanatory of the behaviour of industry participants, it appeared to attract the operation of s 77, and that the circumstance that such opinion was based on observations expressed compendiously but not specifically analysed went to the weight and not the admissibility of that evidence. This decision does not appear to have been the subject of any other judicial consideration.

[4-0620] Exception: lay opinions — s 78

The common law recognised that lay opinion evidence would be admissible where the basis of a witness's impression was either too evanescent or too complicated to be separately and distinctly narrated, because the witness was better equipped than the jury to form an opinion on the matter: Heydon, *Cross on Evidence* at [29085], relying on *Wigmore*, 3rd edn, 1918. The author of *Cross on Evidence*, at [29090], has identified the following typical instances of admissible non-expert opinion — age, sobriety, speed, time, distance, weather, handwriting, identity, bodily health, emotional state, the physical condition of things, the reputation and character of persons, impressions of a person's temperament, relationships and attitudes. The identification of a person known to the witness from a photograph is, however, factual and not opinion evidence: *R v Leung* (1999) 47 NSWLR 405 at [43], see [4-0600] above.

In proposing what is now s 78, the Australian Law Reform Commission considered whether there should be an express requirement that the opinion be rationally based, but did not propose such a requirement because it contemplated that such a provision would be so interpreted or, if it were not, the second requirement — that the evidence is necessary to obtain an adequate account or understanding of the person's perception of the matter or event — should provide sufficient protection: *ALRC Report 26*, vol 1, pars 739–740. The Court of Criminal Appeal has interpreted s 78 as so contemplated: *R v Panetta* (1997) 26 MVR 332 at 332; as has the Federal Court, in *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of New South Wales and ACT* (1998) 154 ALR 527 at 531 (proposition (3)).

A witness's perception of the matter or event will typically be formed and expressed either as opinion or as a mixture of fact and opinion; the Australian Law Reform Commission recognised (at pars 350–351 and 349 of *ALRC Report 26*, vol 1) that witnesses cannot aspire to a perfect and non-modified reproduction of the data perceived, and that the opinion may be the only evidence of the perception: *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [24]–[26]. Where a plaintiff claims damages for injuries suffered arising out of the defendant's defective premises, a question effectively asking whether he or she would nevertheless still have been injured even if the defendant's premises had not been defective, thus involving retrospective reasoning on the plaintiff's part, is nevertheless relevant: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 560, as applied in *Taber v NSW Land and Housing Corporation* [2001] NSWCA 182 at [69] et seq.

However, the absence of a factual basis for a characterisation given by a witness to an event which goes to the heart of the issue in the case may affect the weight to be given to the characterisation, justifying its rejection pursuant to s 135 and s 137 as unfairly prejudicial: *R v Harvey* (unrep, 11/12/1996, NSWCCA) at 6–7; *R v Van Dyk* [2000] NSWCCA 67 at [133]–[134]; *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of New South Wales and ACT* at 532.

In *Nguyen v R* (2007) 180 A Crim R 267, the four accused were identified by two police officers, who had known them for some time, as the four men shown in a CCTV record (and in still photographs extracted from the CCTV record) preparing to commit the crimes charged — the murder of one person and the malicious infliction of grievous bodily harm of another person with intent to do so. The basis on which the identification relied consisted of the police officers' previous detailed knowledge of the activities of the accused (which were established in evidence) and what

they perceived from the CCTV record, and thus went beyond the material otherwise available to the jury (at [23]–[25]). The circumstance that the police officers' opinion was based on more than the material already available to the jury established that their opinion could rationally affect the jury's assessment of the facts in accordance with s 55 (Relevant evidence): *Smith v The Queen* (2001) 206 CLR 650 at [10]–[11]. The descriptions of the accused given by the police officers was evidence of fact, but the identification of the men made by the two offers was evidence of opinion: *Nguyen v R* at [30], see also [59].

Section 78 assumes that the matter or event as perceived by the witness is relevant to the proceedings: *R v Leung*, above, at [28]–[33].

Emphasis has been placed on the requirement of s 78(b) that, not only must the opinion be based on what the witness saw, heard or otherwise perceived but that evidence of that opinion must also be necessary to obtain an adequate account or understanding of the witness's perception of the matter or event: *Partington v R* (2009) 197 A Crim R 380 at [37]–[46]. In that case, in which the Crown alleged that the accused had killed the deceased by damage he caused to his spinal cord, a witness, who was standing inside the front door of an apartment outside which the accused and the deceased were together, gave evidence that she heard bangs against the door and she expressed the opinion that "somebody's head was being pushed up against the door". It was held, by majority, at [47], that she had not relevantly perceived the particular event that was alleged to have caused death and that her belief as to what was causing the noises she heard was not necessary to understand her evidence of that perception.

An opinion expressed by ambulance officers who had not seen the plaintiff fall as to how he had fallen, based upon inferences they had drawn from the physical circumstances of the area in which he had fallen, does not qualify as an asserted fact within the meaning of s 76 (the opinion rule): *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [17], [77], [83].

See *Honeysett v The Queen* (2014) 253 CLR 122, for the situation where an expert opinion (wrongly admitted) does not qualify, in the circumstances, as a lay opinion.

[4-0625] Exception: Aboriginal and Torres Strait Islander traditional laws and customs — s 78A

The Explanatory Memorandum for the *Evidence Amendment Act* accepted the recommendation of the *ALRC Report 102* that a member of an Aboriginal or Torres Strait Islander Group should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law or custom of his or her own group. See *Re: Estate Jerrard, Deceased* (2018) 97 NSWLR 1106 at [69]–[79], [95]–[96]. See further, generally, [4-0420] dealing with a similar provision relating to hearsay evidence.

[4-0630] Exception: opinions based on specialised knowledge — s 79(1)

Last reviewed: March 2024

Section 79(1) has two conditions of admissibility: first, the witness must have "specialised knowledge based on the person's training, study or experience" and, secondly, the opinion must be "wholly or substantially based on that knowledge". In *Honeysett v The Queen* (2014) 253 CLR 122, the High Court explained at [23]–[24] that the "first condition directs attention to the existence of an area of specialised knowledge. Specialised knowledge is to be distinguished from matters of common knowledge. Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience. However, the person's training, study or experience must result in the acquisition of knowledge. The *Macquarie Dictionary* defines 'knowledge' as 'acquaintance with *facts, truths, or principles*, as from study or

investigation' (emphasis added) and it is in this sense that it is used in s 79(1). The concept is captured in Blackmun J's formulation in *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579 at 590: 'the word "knowledge" connotes more than subjective belief or unsupported speculation. ... [It] applies to anybody of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds".

The second condition of admissibility under s 79(1) allows that it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends "observations and knowledge of everyday affairs and events". It is sufficient that the opinion is substantially based on specialised knowledge based on training, study or experience. It must be presented in a way that makes it possible for a court to determine that it is so based: *Honeysett v The Queen*, above, at [24].

The opinion is admissible even if proof of the factual basis for that opinion is controversial and the issues relating to the factual basis cannot be resolved until the end of the trial; the opinion evidence is admissible if there is evidence which, if accepted, is capable of establishing the truth of the assumptions: *Rhoden v Wingate* [2002] NSWCA 165 at [86].

Basis of admissibility: The High Court clarified in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37]) that the admissibility of opinion evidence is to be determined by the application of the requirements of the *Evidence Act* rather than by the application of statements made in decided cases divorced from the context in which those statements were made. The joint majority judgment has nevertheless adopted Heydon JA's statement in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 (at [85]), that the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed in the particular case so as to produce the opinion propounded. Note, the principles stated in *Makita v Sprowles* and applied in *Dasreef Pty Ltd v Hawchar* regarding the admissibility of expert opinion evidence under the uniform evidence legislation, apply equally to the determination of admissibility at common law: *Lang v The Queen* [2023] HCA 29 at [11]; [430]–[434].

No expert evidence is based exclusively on the expert's training, study, or experience. All fields of specialised knowledge assume "observations and knowledge of everyday affairs and events, and departures from them", it being the "added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give [their] opinion": *Lang v The Queen* at [435]; Kiefel CJ and Gageler J at [12]; *Velevski v The Queen* [2002] HCA 4 at [158].

While expert opinion evidence must have a rational relationship with the facts proved (or anticipated to be proved) to be admissible, the requirement is for purported, not actual, justification for the opinion expressed: *Lang v The Queen* at [436].

The analysis in *Dasreef* accepts (at [41]) that the *Evidence Act* does not require the factual basis of the opinion to be established: see "Differentiation between opinion and factual basis; identification of factual basis" (below).

It is accepted that an expert need not amass all of the factual data on which the opinion is to be expressed; the task can be delegated to another, but it is necessary for the expert who is the author of the report to apply his or her mind to the analysis and reasoning that any subordinates have developed, so that, when the report is finalised, the whole of the reasoning and conclusions it contains have been adopted as the expert's own reasoning and conclusions: *ASIC v Rich* (2005) 190 FLR 242 at [329]; *R v Jung* [2006] NSWSC 658 at [57], where Hall J gives the example of an MRI produced by a radiologist which is then utilised by a medical specialist for the purposes of forming an opinion concerning causation, diagnosis or treatment. See also *Paino v Paino* (2008) 40 Fam LR 96 at [66]–[67], [113].

The decision by the trial judge as to whether the opinion was wholly or substantially based on the expert's knowledge is to be determined on the balance of probabilities (s 142), and — in accordance

with the principle in *Blatch v Archer* (1774) 98 ER 969 at 970; *Weissensteiner v The Queen* (1993) 178 CLR 217 at 225–228 and *Ho v Powell* (2001) 51 NSWLR 572 at [14]–[15] — the evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted: *Paino v Paino* at [72]–[74]. In *Gilham v R* (2012) 224 A Crim R 22, the trial judge had been confronted with evidence from two forensic experts opining in relation to the "similarity" of the pattern of stab wounds on the victims. The evidence was permitted and the Crown allowed to address the jury to suggest the "extraordinary co-incidence" of the similarity pointed to one perpetrator causing the death of all three victims. Applying the *Dasreef* test, the Court of Criminal Appeal held, at [345], that the absence of any evidence of relevant experience of fatal stab wounds inflicted by the one killer on multiple victims meant that the evidence of the experts should not have been admitted. Second, its prejudicial impact was such that it ought, in any event, to have been rejected under s 137 of the *Evidence Act*. In addition, the court was critical of the decision by the Crown (at the first trial) not to call an expert forensic witness the Crown had engaged whose opinion differed markedly from the other two experts. The court, at [412], stated that the Crown's failure to call the witness at the second trial constituted a miscarriage of justice.

"specialised knowledge": The "specialised knowledge" test was preferred by the Australian Law Reform Commission to the "field of expertise" test — enunciated in *Frye v United States* 293 F 1013 (1923), followed in *R v Gilmore* [1977] 2 NSWLR 935 at 939–941, and continued, despite its reversal in the United States, in *R v Pantoja* (1996) 88 A Crim R 554 at 558 — because of the difficulties experienced in implementing such a test and the unnecessary restrictions it imposed: *ALRC Report 26*, vol 1 at 743; *ALRC Report 38* at 149–150.

The term "specialised knowledge" is not defined in the *Evidence Act*. The analogous term "expertise" adopted at common law requires a "peculiar" skill on the part of the witness (that is, one out of the ordinary experience of others); that person's opinion becomes admissible only where the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment on it without such assistance and it is of such a nature as to require a course of previous habit or study in order to do so: *Clark v Ryan* (1960) 103 CLR 486 at 491. An alternative formulation of the common law test is that expert opinion evidence is admissible where the information it conveys is likely to be outside the experience and knowledge of a judge or jury: *Murphy v The Queen* (1989) 167 CLR 94 at 111, 126, 130; *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 268 at [18], [33]–[34]; *Forbes v Selleys Pty Ltd* [2004] NSWCA 149 at [56].

The phrase "specialised knowledge" in s 79 was intended to extend the common law, and to emphasise that experience can be a sounder basis for opinion than study: *ALRC Report 26*, vol 1, par 742. The phrase is "not restrictive; its scope is informed by the available bases of training, study and experience": *Adler v ASIC* (2003) 46 ACSR 504 at [629], in which it was held that proper professional conduct, in the sense of due care and obedience to customary practices and ethical rule, was a field of specialised knowledge.

Honeysett v The Queen (2014) 253 CLR 122 is an important contribution to the learning on "opinion evidence". It represents a necessary caution against allowing expert opinion where it is based essentially on a subjective appreciation of facts which may be equivalently assessed by the tribunal of fact.

The appellant was convicted of the armed robbery of a suburban hotel. CCTV cameras had captured images of the robbery. Professor Henneburg, an expert in anatomical matters, gave evidence of physical characteristics that were common to both the appellant and one of the robbers. Over objection, the evidence was admitted (and used by the Crown) as an item of circumstantial evidence to support a conclusion of identity.

The High Court held that the opinion expressed by the expert was based on his subjective impression of what he saw when he examined the CCTV images. However, the court said the admission of the evidence gave the "unwarranted appearance of science" to the prosecution case.

His opinion was not based "wholly or substantially on his specialised knowledge" within s 79(1) and had been wrongly admitted at the trial. The court also held that, in the circumstances, Professor Henneburg's opinion was not admissible as that of an "ad hoc" expert. A new trial was ordered.

A practical application of this necessary caution is to be found in the decision of Harrison J in *Beckett v State of New South Wales* [2014] NSWSC 1112.

At issue was an expert report sought to be tendered in proceedings brought by the plaintiff seeking damages for malicious prosecution. In essence, the report sought to analyse in detail the behaviour of the former detective who had been the prosecutor in the criminal proceedings giving rise to the malicious prosecution. The conduct in question involved (so it was said) intimidating witnesses; causing witnesses to give false testimony; bias and fabricating or planting physical evidence to inculcate Ms Beckett in the criminal charge of attempting to murder her husband. The expert report in question was that of a former policeman who sought to bring to bear his experience and knowledge gained over many years on the propriety of the prosecutor's actions in assembling evidence against Ms Beckett in the criminal proceedings.

Harrison J found that (with one exception) none of the matters in the report fell within the reach of any identifiable expertise. Nor was the expert opinion on these matters otherwise relevant in the malicious prosecution proceedings. Importantly he held (echoing *Honeysett*) that the expert's opinions were necessarily subjective opinions, divorced from any independent means of validation. They were not amenable to "measurement and calculation" and therefore inadmissible.

Recently, the same point was made in *Verryt v Schoupp* [2015] NSWCA 128. The respondent was a 12-year-old boy who had been badly injured while being "towed" on a skateboard behind a motor vehicle. The principal issue on appeal was one of contributory negligence. However, a subsidiary issue related to the admissibility of a "psychiatric report" which purported to express opinions as to how a 12-year-old boy was likely to have acted and thought in the circumstances of the accident. The psychiatrist had not made any psychiatric assessment of the respondent. Meagher JA at [59] (with whom the other members of the court agreed) held that the psychiatrist's evidence was not based on any specialised knowledge of a 12-year-old child's behaviour in the circumstances of the accident. For that reason, it was not admissible under s 79.

See also, *Howard Smith and Patrick Travel Pty Ltd v Comcare* [2014] NSWCA 215. This case dealt with the admissibility of an opinion expressed by stevedoring workers that they had been exposed to asbestos dust during their employment. The evidence was allowed as evidence by lay witnesses as to their perception. It also qualified as admissible evidence on the basis that it was specialised knowledge obtained through extensive experience.

In *BHP Billiton Ltd v Dunning* [2015] NSWCA 55, the Court of Appeal upheld the admissibility of the evidence of a non-expert witness that material in a steelworks factory was or contained asbestos. The witness was well familiar with the operations of the steelworks and was the person responsible for testing replacement materials for asbestos and their efficacy. The court held that the evidence was admissible as "objectively observed fact": at [101].

In some cases, the link between the opinion expressed by the witness and his or her training, study or experience will be apparent from the nature of the specialised knowledge, such as an opinion on general conveyancing practice expressed by a solicitor with specialised knowledge of that practice, but the link would not be apparent in relation to an exotic matter of conveyancing practice, and in such a case it would have to be spelt out: *Adler v ASIC*, above, at [632].

The expert's reasoning process should be sufficiently exposed to enable an evaluation as to how the expert used his or her expertise in reaching the opinion stated: *HG v The Queen* (1999) 197 CLR 414 at [39]–[41]; *Makita (Australia) Pty Ltd v Sprowles* at [85]; *Keller v R* [2006] NSWCCA 204 at [28]–[31]; *Rylands v R* (2008) 184 A Crim R 534 at [84].

In *Allianz Australia Ltd v Sim* [2012] NSWCA 68 the Court of Appeal held that the evidence of a distinguished pathologist, Professor Henderson, as to the causal link between exposure to asbestos

dust and lung cancer was admissible. The opinions expressed emerged wholly or substantially from his expertise and knowledge so as to comply with s 79. Further, the expert was entitled to express an opinion about the ultimate causation issue: s 80.

Opinions based on the expert witness's own interpretation of the evidence are not inadmissible, provided that the reasoning process is properly explained and is shown to depend on the expert's specialised knowledge: *ASIC v Rich* (2005) 53 ACSR 110 at [289]–[291].

Where the provisions of the *Evidence Act* apply, the judge is permitted to take into account only those facts proved in evidence or matters of which judicial notice could be taken; matters of which the judge is otherwise aware from experience in a particular area are not relevant: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [47], overruling a long line of authority in the Full Court and the Court of Appeal starting with *Bryce v Metropolitan Water Sewerage and Drainage Board* (1939) 39 SR 321 at 330.

Bartlett v ANZ Banking Group Ltd (2016) 92 NSWLR 639; [2016] NSWCA 30 is a reminder that seldom, if ever, will a dispute between experts be resolved by an examination of the witnesses' demeanour. This will be so unless the witness "has given dishonest or misleading evidence, or has become an advocate for a party, or where the evidence given is inherently unreliable". The court described observations of an expert's demeanour as "a last resort". The differences between experts should usually be resolved by rational analysis.

"based on the person's training, study or experience": The words "training, study or experience" necessarily include observations and knowledge of everyday affairs and events and of departures from them, and it will frequently be impossible to divorce entirely those observations and that knowledge from the body of purely specialised knowledge on which an expert's opinion depends; it is the added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give his or her opinion: *Velevski v The Queen* (2002) 76 ALJR 402 at [158]. Reference was also made at [158] to s 80, see [4-0640].

In an appeal from a ruling rejecting expert evidence tendered as to what led members of the public to decide to purchase a particular brand of chocolate because that was quintessentially a question of fact within the experience and knowledge of the tribunal of fact, the Full Federal Court has held that, because of s 80 (Ultimate issue rule abolished), expert evidence remains admissible notwithstanding that the issue to be determined remained within the experience and knowledge of the tribunal of fact: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*, above, at [51]–[57]. Special leave to appeal was refused by the High Court, but it appears to have been sought only in relation to the order made by the Full Court that the matter be returned to the original trial judge for further hearing, rather than a new trial before a different judge: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2007] HCA Trans 468. See also *Chen v R* [2018] NSWCCA 106 where these matters are reinforced.

In consumer decision-making and similar cases, knowledge of actual mistake or confusion arising where there has been a particularly close similarity in brand names does not amount to specialised knowledge of the factors that may be causative of, and conditions that create the likelihood of, mistake or confusion in the decision-making purchasers that satisfies the test in *Clark v Ryan*, above: *CA Henschke and Co v Rosemount Estates Pty Ltd* (1999) 47 IPR 63 at [75]–[76]; these rulings were upheld on appeal: *CA Henschke and Co v Rosemount Estates Pty Ltd* (2000) 52 IPR 42 at [17]–[18].

A person experienced in training programmes for the long-term unemployed is qualified to express an opinion as to the capacity of such a person to carry out particular types of work becoming available through the Commonwealth Employment Service: *Hospitality Excellence Pty Ltd v State of NSW* [1999] NSWSC 945 at [10]; but such a person is not, without more, qualified to express opinions as to the probability of that person being employed in that work or the financial benefits from such employment: at [11]–[14].

In *Hawkesbury Sports Council v Martin* [2019] NSWCA 76, the primary judge erred in admitting expert opinion evidence for the respondent as to matters of visual perception and vision science: at

[33]. The expert's report did not explain how his opinions, based on "specialised knowledge", in turn based on his "training, study or experience" and on which the opinion is "wholly or substantially based", applied to the facts assumed or observed so as to produce the opinion propounded as required by s 79: at [33]; *Makita (Australia) Pty Ltd v Sprowles* at [85].

Failure to demonstrate that an opinion is based on a witness's specialised knowledge, based on his or her training, study or experience goes to the admissibility of the evidence, not its weight: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42]; *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [209].

"expert witness code of conduct": Both the *Supreme Court Act* and Rules and the *District Court Act* adopt the Expert Witness Code of Conduct provided in Sch 7 to the Uniform Civil Procedure Rules 2005. In *Chen v R* (2018) 97 NSWLR 915, an interpreter whose written statement had been served, and who was later called to give oral evidence, had not made the acknowledgement required by Pt 75 of the UCPR. The trial judge ruled that the witnesses' failure to be aware of the expert code did not create an absolute bar to admissibility. He suggested that the issue could be dealt with by appropriate directions to the jury. The court agreed with the trial judge's decision, holding that failure to comply did not result in the mandatory exclusion of the interpreter's evidence. However, in an appropriate case, the failure may be relevant to a consideration of the issues in ss 135 and 137 of the *Evidence Act*. See also *Wood v R* (2012) 84 NSWLR 581.

The Court of Criminal Appeal, in *Wood v R*, ordered the acquittal of the accused, Gordon Wood. A significant basis of the court's decision related to its unfavourable view of the principal expert relied on by the Crown to exclude the possibility of the deceased's suicide. The decision contains the useful statement of the obligations cast upon an expert both by the general law and the Expert Witness Code of Conduct: [719]–[729].

Differentiation between opinion and factual basis; identification of factual basis: An expert whose opinion is tendered should differentiate between the assumed facts on which the opinion is based and the opinion in question, to enable the court to identify the facts the witness has either observed or accepted and to distinguish between them and the witness's expressions of opinion; s 79 requires that the opinion be presented in a form which makes it possible to determine whether the opinion is wholly or substantially based on specialised knowledge based on training, study or experience, and such form requires or invites a demonstration or examination of the scientific basis of the conclusion: *HG v The Queen* (1999) 197 CLR 414 at [39], [41]; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [144]; *ASIC v Rich* at [98]–[101], [109]; *R v Tang* (2006) 65 NSWLR 681 at [147]–[153]; *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [37]; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [69].

If those matters are not made explicit in chief, it would normally not be possible for the court to make a judgment as to whether the prerequisites of s 79 have been satisfied and whether the evidence is admissible, and in any event the opinion will be valueless without proof of such factual basis: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 239 ALR 662 at [107]–[108]; *Hancock* at [73]–[78]. The prime duty of an expert is to identify the facts and reasoning process which justify the opinion expressed. That is sufficient to enable the tribunal of fact to evaluate the opinion expressed: *ASIC v Rich* (2005) 218 ALR 764 at [105]. If, however, the material on which the expert opinion is based is not supported by admissible evidence, the opinion may have little or no value, for part of the basis of the opinion is gone: *Hancock* at [76], citing *Ramsay v Watson* (1961) 108 CLR 642 at 649.

Experts who venture opinions outside their field of specialised knowledge, which are sometimes no more than their own inferences of fact, may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted: *HG v The Queen*, above, at [44]. In that case, the Chief Justice criticised the psychologist's opinion tendered in that case has having been based on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of

expertise of a psychologist", and held that it had not been shown to have been based, either wholly or substantially, on the proposed witness's specialised knowledge as a psychologist. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge in which the witness is expert by reason of training, study or experience, s 79 will not be satisfied unless the opinion is presented in the form that makes it possible to answer that question: *HG v The Queen* at [39].

Sackville AJA repeated this point in *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [242] and [243]. It was also reinforced in criminal proceedings in *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532. Indeed, the latter decision at [63]–[69] and [176]–[179] suggests that in a criminal trial, where important facts supporting an expert opinion have not been proved, s 135 will require the discretionary rejection of the evidence, even where the opinion is arguably admissible.

Where an opinion becomes admissible pursuant to s 79, the absence of explanations, discussion and analysis may reduce its probative value to such an extent that that value would be outweighed by its probative effect: *Paino v Paino* [2005] NSWSC 1336 (Barrett J) at [27]. (This proposition was not disputed in the subsequent successful appeal: *Paino v Paino* (2008) 40 Fam LR 96).

The expert evidence of a witness must identify what the witness asserts was an adequate basis for his opinion; matters concerning the process by which an opinion was actually formed go the weight, and not the admissibility, of the evidence, and are relevant to the exercise of the discretion given by s 135: *ASIC v Rich* at [94]. If the proposed evidence identifies the facts asserted to be the basis of the opinion and the process of reasoning by which the opinion was formed, and if the opinion is capable of being based on those facts, the evidence is admissible: at [135]–[136]. The facts do not need to have been proved at the stage the opinion is tendered: at [136]. The issue then for the tribunal of fact is whether the opinion expressed on the facts proved or assumed is correct; in determining this issue, regard must be had, among other things, to the reasoning process (based on those facts) used by the expert: at [136].

The law remains that there is no requirement in the *Evidence Act* for the admissibility of opinion evidence that the factual basis of the opinion to be established either before that evidence may be given or at all, although the absence of such factual evidence at the time the opinion is tendered may, subject to s 136, lead to it being admitted conditionally, and its absence at the end of a particular case may lower the weight of any opinion based on the assumption that the factual basis exists to the point where its use may be limited pursuant to s 136. On the other hand, a failure to establish that the opinion expressed by an expert is based on the expert's specialised knowledge based on training, study or experience goes to its admissibility, not its weight: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [41]–[42]; applied in *Hawkesbury Sports Council v Martin* [2019] NSWCA 76 at [28].

In *Sharma v Insurance Australia Limited t/as NRMA Insurance* [2017] NSWCA 55, the appellant had lost his case at first instance because the trial judge did not accept that the appellant had injured his wrists in a fall from a ladder. Part of the evidence tendered at trial consisted of a number of medical certificates prepared for the purpose of explaining to an employer that the appellant would be unable to attend to his usual employment. These recorded the appellant's claim to the relevant doctors that he had injured his wrists in a fall. The trial judge found that these certificates assumed the correctness of the medical history provided by the appellant but contained no reasoning process to validate any opinion expressed. Applying *Makita (Australia) Pty Ltd v Sprowles*, above, and *Dasreef Pty Ltd v Hawchar*, above, the Court of Appeal held that the medical certificates were not admissible. They did not explain the experts' fields of "specialised knowledge", nor the facts on which any opinion was based. In each case, the document was "a medical certificate intended for use in an employment rather than a curial context". For that and other reasons, the appeal was dismissed.

Evidence given by police officers in relation to covertly recorded conversations between person alleged to have been involved in drug transactions — in which the evidence seeks to translate the codes used by the participants in those conversations as referring to the particular drugs and

quantities being bargained — requires close attention to the requirements of s 79 and the application of s 135, in that the witnesses who give such evidence frequently base their opinions on information concerning the participants which is not part of their specialised knowledge, such as information concerning the activities of the participants conveyed by other police officers who had participated in the police investigation. This material must be identified and proved before the opinions become admissible. In many cases, the other activities revealed disclose uncharged conduct and raise tendency problems. The relevant authorities are reviewed in *Nguyen v R* (2007) 173 A Crim R 557 at [36]–[58].

A good example of the issues that may arise is found in Beech-Jones J's decision in *JP v DPP (NSW)* [2015] NSWSC 1669. A police fingerprint expert provided a certificate which gave brief details of his methodology and then certified that, in his opinion, the defendant's fingerprint was identical to a fingerprint found at a break-and-enter crime scene. However, he was cross-examined over several days and during the cross-examination, gave much more detail of his methodology. Justice Beech-Jones accepted that the brief statements in the report of the fingerprint evidence would not have satisfied the requirement that the claimed field of expertise must be shown to have adhered to the facts found (or assumed) to produce the opinion expressed. In the case of expert fingerprint evidence there must be at least some detail of the points of similarity and how those points have been ascertained and identified. It will often be the case with this type of expert evidence that "little explicit articulation or amplification" will be required: at [33]. However, Beech-Jones J held in dismissing the appeal that the expert's oral evidence "filled the gaps" and secured admissibility for the expert opinion.

Nguyen v R at [60]–[65] demonstrates the importance of the identification of the specialised knowledge on which such an opinion was based. That decision and a number of earlier cases — *Keller v R* [2006] NSWCCA 204 at [24]–[31] and *Chow v R* (2007) 172 A Crim R 582 at [50]–[55] — insist that, in the absence of an identification of the contextual matters which led to the opinion that they were references to drugs, an expert in these cases must be restricted to saying that the code words are consistent with references to drugs.

At the stage when the admissibility of an expert opinion is being considered, and where the factual basis of the opinion is established by hearsay evidence, the opinion is admissible, and the hearsay evidence — having been admitted for the purpose of the admissibility of the opinion — becomes evidence of the truth of the hearsay facts stated in accordance with s 60: *Bodney v Bennell* (2008) 249 ALR 300 at [92]–[93].

Ad hoc experts: Section 79 is sufficiently wide to accommodate the idea of an ad hoc expert witness: *R v Leung* (1999) 47 NSWLR 405 at [36]–[40]. Examples given are of a tape-recording that was substantially unintelligible to anyone who had not played it repeatedly but is then played repeatedly by a person until that person is able to decipher it, and of a tape recording in a foreign language that can be deciphered only by a person familiar with the language who plays it repeatedly: *R v Menzies* [1982] 1 NZLR 40 at 49; *Butera v DPP (Vic)* (1987) 164 CLR 180 at 187–188; *Eastman v R* (1997) 158 ALR 107 at 201–203; *R v Cassar* [1999] NSWSC 436 at [6]–[7]. *Nguyen v R* [2017] NSWCCA 4 is another example of a police officer listening to intercepted calls over a lengthy period of time. The officer's repeated listening gave his identification evidence the quality of ad hoc expertise, and thus was admissible as expert evidence.

The Victorian Supreme Court of Appeal accepted that a police detective had the training and experience, falling short of formal qualifications, placing him in a position of having knowledge as to the effects on concrete of burning accelerants beyond that of a person lacking that training and experience: *Davies v R* [2019] VSCA 66 at [177].

In *Morgan v R* [2016] NSWCCA 25, the appellant had been convicted of a series of "break and enter" offences by circumstantial evidence and voice identification evidence. A tracking device containing a listening device had been placed in a stolen BMW allegedly used by the appellant and his co-defendants. After a voir dire, the trial judge allowed into evidence the "ad hoc" expert

evidence of a police officer in relation to voice similarity. The officer had extensively compared the voices on the listening devices with conversations recorded between the appellant and his partner while he was in custody. The CCA held that *Honeysett v The Queen* (2014) 253 CLR 122 did not cast doubt on the use of "ad hoc" experts. At best, the issue remained to be decided. In any event, the precise point had not been taken at trial and leave to do so was refused in the appeal.

Where an issue arises as to the state of specialised knowledge of some particular issue at some time in the past, an expert in that particular field (even though not an expert at that time) is permitted to give evidence, based on the literature of that particular time, as to what that state of knowledge was at that time: *BI (Contracting) Pty Ltd v University of Adelaide* [2008] NSWCA 210 at [20]–[26].

[4-0635] Specialised knowledge of child development and behaviour: s 79(2)

Section 79(2) was inserted by the *Evidence Amendment Act* in order to "avoid doubt" in order to include within the term "specialised knowledge" such knowledge relating to child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and (see *ALRC Report 102* at [9.138]) in order to encourage the admission of such evidence in appropriate circumstances. The Australian Law Reform Commission did not consider that the provision represented any major departure from existing law, and said that it had been proposed in order to "clarify the position" (*ALRC Report 102* at [9.156]).

There is little case law on the application of s 79(2), however see further two Victorian cases *MA v R* (2013) 40 VR 564 and *De Silva v DPP* (2013) 236 A Crim R 214 which dealt with s 108C(1) (exception to the credibility rule) which is in like terms to s 79(2). *De Silva* stated at [26] that the purpose of such evidence is "educative": to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and so as therefore to be better able to evaluate it.

Section 108C in Pt 3.7 (Credibility) also makes provisions relating to this type of evidence.

[4-0640] Ultimate issue and common knowledge rules abolished — s 80

The intention of the Law Reform Commission was to abolish the "ultimate issue rule": *ALRC Report 26*, vol 1, par 743. The section does not make the evidence admissible unless it is relevant to a particular issue; it merely removes the fact that the evidence goes to an ultimate issue from the reasons for which a court must or could exclude that evidence: *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640 at [39].

The *Evidence Act* has been interpreted as having successfully abolished the rule, but it has been stressed that judges should exercise particular scrutiny when experts move close to the ultimate issue, lest they claim expertise outside their field or express views unsupported by disclosed and contestable assumptions: *R v GK* (2001) 53 NSWLR 317 at 326–327, [40]; *Adler v ASIC* (2003) 46 ACSR 504 at [622], [629]; *Forge v ASIC* (2004) 213 ALR 574 at [264]–[278]. (This issue was not raised in the appeal to the High Court: *Forge v ASIC* (2006) 228 CLR 45 at [48], [120], [242], [279].)

Section 80 deals only with the admissibility of expert evidence (that is, opinion evidence) in relation to a fact in issue or an ultimate issue; it does not affect the practical wisdom of a firm rule that the likelihood of conduct being misleading or deceptive where the sales are to the general public is a question for the tribunal of fact and not for any witness to decide, but it is otherwise when the sales are in specialised markets concerning persons engaged in a particular trade: *Interlago AG v Croner Trader Pty Ltd* (1992) 111 ALR 577 at 617; *Cat Media Pty Ltd v Opti–Healthcare Pty Ltd* [2003] FCA 133 at [55]; *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215; *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416 at [34].

In *Adler v ASIC*, above, the Court of Appeal expressed reservations (at [273]) about an expert in director's duties being asked to give his opinion as to whether the defendant had acted honestly. In *Yates Property Corp Pty Ltd (in liq) v Boland* (1998) 157 ALR 30 at 56, the Full Federal Court sought to discourage expert evidence being given on the issue of negligence by legal practitioners, suggesting that, if such evidence is tendered by reason of s 80, the only appropriate use to which it should be put is to confirm the views of the court on a particular issue rather than to inform those views. In *Minnesota Mining and Manufacturing Co v Tyco Electronics Pty Ltd* [2002] FCAFC 315 at [50], the same court similarly said that expert evidence in a patent case as to whether a claimed invention was obvious or did not involve an inventive step will of necessity be essentially argumentative and, even if admissible, will result in a waste of time and is therefore a prime candidate for the application of s 135 of the *Evidence Act*.

At common law, expert evidence was not admissible to establish matters which the tribunal of fact could determine for itself or formulate its own empirical knowledge as a universal law: *Clark v Ryan* (1960) 103 CLR 486 at 491; the evidence was admissible only if it assisted the tribunal of fact on matters outside its experience and knowledge without usurping its function: *Murphy v The Queen* (1989) 167 CLR 94 at 110–111, 129–130. The Law Reform Commission intended to permit expert evidence — for example, on the behaviour of a "normal" person — so long as it is relevant: *ALRC Report 26*, vol 1, par 743. Such evidence, though admissible, will be excluded in the exercise of the court's discretion pursuant to s 135 or s 137 if there is a risk that the jury will defer to the expert's opinion rather than make up its own mind: *R v Smith* (2000) 116 A Crim R 1 at [69]–[71]; *Keller v R* [2006] NSWCCA 204 at [43]; *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 239 ALR 662 at [54]–[55].

Expert opinion evidence is not inadmissible because it is a matter of common knowledge: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops* above, at [54]; nor is it restricted to issues that are outside the knowledge or experience of ordinary persons: at [57] (The refusal of special leave to appeal to the High Court was not related to this issue: [2007] HCA Trans 468.)

Expert evidence directed to answering a question of law or fact that is directly before the court for decision is likely to be inadmissible not because it goes to the ultimate issue but because it will not be wholly or substantially based on the expert's specialised knowledge or because it will be irrelevant: *ASIC v Vines* [2003] NSWSC 1095 at [27]; *Forge v ASIC* (2004) 213 ALR 574 at [272] (the issue did not arise in the appeal to the High Court: *Forge v ASIC* (2006) 228 CLR 45).

In a fraud trial where an issue is whether there was an arguable case that private tax rulings were incorrect in law, evidence is admissible to show what the law is: *R v Petroulias* (2005) 62 NSWLR 663 at [28].

Where an opinion is given by reference to a legal standard, it is essential, before the opinion is admissible, and "certainly before any weight can be afforded to it, that the expert's understanding of the relevant legal standard be established and be shown to be in accordance with the law": *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416 at [36].

Opinions based on the expert witness's own interpretation of the evidence are not inadmissible, provided that the reasoning process is properly explained and is shown to depend on the expert's specialised knowledge: *ASIC v Rich* (2005) 53 ACSR 110 at [289]–[291].

[4-0650] Time limit on notice

Evidence Act s 177(2) provides that evidence of a person's opinion may be adduced by tendering an expert's certificate. However it is necessary to serve the opinion and certificate 21 days before the hearing, unless the court allows a different period for service: s 177(3)(a) and (b).

In *Director of Public Prosecutions v Streeting* [2013] NSWSC 789, Davies J considered these provisions, holding that the magistrate in the court below had not erred in refusing an adjournment to enable the prosecutor to remedy the failure to serve the relevant certificate within the specified time.

Legislation

- *Evidence Act* 1995, ss 76, 77, 78, 79, 80, 135, 137, 177

Further References

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Discretionary and mandatory exclusions

Evidence Act 1995, Pt 3.11 (ss 135–139)

[4-1600] General

The original heading ("Discretions to exclude evidence") was amended to recognise that Pt 3.11 includes s 137 (Exclusion of prejudicial evidence in criminal proceedings) which involves a balancing exercise, it does not involve the exercise of a discretion: *Em v The Queen* (2007) 232 CLR 67 at [95]). See also [4-1630].

The *Evidence Act* nominates *unfairness* as the test for the exclusion of evidence, or limitation on the use to be made of evidence, in a number of places:

- s 53 requires the trial judge to take into account the danger that a demonstration, experiment or inspection might be unfairly prejudicial
- s 90 gives a discretion to exclude prosecution evidence of an admission where, in the circumstances in which the admission was made, it would be unfair to the defendant to use it
- s 114 presumes that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant to do so
- s 135 gives a discretion to exclude any evidence where its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party
- s 136 gives a discretion to limit the use to be made of any evidence where there is a danger that a particular use of that evidence might be unfairly prejudicial to a party
- s 137 requires the exclusion of any prosecution evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant,
- s 192 requires a court to take into account, when granting leave pursuant to various provisions the *Evidence Act*, the extent to which to grant leave would be unfair to a party or a witness.

Sections 90, 114, and 192 do not refer to unfair *prejudice*, whereas ss 53 and 135–137 do.

[4-1610] General discretion to exclude evidence — s 135

The term "probative value" is defined by the Dictionary to the *Evidence Act* as meaning "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue", which takes up the definition of "relevant evidence" in s 55, which in turn reflects the common law as stated, for example, in *Martin v Osborne* (1936) 55 CLR 367 at 375–376: *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at [2] n 2; *Washer v Western Australia* (2007) 234 CLR 492 at [5] n 4. See also *HML v The Queen* (2008) 235 CLR 334 at [5] n 10, [155] n 141, [423].

When determining the probative value of evidence under s 135 (as in relation to ss 97, 98, 101, 103 and 137), the issues of the credibility and reliability of the evidence should not be taken into account except where those issues are such that it would not be open to a jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of a fact in issue: *Adam v The Queen* (2001) 207 CLR 96 at [60]; *R v Shamouil* (2006) 66 NSWLR 228 at [61]–[65]; *R v Sood* [2007] NSWCCA 214 at [38].

Logically, the first step is to identify the disputed fact in issue to which the evidence is said to be relevant, and then to consider the role that that piece of evidence, if accepted, would play in the

resolution of that disputed fact: *R v Mundine* (2008) 182 A Crim R 302 at [33]–[34]. It would be a fundamental error on the part of the judge not to conduct "a systematic analysis" of the probative value of the evidence: *ASIC v Rich* [2005] NSWCA 152 at [163]; *James Hardie Industries NV v ASIC* [2009] NSWCA 18 at [32]. A slightly differently stated requirement, that the judge should make "some comparative analysis" of the probative value and the danger of unfair prejudice involved, was put forward in *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [49].

The weighing of probative value against the danger that the evidence may be unfairly prejudicial to a party has an inherent difficulty, in that it involves the weighing of essentially incommensurable factors; nevertheless, the judge must analyse the probative value of the evidence against which the degree of prejudice and the possibility of confusion and waste of time must be weighed: *ASIC v Rich*, above, at [164]. See also *Pfennig v The Queen* (1995) 182 CLR 461 at 528 (McHugh J) (a common law case).

The requirement in s 135 that the probative value of the evidence ***substantially*** outweighs its prejudicial effect has been described as one where the probative value of the evidence "well" outweighs that prejudicial effect: *R v Clark* (2001) 123 A Crim R 506 at [163].

Where the process of inference or reasoning that leads to the conclusion expressed has not been stated or revealed in a way that enables the conclusion to be tested and a judgment formed as to its reliability and the weight to be given to it, the evidence would normally be rejected under s 135: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2009] FCAFC 8 at 109.

The risk that an expert based his opinion on material that should have been excluded (identified by the trial judge as a risk to which s 135 related) is relevant to the credit of the expert, but its impact on the formation of the opinion has also to be assessed, and such an assessment must include the degree to which any particular opinion was likely to have been formed on the basis of the excluded material, and not on an assumption that the use of the excluded materials necessarily diminished the probative value of those opinions: *ASIC v Rich* at [168]–[179]. Authorities supporting the reliance by the trial judge on s 135 as justifying the exclusion of opinion material because of the risk that the evidence may be unfairly prejudicial to the other party are identified in Pt 3.3 Opinion, at [4-0620].

The operation of s 135 does not appear to be limited to the exclusion of evidence made admissible by the *Evidence Act*, and accordingly s 135 may be applied to evidence made admissible by the common law: *Evans v The Queen* (2007) 235 CLR 521 at [113].

Unfair prejudice Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted; prejudice will be unfair if there is a real risk that the evidence will be misused by the jury in some unfair way: *R v BD* (1997) 94 A Crim R 131 at 139; *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]–[92]; *Ainsworth v Burden* [2005] NSWCA 174 at [99]; *Gonzales v R* (2007) 178 A Crim R 232 at [70]; *R v Ford* (2010) 201 A Crim R 451 at [56]; *Doklu v R* (2010) 208 A Crim R 333 at [45]. The test of a danger of unfair prejudice is not satisfied by the mere possibility of such prejudice; what is required is a real risk of unfair prejudice by reason of the admission of the evidence: *R v Lisoff* [1999] NSWCCA 364 at [60]; *R v Clark*, above, at [233].

An example of the risk that evidence will be misused in some unfair way is to be found in *R v SY* [2004] NSWCCA 297, in which the accused was charged with sexual intercourse without consent with a person under the age of sixteen. The complaint was not made for many years after the events were alleged to have occurred and, when it was made and the fact (but not the content) of the complaint was communicated to the accused, he told the complainant "I'll never remember, you know, because I was on drugs". This evidence was led by the prosecution at the peremptory direction of the judge, who appears to have left it to the jury as constituting an implied admission. The appeal was upheld; the interference by the judge in the conduct of the prosecution was held (at [17]) to have caused the trial to miscarry, but it was also held (at [26]) that it was incumbent upon the trial judge to direct the jury that they were not to use the evidence adversely to the accused in the sense that it showed that he was a person of bad character and either more likely to lie or more likely to

commit the offences with which he had been charged. His failure to do so was considered to be of such significance as to justify the grant of leave to the appellant to raise it as a ground of appeal notwithstanding that no such direction had been sought at the trial (at [26]).

Few applications based on s 135 to exclude evidence led by the accused in a criminal trial — where its purpose is merely to raise a reasonable doubt in relation to the Crown case (and thus is unrelated to any burden of proof) — should be successful: *R v Taylor* [2003] NSWCCA 194 at [130].

In *R v Cakovski* (2004) 149 A Crim R 21, the appellant was charged with the murder of a man (Eugene Victorovich Petroff) whom he had intended to rob by stabbing him with a knife he had been carrying. He claimed, inter alia, that he had killed in self-defence in the face of a threat made by Petroff that he would kill him. The trial judge rejected as tendency evidence the fact that Petroff had in 1978 shot dead three persons by shooting them in retaliation for "ripping him off" in a drug deal. Evidence was adduced in the cross-examination of a Crown witness of an incident that occurred a few hours before the stabbing in the present case when Petroff had, under the influence of alcohol, attacked the witness at a reunion by attempting to gouge his eyeball out, but further cross-examination of the witness that Petroff had said to him "How would you like a knife through your head? I'm going to kill you like I killed the other three people" was rejected. Both lines of questioning were rejected as being too remote in time, and because their probative effect was outweighed by the difficulties for the Crown in reproducing the factual circumstances in order to analyse the comparative circumstances of the two killings. The Crown had submitted to the jury that the evidence of the appellant of the threat to kill him was a concoction.

It was held on appeal (at [36], [56]–[57], [70]) that the 1978 murders had both significant and substantial probative value as making it less improbable that Petroff had threatened to kill the appellant, a threat which was otherwise on its face "extremely" improbable, and more so when reference had been made to those killings just a few hours beforehand when threatening the Crown witness. Hodgson JA also held (at [39]) that the evidence of the Crown witness of the attack by Petroff some hours earlier could have had some relevance and was admissible as demonstrating Petroff's tendency to act violently when affected by alcohol, but the absence of notice of the accused's intention to lead the tendency evidence (required by s 97(1)) meant that a detailed investigation of the 1978 murders was necessary; the material was therefore correctly rejected as being relevant to the issue of tendency. Hulme J held (at [56]) that the evidence was admissible only on the first of those bases, and (at [58]–[60]) that it was inadmissible as tendency evidence because there was insufficient material before the court to disclose what were the operative factors that inspired the 1978 killings. (It appears that the court's attention was not drawn to its earlier decision concerning those killings, in *R v Petroff* (1980) 2 A Crim R 101 at 103.) Hidden J held (at [71]) that the evidence was admissible as tendency evidence and that the difficulty for the Crown in the absence of notice resulting from the remoteness in time of the 1978 events would not have justified the exercise of discretion against an accused pursuant to s 135.

It should be noted that no reference was made by the Court of Criminal Appeal in *R v Cakovski* to s 101(2) (probative value of tendency evidence must substantially outweigh any prejudicial effect). In *R v Nassif* [2004] NSWCCA 433, where Simpson J (with whom Adams J and Davidson AJ agreed) pointed out (at [59]–[60]) that, if the issue posed by s 101 is answered adversely to the defendant, it is impossible to see how s 135 or s 137 could have a different result. See also *R v Ngatikaura* (2006) 161 A Crim R 329, discussed under **Tendency evidence**, below. It is suggested that the considerations which led the judges in *Cakovski* to their different conclusions would be equally applicable under s 101. It has been stated that *Cakovski* contains no binding or persuasive statement of principle in relation to tendency evidence: *Elias v R* [2006] NSWCCA 365 at [31].

In the NSW trial of *R v Burrell* in 2006 for the 1997 murder of Kerry Whelan, the Crown case was a circumstantial one and the accused sought to put forward, as an explanation consistent with his innocence of her murder, "running sheets" compiled by the police of statements made to them by a

Mrs Shaw (a former secretary of Mr Whelan) that Mr Whelan's father was a policeman and was the contact between Mr Whelan and the criminal underworld in Victoria in 1967, 30 years before the murder charged, and that they may have been responsible for her murder. The trial judge (Barr J) rejected the evidence on the basis that it would be unfair to the Crown to have to respond to hearsay evidence of the most tenuous kind so long after the alleged events and which had no probative value: *R v Burrell* (unrep, 23/3/2006, NSWSC) at [7]–[8].

Evidence relevant to case against one but not all defendants Where several parties are involved, and evidence is relevant to the case against some defendants but not against other defendants, there is no prejudice to those other defendants if the evidence is admitted; the previous common law practice of admitting evidence against only one or more defendants has been superseded: *ASIC v Macdonald* [2008] NSWSC 995 at [9]–[14], following *Silvia v FCT* [2001] NSWSC 562 at [5]–[7]. Such a practice may nevertheless be followed where the use of such evidence against one or more defendants has been limited pursuant to s 136: *ASIC v Macdonald* at [17]–[18], following *ASIC v Vines* (2003) 48 ACSR 282 at [22]–[26].

Section 135(a) — "a party" The expression "unfairly prejudicial to a party" in s 135(a) of the Act, the word "party" extends to and includes a co-accused in a joint criminal trial: *McNamara v The King* [2023] HCA 36 at [78]; [83], [91], [113]. There are strong reasons of principle and policy in support of a judicial discretion to exclude admissible evidence of a co-accused where the probative value of that evidence to that co-accused was outweighed by its prejudicial effect on another co-accused: *McNamara v The King* at [51]–[52].

Defamation proceedings Where a defamation action is based on the broadcast of statements made on radio or television, a transcript of what was said is either irrelevant to the meaning conveyed or prejudicial in a jury case because of the difficulty a jury would have in determining the effect of what was said on viewers or listeners without access to such a transcript: *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 472-473; *Griffith v ABC* [2003] NSWSC 483 at [13]–[14]; *Nuclear Utility Technology & Environmental Corporation Inc (Nu-Tec) v Australian Broadcasting Commission (ABC)* [2010] NSWSC 711 at [4]–[12].

Procedural unfairness Unfair prejudice may also arise in both criminal and civil proceedings from procedural considerations, so that an inability to cross-examine on hearsay evidence relating to a crucial issue in the litigation may be a relevant and important (though not necessarily a crucial) issue in the exercise of the discretion granted by s 135: *Bakerland Pty Ltd v Coleridge* [2002] NSWCA 30 at [51]–[55]; *R v Suteski* (2002) 56 NSWLR 182 at [126]–[127]; *Longhurst v Hunt* [2004] NSWCA 91 at [44]–[49]; *Galvin v R* (2006) 161 A Crim R 449 at [40]. The same cases are authority for the proposition that the evidence is not prejudicial merely because it supports the opponent's case; see also *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78 at [82]. In *Singh v Newridge Property Group Pty Ltd* [2010] NSWSC 411 at [21], Biscoe AJ took into account the shortness of the notice given that the evidence would be given made it impracticable for the opposing party to investigate and marshal the evidence to rebut it.

The prejudice to the defendant involved in s 135 (and s 137) is not the simple fact that the evidence may advance the Crown case or weaken the defence case. What is meant is that the evidence would damage the defence case in some unacceptable way: *R v Lockyer* (1996) 89 A Crim R 457 at 460; *R v Serratore* (1999) 48 NSWLR 101 at 109 ([31]); *R v Suteski*, above, at [116]; *Tan v R* (2008) 192 A Crim R 310 at [93].

It has been held that, if the impossibility of challenging the veracity of hearsay statements by non-witnesses were generally accepted — either alone or as a significant factor — as justifying the exclusion of the evidence pursuant to s 135, the result would to a large extent be to write the hearsay exceptions out of the *Evidence Act*, and thus contrary to the legislative intention: *R v Clark* (2001) 123 A Crim R 506 at [164], [239]. However, each case needs to be examined in relation to the character of the evidence involved and the nature or strength of the potential prejudice to the defendant: *R v Suteski* at [126]–[127].

The failure to provide evidence prior to the hearing or even to adduce it in chief, so as to enable it to be properly considered and responded to by the other party, has been held to be unfairly prejudicial to the other party when raised for the first time in re-examination, and it was rejected on that basis: *Barrett Property Group Pty Ltd v Metricon Homes Pty Ltd* (2007) 74 IPR 52 at [161] (the issue did not arise on appeal: *Metricon Homes Pty Ltd v Barrett Property Group Pty Ltd* [2008] FCAFC 46).

The prejudicial effect of unfairly prejudicial evidence may be limited by a direction pursuant to s 136 limiting the use to which the evidence may be put by the jury: *TKWJ v The Queen* (2002) 212 CLR 124 at [47].

Proof of radio and television broadcasts There has been disagreement in first instance judgments as to the admissibility of a transcript of a radio or television broadcast in defamation proceedings based on that broadcast.

Prior to the *Evidence Act* 1995, the NSW Court of Appeal had held that such a transcript was likely to distract the jury in its task of assessing the meaning conveyed where there was no difficulty in understanding, respectively, a sound or video recording of such a broadcast, in accordance with the general principle that the meaning of such a broadcast conveyed to the ordinary, reasonable listener or viewer (who hears or views the broadcast only the once) is in many cases a matter of impression: *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 472G–473E, 474B.

Since the *Evidence Act* 1995, in *Goldsworthy v Radio 2UE Sydney Pty Ltd* [1999] NSWSC 290, Dunford J held that such a document would only have distracted the jury from that task. In *Vacik Distributors Pty Limited v Australian Broadcasting Corporation* (unrep, 4/11/99, NSWSC) Sperling J, it was held that an accurate transcript of the broadcast was an aid rather than a distraction from the jury's proper performance of that task. In *Purcell v Cruising Yacht Club of Australia* [2001] NSWSC 926, Levine J (at [6]) referred to the real danger of the jury being distracted by the use of a transcript by a jury where the words used, which are the foundation of the action, are recorded. In *Griffith v Australian Broadcasting Corporation* [2003] NSWSC 483, Levine J held that, where there is an accurate recording of the radio or television broadcast, there was no issue in the case to which such a transcript was relevant within the meaning of s 55 as it is the impression which the transient words conveyed to the listener or viewer which is important. In *Nuclear Utility Technology (Nu-Tec) v Australian Broadcasting Corporation* [2010] NSWSC 711, McCallum J held, at [12], that the principle stated by the Court of Appeal in *Radio 2UE Sydney Pty Ltd v Parker*, above, and followed in *Goldsworthy*, above, and *Griffith*, above, remained appropriate under the *Evidence Act*.

It is suggested that the decisions of Dunford J, Levine J and McCallum J are clearly correct, and that of Sperling J should not be followed, as the reasons given by the Court of Appeal in *Radio 2UE Sydney Pty Ltd v Parker* are equally applicable under the *Evidence Act*.

On the other hand, in interlocutory proceedings seeking to restrain the publication of defamatory matter, Harrison J emphasised that an objection to the use of a transcript of a telecast should identify errors that it is said to contain rather than rely on a hypothetical possibility of prejudice giving rise to relief under s 135: *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWSC 161 at [67]–[71] (this ruling was not in issue in the subsequent appeal: *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506).

Misleading or confusing A commonly arising example of evidence likely to mislead or confuse is that of the raw percentage results of DNA tests, which necessarily require complicated explanations from expert witnesses: see, for example: *R v GK* (2001) 53 NSWLR 317 at [60], [100]; *R v Galli* (2001) 127 A Crim R 493 at [72]. Expert DNA evidence itself, however, if properly formulated and explained by reference to the available evidence, is no more essentially complex or difficult than questions of fact that are routinely, and correctly, left to juries in criminal cases: *R v Lisoff* [1999] NSWCCA 364 at [55].

Considerable caution should, however, be exercised in relation to the way in which DNA evidence is explained to juries; the High Court has granted special leave to appeal from the decision of the

NSW Court of Criminal Appeal in *Aytugrul v R* (2010) 205 A Crim R 157, in which the majority judgment dismissed an appeal based on the way in which the DNA evidence was described by the Crown's expert witness as the particular percentage of the relevant community who would not be expected to have that DNA profile (the "exclusion percentage"), rather than as the number of persons in that community who would be likely to have that DNA (the "frequency ratio") as had been suggested in *R v Galli*: *Aytugrul v The Queen* [2011] HCATrans 238 (2 September 2011).

Documents in the Japanese language (translated into English with the warning that the original was written in anecdotal, colloquial and often ambiguous language and assumes a large body of knowledge which is unidentified) would be rejected pursuant to s 135: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 654 (Barrett J) at [19]–[24].

Undue waste of time In *Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (2000) 100 FCR 90 at [21], it was suggested that this provision reflected the common law stated by Professor Julius Stone in *Evidence: Its History and Policies* (revised by W Wells), Butterworths, Sydney, 1991 at 60–62 — that the law has always excluded the use of evidence which, though possibly relevant, would involve a waste of the court's resources out of all proportion to the probable value of the results. See also *DF Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597 at 478.

The defendant, late in the hearing of a long civil case, sought to place substantial reliance on a document which it had failed to produce in answer to a subpoena well prior to the trial, in circumstances described as unexplained and flagrant misconduct on its part. The document on its face could have had considerable significance in defeating the plaintiff's claim, but a lengthy adjournment would have had to be granted to the plaintiff to investigate the document, which required substantial interpretation and which, as a result of that investigation, may not have had the significance the defendant claimed. It was held that the trial judge was entitled to refuse to admit the document on the basis that its admission might result in an undue waste of time which substantially outweighed its probative value: *Dyldam Developments Pty Ltd v Jones* [2008] NSWCA 56 at [49]–[52].

Expert evidence about a matter which is known to all would normally be a waste of time and excluded pursuant to s 135: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 239 ALR 662 at [55].

Unreasoned opinion evidence Evidence of opinion where the witness has not stated in his or her evidence-in-chief the grounds and reasoning that led to the formation of the opinion will normally be rejected pursuant to s 135 except in a straightforward and uncomplicated case: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2009) 174 FCR 175 at [108]–[109]. The refusal of special leave to appeal ([2007] HCA Trans 468) did not relate to this issue.

Tendency evidence Where tendency evidence is adduced (with the intention that it be used as such), ss 97 (significant probative value) and 101(2) (probative value substantially outweighs any prejudicial effect) provide the tests for the admission of tendency evidence, and there remains no room for the application of either s 135 (probative value substantially outweighs danger of unfair prejudice) or s 137 (probative value outweighed by danger of unfair prejudice): *R v Ngatikaura* (2006) 161 A Crim R 329 at [14] (Beazley JA), [68]–[71] (Simpson J). The concurring judgment by Rothman J does not follow quite the same path as that followed by Simpson J and Beazley JA (who dissented only on the basis that the evidence was not tendency evidence). No reference was made in *Ngatikaura* to the court's earlier decision in *R v Cakovski* discussed under the heading **Unfair prejudice** above (but where no consideration was given to s 101). It is suggested that the considerations which led the judges in *Cakovski* to their different conclusions would be equally applicable under s 101. See also *R v Nassif* [2004] NSWCCA 433 at [59]–[60] under the same heading.

In *Collaroy Services Beach Club Ltd v Haywood* [2007] NSWCA 21, it was held (at [49]) that a discretionary decision made by a trial judge to exclude evidence pursuant to s 135 would be reviewed on appeal in accordance with the ordinary rules in relation to discretionary decisions, as stated in *House v The King* (1936) 55 CLR 499 at 504–505.

[4-1620] General discretion to limit use of evidence — s 136

This section applies to evidence to which objection is taken under either s 135 or s 137. Its use is one of the ways the prejudicial effect of evidence to which objection is taken may be overcome or at least reduced to the extent that the probative value of the evidence is no longer outweighed by the danger of its unfair prejudice (s 137) or substantially outweighed by that danger (s 135).

The exercise of the s 136 discretion depends to a substantial extent upon whether objection is taken to the evidence in question, but there may be a case where the possible exercise of this discretion is so obvious that the trial judge should have had this discretion in mind: *Cvetkovic v R* [2010] NSWCCA 329 at [293]; *Cvetkovic v The Queen* [2011] HCASL 133 (8 June 2011).

The prejudicial effect of hearsay evidence where the maker of the hearsay is not available for cross-examination (see **Procedural fairness** under [4-1610]) may be reduced — where there is a genuine dispute as to the facts stated — by limiting the use to which the evidence is put by excluding its operation under s 60 to establish the truth of what was said: *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 621, 625. That decision was distinguished in a dissenting judgment in *Rhoden v Wingate* [2002] NSWCA 165 at [121] on the basis that much of the essential material on which the relevant opinion had been based was already in evidence. However, that does not appear to have been the basis on which the judgment in *Quick v Stoland Pty Ltd* rested.

The discretion to limit the use of evidence will more readily be exercised where the proceedings are to be tried by a jury, since the weight to be attributed by a judge to evidence untested by cross-examination would be less than that attributed by a jury: *Seven Network Ltd v News Ltd (No 8)* [2005] FCA 1348 at [21]; *Australian Securities and Investments Commission v Macdonald* [2008] NSWSC 995 at [23].

When the use of evidence is restricted because of the danger that it may be unfairly prejudicial to a party, a strong direction to the jury is needed, both at the time of the tender and in the summing-up, as to the limited use to which the evidence could be put: *Ainsworth v Burden* [2005] NSWCA 174 at [103].

Where the author of a document sought to be tendered elects not to give evidence, and thus cannot be cross-examined, it is the fact that he will not be cross-examined, and not the reason for it, which is relevant to the issue posed by s 136; the issue is (as posed by McHugh J in *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]) whether there is a real risk that the tribunal of fact will misuse the evidence in an unfair way in the absence of cross-examination: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 654 at [17]–[21], although acknowledging (at [20]) that the Court of Appeal has said, in *Bakerland Pty Ltd v Coleridge* [2002] NSWCA 30 at [55], that the absence of cross-examination can be relevant to the issue to be determined in accordance with s 136.

Hearsay It is the effect of s 60 of the *Evidence Act* (which makes evidence, admitted for a purpose *other* than proof of the truth of the fact asserted, proof of the truth of that fact) that makes it important that a limitation be imposed pursuant to s 136 on the use to which the evidence may be put where that fact is controversial in the proceedings: *Guthrie v Spence* (2009) 78 NSWLR 225 at [75]. This is so, no matter how remote hearsay the evidence may be and irrespective of whether the source of the information is disclosed: *Roach v Page (No 11)* [2003] NSWSC 907 at [37]–[38], [74]; *Hamod v State of NSW (No 10)* [2008] NSWSC 611 at [4] et seq.

Statements made by the complainant in a sexual assault case, both to the police very shortly after the events in issue and to the doctor who examined her within three hours, should be permitted as evidence of their truth: *Thorne v R* [2007] NSWCCA 10 at [41].

Section 136 has been considered in *Fulham Partners LLC v National Australia Bank Ltd* [2013] NSWCA 296. The respondent sought to resist a claim by the appellant that it had validly secured charges over property owned by Idoport Pty Ltd, a company later placed in liquidation. The principal issue was whether the respondent's consent was necessary to the validity of the charges. A subsidiary issue was whether certain internal emails of the respondent and letters sent to Idoport (withholding consent) were admissible. It was held that the documents were admissible, not only to demonstrate how and when the respondent had rejected the request for consent, but also as evidence of the reasons relied upon in making that decision. The Court of Appeal rejected the submission that, in the absence of a limitation order, unfair prejudice would arise to the appellant.

Verified pleadings In *Crowe-Maxwell v Frost* (2016) 91 NSWLR 414, the CCA held that in a given case, statements made in verified pleadings constitute admissible evidence. It is not correct to say that verified pleadings can never be evidence. In the instant case, a company liquidator sought to recover monies alleged to have been paid by the company for the director's benefit. The director appeared in person, gave evidence and was cross-examined. The trial judge allowed portions of the verified defences as evidence in the proceedings. The liquidator's appeal was dismissed.

[4-1630] Exclusion of prejudicial evidence in criminal proceedings — s 137

Whereas both ss 135 and 136 use the word "may", s 137 uses the word "must". The mandatory terms of s 137 are more consistent with an evaluative judgment than with the exercise of a judicial discretion; the section involves a balancing exercise and, once that exercise has been performed, there is no residual discretion: *R v Blick* (2000) 111 A Crim R 326 at [20]; *Rolfe v R* (2007) 173 A Crim R 168 at [60]; *R v Sood* [2007] NSWCCA 214 at [23]; *Qoro v R* [2008] NSWCCA 220 at [63]. The absence of any discretionary element has been confirmed in the High Court: *Em v The Queen* (2007) 232 CLR 67 at [95]. If the imbalance has been demonstrated, the trial judge is obliged or bound to exclude the evidence: *Em v The Queen* at [95], [102].

As minds might reasonably differ in determining the appropriate balance, the Court of Criminal Appeal will reach a different conclusion from that of the trial judge only if it came to the view that the decision was unreasonable or otherwise clearly in error within the principles laid down in *House v The King* (1936) 55 CLR 499 at 504–505: *Louizos v R* (2009) 194 A Crim R 223 at [23].

There is no general rule that a judge should reject evidence pursuant to s 137 to which no objection is taken at the trial: *FDP v R* (2008) 192 A Crim R 87 at [27]–[30], declining to follow *Steve v R* (2008) 189 A Crim R 68 at [60], preferring the views expressed in *R v Reid* [1999] NSWCCA 258 at [3]–[5] and *Dhanhoa v The Queen* (2003) 217 CLR 1 at [18]–[22], [53], [91].

The NSWCCA declined to express a concluded view about this issue in *Perish v R* (2016) 92 NSWLR 161; [2016] NSWCCA 89. The present position remains as stated in *FDP v R*, above, although undoubtedly, in a criminal trial there remains an overriding duty on a trial judge to ensure a fair trial and to prevent a miscarriage of justice even where no objection has been made under s 137.

The position is complicated by the NSWCCA's decision in *Tieu v R* (2016) 92 NSWLR 94; [2016] NSWCCA 111. The case turned on the failure of a trial judge to consider and respond adequately to the requirements of the credibility provisions of the *Evidence Act* when permitting the Crown to cross-examine a defendant concerning his criminal convictions. Defence counsel had raised some "concerns" about the proposed cross-examination but had not made specific reference to the requirements of s 137. Nor did the judge in allowing the cross-examination to occur without a specific order granting leave. Basten JA referred to *FDP v R* but, subject to qualifications, suggested ss 135 and 137 might have application. One of those qualifications related to his careful analysis of the legislation. He concluded tentatively that, as there is a difference between the "probative value" of evidence and the assessment of the credibility of a witness, ss 135 and 137 may not have application to the issues under s 104(2) and (4). He declined to express a final opinion on the matter. Neither McCallum not Davies JJ addressed the issue in detail. Justice McCallum assumed

that s 137 applied and had not been addressed by the trial judge. Justice Davies thought it may have been applied because trial counsel had raised a general concern with "prejudice". From a practical perspective, the position remains, at least for the time being, governed by the decision in *FDP v R*.

A decision by the trial judge under s 137 may be reviewed by an appellate court without the restrictions relating to discretionary judgments: *R v Cook* [2004] NSWCCA 52 at [38].

Other important distinctions between ss 135 and 137 are:

- s 135 requires the danger of unfair prejudice to outweigh the probative value of the evidence substantially, whereas s 137 does not; and
- s 135 encompasses the danger of unfair prejudice against any party, whereas s 137 is directed to unfair prejudice against the accused in a criminal trial.

Relevant to both ss 135 and 137 is the proposition that the issues of the credibility and reliability of the evidence should not be taken into account except where those issues are such that it would not be open to a jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of a fact in issue: *Adam v The Queen* (2001) 297 CLR 96 at [60]; *R v Shamouil* (2006) 66 NSWLR 228 at [61]–[65]; *R v Sood*, above, at [38]: *R v Mundine* (2008) 182 A Crim R 302 at [33].

The Victorian Court of Appeal held in *Dupas v R* (2012) 218 A Crim R 507 that *R v Shamouil*, above, (and like decisions) were wrongly decided and should not be followed. The court held that a judge considering "probative value" of evidence is only obliged to assume that the jury will accept the evidence as truthful but is not required to assume that its reliability will be accepted. See also to like effect: *MA v R* (2013) 226 A Crim R 575.

However, in *R v XY* (2013) 84 NSWLR 363, a majority of the five-judge bench declined to overrule *R v Shamouil*, and held that it should be followed by the courts in NSW. Blanch J did not consider the question, whereas Price J, finding it unnecessary to do so, nevertheless expressed some support for the reasoning in *Dupas v R*, above. The position in NSW, therefore, remains that in assessing probative value for the purposes of s 137, questions of credibility and reliability, in general terms, are not considered. (For one possible exception in relation to tendency and coincidence evidence, see *DSJ v R* (2012) 215 A Crim R 349.)

The difference of opinion between the two jurisdictions has now been resolved in the High Court: *IMM v The Queen* (2016) 90 ALJR 529. The majority of the court agreed with the reasoning in *R v Shamouil* — in determining the probative value of evidence, the trial judge has no role to play in assessing the credibility or reliability of the evidence. The *Evidence Act* contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. Questions of reliability or credibility, generally speaking, are matters for the jury. The judge may proceed on the basis that the evidence is credible and reliable. The only exception to this approach is in the limited situation where the proffered evidence is inherently incredible, preposterous or fanciful. In that situation, the evidence would fail the threshold requirement of relevance. The Victorian response to the High Court's decision can be seen in *Bayley v R* [2016] VSCA 160, a case involving the wrongful admission of identification evidence: see also *R v Smith (No 3)* [2014] NSWSC 771 per Garling J.

The issue under s 137 is whether the prejudicial effect of the challenged evidence outweighs its probative effect — that is, would the jury give the evidence more weight than it deserves, or would the evidence divert the jurors from their task? This question involves an evaluative exercise, in respect of which judicial minds may differ: *R v Arvidson* (2008) 185 A Crim R 428 at [34], [46], applying *Festa v The Queen* (2001) 208 CLR 593 at [51]. See also *R v Suteski* (2002) 56 NSWLR 182 at [126]; *Lodhi v R* (2007) 179 A Crim R 470 at [140].

All admissible evidence which has probative force is prejudicial in a colloquial sense, but that is not the sense in which the term is used in the *Evidence Act*: *Festa v The Queen*, above, at [22]–[23]; *R v Burnard* (2009) 193 A Crim R 23 at [89]. The danger of unfair prejudice is typically shown where

the evidence may lead a jury to adopt an illegitimate form of reasoning or give the evidence undue weight, notwithstanding that the judge will give the appropriate directions: *The Queen v Falzon* (2018) 92 ALJR 701 at [42], [45]; *R v Yates* [2002] NSWCCA 520 at [252]; *R v Shamouil*, above, at [72]; *Qoro v R*, above, at [64]. There must therefore be some appreciation of the consequences of any explanation an accused person might be obliged to advance in order to nullify the adverse inferences that would arise from the evidence without that explanation: *R v Cook* at [37]–[49]. In that case, there had been a voir dire examination in which the appellant sought to explain his flight as the fear of arrest on other (disassociated) serious charges against him rather than a consciousness of guilt of the offence charged. It was held that the trial judge would have to consider the nature of such prejudice in the particular case; where it would demonstrate the guilt of serious offences of a "disturbingly close" relationship with the offence charged, the unfair prejudice may be considered to outweigh the probative value of the evidence.

In *The Queen v Falzon* (2018) 92 ALJR 701, the High Court held that a majority of the Victorian Court of Appeal erred in their approach to s 137 (identical to s 137 *Evidence Act* 1995 (NSW)) in finding that evidence of cash found at the respondent's house was unfairly prejudicial under s 137. The respondent had been convicted of cultivating a commercial quantity of cannabis and drug trafficking contrary to ss 72A and 71AC respectively of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). Cannabis plants and dried cannabis were found during searches of several properties, including two properties associated with the respondent. A smaller amount of cannabis, drug trafficking paraphernalia and a significant sum of cash ($120,800) were also found at the respondent's home. The High Court held the probative value of the evidence of the cash was high and constituted part of the powerful circumstantial case that the respondent was engaged in a business of cultivating and selling cannabis. Admittedly, the evidence of the cash was prejudicial because it assisted to demonstrate his purpose in possessing the cannabis was for sale, but that is why it was admissible. It was not unfairly prejudicial to a significant extent: at [45]. The risk of the jury engaging in tendency reasoning was minimal, especially given that the trial judge had specifically directed the jury that they were not to think that because a person breaks the law in one instance, he is likely to break the law in another: at [45].

In *R v Lumsden* [2003] NSWCCA 83, Mason P suggested (at [4]–[6]) that the probative value of evidence of other offences closely associated with that charged — such as possession of drugs when the charge is supply — should not be excluded pursuant to s 137, provided that the evidence is not relied on by the Crown for tendency purposes (s 97). Hulme J suggested (at [47]) that such evidence could not be tendency evidence (a proposition on which Mason P reserved his position, at [9]) but that, as it shows that the accused was in the business of selling the relevant drugs at the relevant time, it also tends to prove that the accused in fact sold them as charged (a proposition with which Mason P agreed, at [8]). Smart AJ held that the evidence of possession related to a period too remote in time, and was inadmissible (at [112]), and that it did not tend to establish the charge of supply (at [117]). The appeal was dismissed (Smart AJ dissenting).

Section 137 does not require the evidence to be unambiguous in order to avoid exclusion, provided that the evidence is capable of bearing the interpretation or giving rise to the inference for which the Crown contends: *R v SJRC* [2007] NSWCCA 142 at [37]–[39].

The use to which the evidence is to be put is the most important consideration in determining the balancing exercise required under s 137. Where hearsay evidence of a deceased witness of conversations with the complainant in a child sexual assault case was tendered, the evidence that she had made a complaint to him was relevant to her credibility, but a direction to the jury that they could not use that evidence as establishing the truth of what was stated resulted in its significance being less than it would otherwise be, and the exclusion of the evidence would not have been required pursuant to s 137: *Galvin v R* (2006) 161 A Crim R 449 at [28]. However, a different result was required under s 137 in relation to further hearsay "context" evidence of the deceased witness that the accused had confessed to him that he had committed a sexual act (other than one of those charged) on the complainant, which was highly prejudicial tendency evidence: *Galvin v R* at [28]–[34].

The mere fact that the evidence may, as a practical matter, require the accused to give evidence himself is not an "unfair" prejudice within the meaning of s 137: *Hannes v DPP (No 2)* (2006) 165 A Crim R 151 at [315]; *Rolfe v R* (2007) 173 A Crim R 168 at [58].

A practical application of the current use of s 137 (is probative value outweighed by the danger of unfair prejudice) is to be found in *R v Ali* [2015] NSWCCA 72. The accused was charged with one count of sexual intercourse with a child under 10 years. The trial judge excluded expert evidence relating to DNA testing. Primarily he did so in reliance on s 137. His Honour considered that the probative value of the DNA evidence was undermined because of the possibility of contamination and doubts about the chain of possession.

The CCA said the trial judge's approach was inconsistent with *R v Shamouil*. The issues that troubled his Honour should have been left to the jury with appropriate directions. It was their task, not his, to resolve those issues.

Another useful illustration is to be found in *The Queen v Dickman* [2017] HCA 24. The High Court overturned the Victorian Court of Appeal's decision. At issue was an identification by a victim based on a photoboard. There had been earlier mistaken identification by the victim. However, the High Court held that even though the probative value of the identification was "low", it was none the less "a relevant circumstance". Its exclusion was not required unless that value was outweighed by "the danger of unfair prejudice". The trial judge had correctly assessed the danger of unfair prejudice as "minimal" and it had adequately been addressed by careful directions.

Context/Relationship evidence Evidence that merely demonstrates a relationship between the complainant and the accused in a sexual assault case does not demonstrate its admissibility. There must be an issue in relation to the charged act or acts which justifies the admission of evidence of other such acts. If there is no such issue, the evidence is admissible only as tendency evidence; if it does not qualify as such, it is irrelevant: *DJV v R* (2008) 200 A Crim R 206 at [36].

Examples of the application of s 137 Questions by the Crown in re-examination, deliberately for the purpose of undermining character evidence favourable to the accused given in cross-examination, asked the witness to assume that the accused had acted in the way alleged by the indictment and then to say how that affected the assessment of his character she had given. The trial judge directed the jury to disregard the re-examination, and that it was clearly open to them to find that the accused was a person of good character. The re-examination was held on appeal to have raised a false issue and to be both mischievous and impermissible; the re-examination was entirely prejudicial, and should have been rejected under s 137: *Hannes v DPP (No 2)*, above, at [222], [228]; it was improper conduct on the part of the Crown, and in those circumstances the Crown could not invoke rule 4 of the Criminal Appeal Rules to prevent the issue being raised on appeal: at [229]. However, the judge's direction to disregard the Crown's conduct was unequivocal and it was appropriate to proceed in a confident expectation that the jury would have obeyed the direction given: at [245]–[250].

Odgers, *Uniform Evidence Law* (13th edn at [EA.137.60]), has suggested that the previous common practice of limiting if not excluding photographic evidence of injuries to the deceased where a pathologist has already described them orally is now justified under s 137.

Appellate review Notwithstanding the ruling that s 137 requires an evaluative judgment, and that, once the balancing exercise required has been performed, there is no residual discretion (see first paragraph of text under s 137), the decision of the trial judge may be reviewed on appeal only in accordance with *House v The King* (1936) 55 CLR 499: *Vickers v R* (2006) 160 A Crim R 195 at [76]; *R v SJRC*, above, at [34]; *Can v R* [2007] NSWCCA 176 at [43]; *Steer v R* (2008) 191 A Crim R 435 at [35].

[4-1640] Discretion to exclude improperly or illegally obtained evidence — s 138

Section 138 is wider in its application than those sections in Pt 3.4 (ss 81–90) which deal with similar situations — s 84 (Exclusion of admissions influenced by violence and certain other conduct) and

s 85 (Criminal proceedings: reliability of admissions by defendants) — but many of the decisions on those two sections will provide some assistance in relation to the element of impropriety in s 138. (Section 90 (Discretion to exclude admissions) is directed to the unfair *use* of an admission rather than the circumstances in which it was *obtained*.)

Notwithstanding the issue being raised (but not resolved) in *ACCC v Pratt (No 2)* [2008] FCA 1833 at [14], it is suggested that it is very clear from its context that the word "obtained" in the phrase "improperly or illegally obtained evidence" s 138 means not only "brought into existence" but also "obtained by the party seeking to tender it".

The core meaning of something done in "contravention" of the law involves disobedience of a command expressed in a rule of law which may be statutory or non-statutory. It involves doing that which is forbidden by law or failing to do that which is required by law to be done. Mere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as "impropriety" although that word does cover a wider range of conduct than the word "contravention": *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [29]–[30]; *ASIC v Sigalla (No 2)* (2010) 271 ALR 194 at [112].

Impropriety extends to conduct which, although not either criminal or unlawful, is quite or clearly inconsistent with minimum standards that society expects and requires of those entrusted with law enforcement: *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at [22]–[23]. No preponderance is ascribed to any of the matters identified in s 138(3) over others; each, if applicable, is to be weighed in the balance in favour of or against the exercise of discretion: *ASIC v Macdonald (No 5)* [2008] NSWSC 1169 at [27].

The concept of unfairness has been expressed in the widest possible form in ss 90 (Discretion to exclude admissions) and 138 of the *Evidence Act* and reflects the "policy discretion" developed by the common law: *The Queen v Swaffield* (1998) 192 CLR 159 at [67]–[68]; *Pavitt v R* (2007) 169 A Crim R 452 at [30].

The discretion to admit evidence under s 138 is, however, a distinct and separate discretion from that arising under s 90; s 138 seeks to balance two competing public interests, neither of which directly involves securing a fair trial for the accused: *R v Em* [2003] NSWCCA 374 at [74]; *R v Syed* [2008] NSWCCA 37 at [36]–[37].

The clear intention of s 138 is to replace the general law discretion to exclude improperly obtained evidence: *Robinson v Woolworths Ltd*, above, at [24]. The term "impropriety" is not defined by the *Evidence Act*, and the concept as defined for the common law by *Ridgeway v The Queen* (1995) 184 CLR 19 at 36–40 is applicable: *Robinson v Woolworths Ltd* (at [22]). In *R v Camilleri* (2007) 68 NSWLR 720, the NSW Court of Criminal Appeal restated the test in the following terms:

> The prejudice to the individual accused, which to varying degrees must be present in every case, will rarely be material. It may be of concern if the means by which the evidence was obtained has the consequence that an accused cannot effectively respond to it. There may be other personal considerations in a particular case. However, the fundamental concern of the section is to ensure that, if the law has been breached, or some other impropriety has been involved in obtaining the evidence, this is balanced against the public interest in successfully prosecuting alleged offenders. The competing interests are obedience to the law in the gathering of evidence and enforcement of the law in respect of offenders.

A number of dissenting opinions given by Kirby J in the High Court on this issue led to a firm statement by the NSW Court of Criminal Appeal that s 138 is to be interpreted as stated in *R v Camilleri*: *Fleming v R* (2009) 197 A Crim R 282 at [21].

Section 138 should be read in conjunction with s 139, which defines the application of s 138 insofar as it deals with evidence obtained during official questioning. If in the particular case a full caution was required to be given to a suspect during official questioning (see s 139), and it was not given, it falls within s 138: *Em v The Queen* (2007) 232 CLR 67 at [119]–[120]. Section 138 is not, however, confined in its application to evidence obtained during official questioning.

The accused's right to silence will only be infringed where it was another person who caused the accused to make the statement, and where that person was acting as an agent of the state at the time the accused made the statement. Accordingly, two distinct inquiries are required: (i) did another person cause the accused to make the statement? and (ii) was that person an agent of the state? A person is an agent of the state if the exchange between the accused and that person would not have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents. There is no violation of the accused's right to choose whether or not to speak to the police if the police played no part in causing the accused to speak. If the accused speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police. The other person will have caused the accused to make admissions if the relevant parts of the conversation were the functional equivalent of an interrogation and if the state agent exploited any special characteristics of the relationship to extract the statement. Evidence of the instructions given to the state agent for the conduct of the conversation may also be important. The fact that the conversation was covertly recorded is not, of itself, unfair or improper, at least where the recording was lawful: *Pavitt v R*, above, at [70].

Unlawful or improper conduct does *not* include subterfuge, deceit or the intentional creation of opportunities for the commission of a criminal offence in the course of a police investigation, but that is not so where such conduct involves a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances, including (amongst other things) the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and imminent danger to the community: *Ridgeway v The Queen* (1995) 184 CLR 19 at 37.

The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence — the public interest in maintaining the integrity of the courts and ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement — will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution if criminal proceedings: *Ridgeway* at 38. When assessing the effect of the illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances. Ordinarily, however, any unfairness to the particular accused will be of no more that peripheral importance: ibid at 38. The discretion to exclude all evidence will ordinarily fall to be exercised on the assumption that the offence has been committed and that the effect of the exclusion of the evidence is that the prosecution will be shut out completely from proving guilt and that a guilty person will walk free. In contrast, the discretion to exclude illegally procured evidence will ordinarily be exercised on the basis that guilt or innocence remains an open question to be determined by reference to any other admissible evidence which the parties may see fit to place before the court: ibid at 38. On the other hand, in the worst cases of entrapment by illegal police conduct, the weight to be given to the public interest in the conviction and punishment of those guilty of crime may be lessened by the diminution in the heinousness of the accused's conduct resulting from (for example) the fact that he or she was an otherwise law-abiding person who would not have offended were it not for the "inordinate inducements" involved in the illegal conduct: ibid at 38–39. See also *Parker v Comptroller of Customs* [2007] NSWCA 348 at [58]–[62], [65]; *Dowe v R* (2009) 193 A Crim R 220 at [99]; *Cornwell v R* [2010] NSWCCA 59 at [180], [383].

Instances in which s 138 may or may not be applied Obtaining consent to a search of premises by inducing a false belief in the occupant that the police had a warrant which could be relied on

if consent were not forthcoming may in some circumstances amount to trickery or unacceptable deception, as would reliance on a warrant that was known to be invalid: *Parker v Comptroller-General of Customs*, above, at [56]; *AG v Chidgey* (2008) 182 A Crim R 536 at [8].

It is common, acceptable and expected practice that police investigators will, from time to time, speak to a suspect with a view to that suspect becoming a Crown witness (to "roll-over"). The process of taking an induced statement (that is, one rendered inadmissible against the suspect) to be considered by relevant prosecuting authorities is not uncommon, but it is for the Director of Public Prosecutions, and not police officers, to exercise the statutory power to determine whether an undertaking will be given under s 9 of the *Director of Public Prosecutions Act* 1983 (Cth): *R v Petroulias (No 9)* [2007] NSWSC 84 (Johnson J) at [47].

The failure of police to comply with time limits when interviewing a juvenile in relation to a robbery in company, where the failure would have led to the exclusion of the ERISP record in the trial of the juvenile, was irrelevant where the juvenile was called as a prosecution witness in the trial of the other persons involved in the robbery and where his interview was tendered in evidence, as s 138 is directed to the protection of the person interviewed and not of those other persons; a complaint that the tender was unfair to the accused on trial, who were not involved in the interview and would have to explain what he had said, was rejected: *R v Syed* [2008] NSWCCA 37 at [37]–[38].

Relevant to the discretion to be exercised under s 138 is whether the breaches of regulations were deliberate or reckless: *Lodhi v R* (2007) 179 A Crim R 470 at [162]. The action of an agent provocateur or person who induces another to commit a crime through subterfuge or trickery falls within the definition of improper conduct in s 138: *Parker v Comptroller-General of Customs* at [55]. Also caught by s 138 is reliance on a warrant known by police to be invalid or even reliance on a valid warrant which the police believed to be invalid: at [56]. There is no significant distinction between evidence obtained in contravention of an Australian law and evidence obtained in consequence of such a contravention: at [55].

There is no significant distinction between evidence obtained *in contravention of* an Australian law and evidence obtained *in consequence of* such a contravention: *Parker v Comptroller-General of Customs* at [55].

A helpful and practical analysis of s 138 is to be found in *R v Gallagher* [2015] NSWCCA 228. A police officer attended a rural property to conduct a firearms audit. There appeared to be nobody at the premises. He walked around the property and ultimately his attention was drawn to equipment and plants which he assessed to be cannabis plants. The officer left the property, arranged for the issue of search warrants and later took part in the search and seizure of an extensive range of plants and equipment.

At the trial of the occupants of the property, the judge found that the evidence was obtained as a consequence of "a contravention of an Australian law", namely a trespass on private property. He found that the police officer's conduct was reckless and that his contravention of the common law dictate against trespass was "of substantial gravity". The evidence was excluded from the trial.

The CCA (Gleeson JA, Adams and Beech-Jones JJ) disagreed with so much of the decision that asserted recklessness on the part of the police officer. His conduct could not be characterised "as anything worse than careless conduct undertaken in the honest belief that he was entitled to act as he did". His failure to observe the law, in all the circumstances, represented a relatively minor contravention of the law. The appeal was allowed.

Onus and burden of persuasion The onus of persuasion is initially on the party objecting to the evidence to establish that the evidence falls within the terms of s 138(1): *Gilmour v Environment Protection Authority* (2002) 55 NSWLR 593 at [46]. Once the judge is satisfied that it does, the onus of persuasion shifts to the party tendering the evidence that the desirability of admitting the evidence outweighs the undesirability of admitting it in the circumstances in which it had been obtained: *R v Coulstock* (1998) 99 A Crim R 143 at 147; *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at [33], [106].

There is no residual discretion: *R v Blick* [2000] NSWCCA 61 at [18]–[20]; *L'Estrange v R* (2011) 214 A Crim R 9 at [47]–[50].

The burden of proof required by s 142 of the *Evidence Act* for the admissibility of evidence (the balance of probabilities) requires a consideration of the gravity of the allegation and its consequences in accordance with *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362: *R v Petroulias (No 8)* (2007) 175 A Crim R 417 at [16]–[18].

In *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37 the Court of Appeal considered whether an allegation of sexual harassment in a termination of contract case required the trial judge to have regard to both the *Briginshaw* standard and "the gravity of the matters alleged" as required by s 140(2)(c). Gleeson JA said that s 140 reflected the principles stated in *Briginshaw v Briginshaw*, above, that the requirement that there should be clear and cogent proof of serious allegations did not change the standard of proof but merely reflected the perception that members of the community do not ordinarily engage in serious misconduct. In the present case the allegations against the defendant were clearly of a serious nature and, if established, would have significant detrimental consequences for him both under his business contract and in respect of his future employment prospects. There was no error of law in the trial judge referring to both *Briginshaw* standard and s 140(2)(c).

Application to civil proceedings Section 138 is not confined to criminal proceedings: *Robinson v Woolworths Ltd*, above, at [21]; but it has been little used in civil proceedings. In *Bedford v Bedford* (unrep, 20/10/98, NSWSC), it was unsuccessfully alleged that a tape recording had been made contrary to the *Listening Devices Act* 1984 (now repealed), and thus rendered inadmissible by s 13(1). It was, however, accepted by Windeyer J that the evidence had been improperly obtained, as the statements sought to be introduced into evidence were made in association with litigation improperly commenced and in response to a false statement (see s 138(2)(b)). The judge considered (at 13–14) that the evidence was not such that the action would fail without it, that the conduct on the part of the plaintiff and his solicitor was deliberate and most serious, and that disciplinary proceedings might possibly be taken against the solicitor (s 138(3)(g)). The evidence was rejected on the basis that the undesirability of admitting the evidence outweighed the desirability of admitting it. (Strictly speaking, it would have been sufficient for the judge to have rejected the evidence on the basis that the plaintiff had failed to persuade him that the desirability of admitting the evidence outweighed the undesirability of not admitting it).

Another example of the application of s 138 in a non-criminal situation is to be found in *Gibbons v Commonwealth* [2010] FCA 462 at [26]. This was an application for an extension of time in which to appeal from the decision of a magistrate to dismiss declaratory relief to a former police officer refused relief under the (Cth) *Disability Discrimination Act* 1992. He had been injured in a motor vehicle accident unassociated with his employment. The ACT magistrate's decision was based in part on the report of a defence force medical practitioner (Dr Lambeth) who was not registered to practise in the ACT, but whose opinion had been sought by the applicant and which, although unfavourable, the applicant had tendered for the particular forensic purpose of attempting to demonstrate an improper relationship between Dr Lambeth and his former employer, the Australian Federal Police. The Commonwealth had not objected to its tender, and in part relied on its conclusion to support its case. In the Federal Court, Logan J held that the magistrate had not erred in relying on the report as establishing the medical issue in favour of the AFP. He held (at [29]) that the doctor, although not at the time registered in the ACT, was qualified in the sense of possessing the requisite training to express a medical opinion, and it was the opinion, not the circumstances attending registration, that was relevant.

[4-1650] Cautioning of persons — s 139

The term "investigating official" is defined in the Dictionary to the *Evidence Act*.

"questioning" The word is not defined in the *Evidence Act*. It does not include a conversation between the accused and the police officer; it is aimed at formal or informal interrogation of a suspect by a police officer for the purpose of the officer obtaining information, whether or not at the time of the interrogation the suspect was formally under arrest: *R v Naa* (2009) 197 A Crim R 192 at [98]–[99]). That was a "siege" case, and the police officer was involved in negotiation rather than investigation.

The provisions as to admissions contained in s 139 apply only to matters caught by the statutory definition of that term and its essential element "representation" as contained in the Dictionary; a handwriting sample provided does not amount to a representation: *R v Knight* (2001) 120 A Crim R 381 at [80]; *Knight v The Queen* [2002] HCA Trans 81 (5 March 2002)

Section 139(1) and (2) are deeming provisions: *Em v The Queen* (2007) 232 CLR 67 at [105], [117]–[118]. They require the court to find that there has been an impropriety in accordance with s 138(1) notwithstanding that the court might not have considered that, on the particular facts and circumstances before it, the evidence was improperly obtained or obtained as a result of an impropriety; the court should determine whether the section is engaged having regard to the particular facts and circumstances before it, but with due regard to the seriousness of a finding that evidence was obtained improperly or as a consequence of an impropriety and to the outcome of such a finding. Not every defect, inadequacy, or failing in an investigation should result in a finding that the section applies merely because it may be considered that, as a result of those defects, inadequacies or failings, the investigation was not properly conducted or that the police did not act properly in a particular respect. On the other hand, the terms of s 138(3)(e), which require the court to take into account whether the "impropriety or contravention was deliberate or reckless", makes it clear that the conduct need not necessarily be wilful or committed in bad faith or as an abuse of power: *R v Cornwell* (2003) 57 NSWLR 82 at [18]–[20] (the decision in *Cornwell v The Queen* (2007) 231 CLR 260 did not relate to this statement).

In the balancing exercise required by s 138, the absence of the caution required by s 139 may be disregarded where it is clear that the accused was well aware of his rights having already been interviewed by way of ERISP when he was cautioned: *R v Walsh* [2003] NSWSC 1115 at [18].

Posing for a photograph at the direction of a police officer was not an act done during questioning for the purposes of s 139(1): *R v G* [2005] NSWCCA 291 at [62].

In a case in which the accused was charged with knowingly making false applications for birth and death certificates in false names, the prosecution sought to prove that the applications were made in the accused's handwriting by tendering documents (known as P 59B forms) which provided identification material such as date and place of birth, physical description, and employment. The accused had completed these documents when he was fingerprinted after his arrests at different times on this and other charges, and which documents were the subject of a comparison by an expert handwriting witness to establish that the false applications had been written by the accused. No caution had been given to the accused when asked to complete the documents as to the use that they could be put against his interests and he was not told that there was no compulsion on him to complete the forms. The legislative provision expressly provided that the consent of the person arrested was not required for the taking of fingerprints or particulars thought to be necessary for the identification of that person. There was no finding that the accused would not have completed the forms if told it was not compulsory. On appeal, it was held that there was no basis for a finding that the documents amounted to self-incrimination which should have been preceded by a caution, or that there had been any impropriety: *R v Knight* (2001) 120 A Crim R 381 at [78]–[81].

For an example of how far investigating officials are entitled to go in continuing their investigation without forming a belief that there was sufficient evidence to establish that the person questioned has committed an offence, see *R v Pearce* [2001] NSWCCA 447 at [97]–[105].

Legislation

- *Director of Public Prosecutions Act* 1983 (Cth), s 9
- *Evidence Act* 1995, ss 53, 55, Pt 3.3 (ss 76–80), Pt 3.4 (ss 81–90), s 114, Pt 3.11 (ss 135–139), ss 142, 192, 192A, Dictionary
- *Evidence Amendment Act* 2007
- *Listening Devices Act* 1984, s 13(1) (repealed)

Further references

- Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102; NSWLRC Report 112, VLRC Final Report, 2005
- S Odgers, *Uniform Evidence Law*, 18th edn, Thomson Reuters, Sydney, 2023
- J Stone, *Evidence: Its History and Policies*, Butterworths, Sydney, 1991

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Appeals except to the Court of Appeal, applications, reviews and mandatory orders

Appeals from judges of the Supreme Court and the District Court and from certain decisions of the Civil and Administrative Tribunal lie to the Court of Appeal and are not covered by this review.

[5-0200] Appeal from an associate judge of the Supreme Court to a judge of that court

An appeal lies from an associate judge of the Supreme Court to a judge of that court except where an appeal lies to the Court of Appeal: r 49.4.

Section 75A, Appeal, of the SCA applies: s 75A(1). The section includes the following provisions:

- Where the decision under appeal follows a hearing, the appeal is by way of rehearing: s 75A(5). That is a rehearing on the record, as delineated in *Warren v Coombes* (1979) 142 CLR 531 at 553. See also *Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409 at 420 per Cross J and *Morrison v Judd* (unrep, 10/10/95, NSWCA). For a fuller discussion of the nature of such an appeal, see *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40] and *Thomson Reuters* [SCA 75A.60]
- The court has the powers and duties of the court, body or person from whom the appeal is brought: s 75A(6)
- The court may receive further evidence (s 75A(7)), but only on special grounds if the appeal is from a judgment following a trial or hearing on the merits unless the evidence concerns matters occurring after the trial or hearing: s 75A(8) and (9). What constitutes "special grounds" depends on the circumstances of the case. For a fuller discussion, see *Ritchie's* [SCA s 75A.45]–[SCA s 75A.52]; *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* (2019) 99 NSWLR 447 at [68]–[70], [83]. Also see *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 and *Levy v Bablis* [2013] NSWCA 28,
- The court may make any finding, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires: s 75A(10).

Part 49 of the UCPR, Reviews and Appeals within the court, applies insofar as it relates to appeals. The Part includes the following provisions:

- an appeal is instituted by notice of motion: r 49.8(1)
- time for appeal: r 49.8(2)–(5)
- contents of notice of motion: r 49.9
- institution of an appeal has no effect on the judgment, order or decision under appeal unless otherwise directed: r 49.10
- cross appeal: r 49.11
- no further evidence on appeal unless by leave, and the form of any such further evidence: r 49.12,
- notice of contention: r 49.13.

It appears that the requirement for leave under r 49.12 is intended to restrict the reception of further evidence pursuant to s 75A(7) of the SCA.

The practice is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

[5-0210] Sample orders

Appeal allowed / dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0220] Appeals to the Supreme Court and to the District Court

Such appeals are constituted by the legislation relating to the court or tribunal from which the appeal lies.

Whether the appeal is as of right or only by leave depends on the legislation constituting the appeal. The nature of the appeal may be specified or may have to be inferred from the legislation: *Builder Licensing Board v Sperway Construction (Sydney) Pty Ltd* (1976) 135 CLR 616.

As to appeals from the Civil and Administrative Tribunal, see R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney. Also at R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87.

Most appeals to the Supreme Court, other than to the Court of Appeal, are assigned to the Common Law Division: see r 45.8 and Sch 8.

In the case of appeals to the Supreme Court, s 75A of the SCA applies. (See [5-0200], above, for a summary of the section.) Section 75A is subject to any other Act: s 75A(4). The statutes constituting appeals often include provisions (relating, for example, to the nature of the appeal or time for appeal) which then take priority.

Part 50 of the UCPR, Appeals to the Court, applies to appeals to the Supreme Court (other than appeals to the Court of Appeal) and to appeals to the District Court: r 50.1. The Part operates subject to any provision in any Act to the contrary: see the note in the UCPR following r 50.1.

Part 50 includes provisions relating to the following matters:

- time for appeal: r 50.3
- the required content of the summons initiating the appeal and of the separate statement of grounds of appeal: r 50.4 and Form 74
- parties: r 50.5
- the appeal does not operate as a stay: r 50.7
- security for costs: r 50.8
- cross-appeals: r 50.10
- notice of contention: r 50.11
- procedure concerning leave to appeal (r 50.12), and cross-appeal: r 50.13
- preparation, filing and service of the reasons for decision of the court below, transcript, exhibits etc: r 50.14
- if the decision under appeal has been given after a hearing, the appeal is by way of rehearing: r 50.16. See [5-0200], above, in relation to SCA s 75A(5),
- obligation on a defendant who objects to the competency of an appeal to apply for an order dismissing the appeal as incompetent: r 50.16A.

As in the case of appeals from an associate judge to a judge of the Supreme Court, the practice in the Supreme Court is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

Special provisions relating to appeals from the Local Court are reviewed below.

[5-0230] Sample orders

Appeal allowed/ dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0240] Appeals from the Local Court

As of right: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division, but only on a question of law: LCA s 39(1).

An appeal lies to the District Court against a judgment or order of the Local Court sitting in its Small Claims Division but only on the ground of lack of jurisdiction or denial or denial of procedural fairness: LCA s 39(2).

By leave of the Supreme Court: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division on a ground which involves a question of mixed law and fact (s 40(1)) or which is an interlocutory judgment or order, a consent judgment or order or an order for costs: s 40(2).

The Supreme Court may dispose an appeal under s 39(1) or s 40 by:

- varying the terms of the judgment or order
- setting aside the judgment or order
- setting aside the judgment or order and remitting the matter to the Local Court for determination in accordance with the Supreme Court directions,
- dismissing the appeal: s 41(1).

The general principles which govern an application for leave to appeal are set out in *Namoi Sustainable Energy Pty Ltd v Buhren* [2022] NSWSC 175 at [34]–[39] (which concerned an appeal from an interlocutory decision of a magistrate) and include:

1. The jurisdiction which the court exercises is a preliminary procedure which is recognised by the legislation as a means of enabling a court to control the volume of appellate work requiring its attention:*Coulter v The Queen* (1988) 164 CLR 350.
2. It is appropriate to grant leave only in those matters that involve issues of principle, questions of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable:*Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284; *McEvoy v Wagglens Pty Ltd* [2021] NSWCA 104 at [35].
3. It is necessary for the court to examine the merits of the arguments advanced in support of the appeal, and pay attention to whether any injustice had been occasioned to either party, such that the intervention of the court is required: *Sokolowski v Craine* [2019] NSWSC 1123 at [119].

4. The intention of the *Local Court Act 2007* is that the Supreme Court should have supervision over Local Courts in matters of law. Where small claims are involved, it is important that there be early finality in the determination of litigation: *Henamast Pty Ltd v Sewell* [2011] NSWCA 56 at [22].
5. There is a need for legal costs to be proportionate to the amount in issue. A relevant consideration in the exercise of the discretion to grant leave is the proportionality between the amount in issue and the legal costs which have been expended: *Crane v The Mission to Seafarers Newcastle Inc* [2018] NSWSC 429 at [28].

The District Court has similar powers in respect of appeals under s 39(2): s 41(2).

Appeal from the Local Court in its special jurisdiction: Section 70(1) LCA confers a right of appeal in respect of any order made in its special jurisdiction. Any appeal to the District Court is to be made in accordance with Pt 3 of the *Crimes (Appeal and Review) Act* 2001 (CARA Act) "in the same way as such an … appeal may be made in relation to a conviction arising from a court attendance notice" dealt with under Pt 2 of Ch 4 of the *Criminal Procedure Act 1986*: *Huang v Nazaran* [2021] NSWCA 243 at [22]–[24]. Section 70 is not to be construed as restricting or qualifying the subject matter of such an appeal so that it is limited to a conviction (or sentence) appeal: *Huang v Nazaran* at [21]. The right to appeal from any order is "by way of rehearing" in accordance with ss 18 and 19 of the CARA Act, the District Court relevantly having power in determining the appeal to exercise "any function that the original Local Court could have exercised in the original Local Court proceedings" (s 28(2)): *Huang* at [23]; see also *Lewis v Sergeant Riley* (2017) 96 NSWLR 274 at [12].

In *Huang*, the applicants were found to have a right of appeal to the District Court from an order of a magistrate dismissing their application for a noise abatement order, an order awarding costs and an order revoking a noise abatement order pursuant to s 268 of the *Protection of the Environment Operations Act* 1997.

[5-0250] Sample orders

Appeal allowed/ dismissed.

(If allowed) I vary the terms of the judgment/ order by deleting/ substituting/ adding …, or

I set aside the judgment/ order, or

I set aside the judgment/ order, or

I set aside the judgment/ order and remit the matter to the Local Court for determination in accordance with these reasons for judgment (or specifying directions as may be appropriate)…

Costs

[5-0255] Applications and appeals to the District Court and Local Court in federal proceedings

Federal proceedings are covered in Pt 3A of the *Civil and Administrative Tribunal Act* 2013. "Federal jurisdiction" (formerly referred to as "federal diversity jurisdiction") is defined in s 34A as "jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution".

The *Justice Legislation Amendment Act* 2018 (commenced 1 December 2018) amended Pt 3A of the *Civil and Administrative Tribunal Act* 2013 to enable persons to commence proceedings in the District or Local Court for the determination of original applications and external appeals that the NSW Civil and Administrative Tribunal (the Tribunal) cannot determine because they involve the exercise of federal jurisdiction.

These amendments were made in response to a series of cases concerned with whether the Tribunal could exercise federal jurisdiction. In *Burns v Corbett* (2018) 265 CLR 304, the High Court held that the Tribunal could not exercise jurisdiction of the kind referred to in ss 75 or 76 of the Constitution (Cth). A State law purporting to confer such jurisdiction is inconsistent with Ch III and therefore invalid. The High Court affirmed, for different reasons, the NSW Court of Appeal's decision that the Tribunal had no jurisdiction to determine matters between residents of different States: *Burns v Corbett* (2017) 96 NSWLR 247. It was common ground between the parties that the Tribunal was not a court of the State, so the High Court was not required to decide this issue.

Following these decisions, an Appeal Panel of the Tribunal determined that, in making orders under the *Residential Tenancies Act* 2010 (NSW) commenced between residents of different States, the Tribunal was exercising federal jurisdiction. Further, the Tribunal determined that the Tribunal was a court of the State within the meaning of s 39(2) of the *Judiciary Act* 1903 and s 77(ii) of the Constitution: *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45. The Court of Appeal, in a 5-judge decision, held that the Tribunal was not a court of the State for this purpose: *Attorney General for NSW v Gatsby* [2018] NSWCA 254.

A person with standing to make an original application or external appeal may, with the leave of an authorised court (the District Court or the Local Court), make the application or appeal to the court instead of the Tribunal: s 34B(1).

Leave may be granted only if the court is satisfied that the application or appeal was first made with the Tribunal (s 34B(2)(a)), that the Tribunal does not have jurisdiction to determine the matter because its determination involves the exercise of federal jurisdiction (s 34B(2)(b)), that the Tribunal would otherwise have jurisdiction to determine the matter (s 34B(2)(c)), and that substituted proceedings would be within the jurisdictional limit of the court: s 34B(2)(d).

The court may remit on application or appeal to the Tribunal if it is satisfied that the Tribunal has jurisdiction to determine it: s 34B(5).

The District Court may grant leave and then transfer proceedings to the Local Court in accordance with the provisions of Pt 9 Div 2 CPA.

For s 75(iv) of the Constitution to apply, the parties must have been residents of different States at the time of bringing the application: *Dahms v Brandsch* (1911) 13 CLR 336.

A company is not a resident for the purposes of s 75(iv): *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282.

The District Court or Local Court has, and may exercise, all of the jurisdiction and functions in relation to the substituted proceedings that the Tribunal would have had if it could exercise federal jurisdiction: s 34C(3).

Section 34C(4) makes a number of modifications as to functions of procedural matters in relation to the conduct of the proceedings.

[5-0260] Review of directions etc of registrars

Part 49 of the UCPR, Reviews and Appeals within the Court, includes provisions relating to the review of a registrar's directions, orders and acts.

These provisions do not apply to the judicial registrar of the District Court: r 49.14. Otherwise, they apply to registrars of the Supreme Court, District Court and Local Court.

A judge or magistrate of the Supreme Court, District Court or Local Court may, on application, review the direction, order or act of a registrar of the respective court, and may make such order by way of confirmation, variation, discharge or otherwise as is thought fit: r 49.19(1). However, decisions of the registrar of the court under cl 11(1) of the *Civil Procedure Regulation* 2017 are not reviewable by a court under Div 4, Pt 49 of the Rules: (r 49.19(2)).

Section 75A of the SCA, Appeal, does not apply to a review.

Prior to the amendment of r 49 on 7 September 2007, a line of authority had developed to the effect that a review was akin to an appeal of the kind provided for in the rules. Following the amendment it is clear that a review is not such an appeal: *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 (CA); *Liverpool City Council v Estephen* [2008] NSWCA 245 at [17].

In *Tomko v Palasty (No 2)*, above, at [52] Basten JA set out the correct approach to a review under r 49 as follows:

> (2) a review, unlike an appeal, does not require demonstration of error, nor is it restricted to a reconsideration of the material before the primary decision-maker;
>
> (3) authorities with respect to the conduct of appeals against the exercise of discretionary powers, such as *House v The King*, do not in terms apply to a review;
>
> (4) nevertheless, similar policy considerations may arise in relation to a review, including:
>
> (a) a court may be less inclined to intervene in relation to a decision concerned with the management of an on-going proceeding, as opposed to one which terminates the proceeding or prevents its commencement;
>
> (b) different factors may need to be addressed in relation to breach of time limits in relation to the commencement of proceedings, as compared with breach of time limits for steps to be taken in the course of proceedings properly commenced, and
>
> (c) a court may be more inclined to intervene on a review based on fresh evidence, changed circumstances or where error is demonstrated in the decision under review.

It should be noted that, whilst Hodgson and Ipp JJA agreed with this approach and that on such a review the court must exercise its own discretion, Ipp JA agreed with qualifications expressed by Hodgson JA at [7]–[9] which can be summarised as follows:

- A court's discretion extends to a discretion as to whether, and if so how, to intervene.
- There is an onus on a person seeking to have a court set aside or vary a registrar's decision to make a case that the court, in the interests of justice, should exercise its discretion to do so.
- In the case of a decision on practice or procedure, this will normally require at least demonstration of an error of law, or a *House v The King* (1936) 55 CLR 499 error, or a material change of circumstance or evidence satisfying the strict requirements of fresh evidence. Even then, the court may not think the interest of justice requires intervention. A court may be more willing to intervene in a decision which finally determines a party's rights or has a decisive impact upon them.

Following the amendment referred to above, Pt 49 now includes the following provisions:

- a review is instituted by notice of motion: r 49.20(1)
- time for review: r 49.20(2)–(5),
- exceptions to the foregoing subrules: r 49.20(6).

The amendment of r 49 repealed r 49.17 which provided that the institution of a review had no effect on the direction etc under review.

[5-0270] Sample orders

I order that the order/ direction/ act/ certificate of Registrar … made/ given/ done/ issued on … be confirmed/ varied by …/ discharged/ replaced with the following direction/ order/ act/ certificate, namely …

Costs

[5-0280] Mandatory order to a registrar or other officer

A judge or magistrate of the Supreme Court, District Court or Local Court, of his or her own motion or on application, may, by order, direct a registrar or other officer of the respective court to do or refrain from doing any act in any proceedings relating to the duties of his or her office: r 49.15.

The rule does not apply to the judicial registrar of the District Court: r 49.14.

[5-0290] Sample orders

Last reviewed: March 2024

I direct the Registrar (or other officer) to… / not to …

Legislation

- *Supreme Court Act* 1970, s 75A, Sch 8
- *Local Court Act* 2007, ss 39, 40, 41

Rules

- UCPR r 45.8, Pt 49, Pt 50

Further references

- *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40], [SCA s 75A.45]–[SCA s 75A.52]
- *Thomson Reuters* [SCA 75A.60]
- R Beech-Jones, "The Constitution and State Tribunals" (2023) 1 *Judicial Quarterly Review* 41
- R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney
- R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87

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Equitable jurisdiction of the District Court

Acknowledgement: the following material has been prepared by Mr Christopher Wood.

This chapter is adapted with permission from E Finnane, HN Newton & C Wood, Equity Practice and Precedents, Thomson Reuters 2008.

[5-3000] Sources of jurisdiction

Last reviewed: March 2024

The District Court of New South Wales has no powers beyond those that the Parliament conferred on it, or which can be necessarily inferred from those powers. Over the years there has been an enlargement of the District Court's equitable jurisdiction (conveniently traced by Kirby J in *Pelechowski v Registrar, The Court of Appeal* (1999) 198 CLR 435 at [118]–[120]) culminating in the inclusion of s 134(1)(h) in the *District Court Act* 1973 (the Act), said to be for a "wide reforming purpose": *Commonwealth Bank of Australia v Hadfield* (2001) 53 NSWLR 614 at [68] per Bryson J.

The jurisdiction of the District Court to deal with applications of this kind is derived from three broad sources. First, there is a range of equitable powers and remedies conferred by the Act. These are discussed below.

Secondly, the District Court has such jurisdiction as is conferred upon it by any other legislation (s 9 of the Act). For example, the District Court has jurisdiction to grant relief under s 7 of the *Contracts Review Act* 1980 that is in the nature of equitable relief and is informed by equitable principles (s 134B and definition of "Court"). The District Court also has the power to grant some statutory applications involving property claims arising from relationships or deceased estates: *Property (Relationships) Act* 1984; *Family Provision Act* 1982 and the *Testator's Family Maintenance and Guardianship of Infants Act* 1916. The jurisdictional limit applicable to these provisions is set out in s 134.

Thirdly, the District Court has such power as is necessarily implied from any specific grant of power: *Grassby v The Queen* (1989) 168 CLR 1. This is to be distinguished from inherent jurisdiction because it is not referable to the nature and function of the court itself, but only to the statutory grant of power (and the things that may be necessary to give proper effect to that grant). Implied powers are confined to those reasonably required or legally ancillary to the exercise of a specific power: *Attorney-General v Walker* (1849) 154 ER 833 at 838–839, applied in *Pelechowski*, above, at [51]. A precondition to implication of a power is that the power sought to be implied is necessary for the proper use of the power granted by Parliament. This has been said to be subject to a touchstone of reasonableness: *State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447 at 452.

In *Pelechowski*, above, the majority of the High Court (at [51] per Gaudron, Gummow and Callinan JJ) went so far as to say that power to grant a Mareva-style order after judgment to prevent the judgment debtor selling his house was not to be implied into the power to grant orders for execution against the house. This was so, the majority said, because the order granted in the District Court was wider than the order strictly necessary to prevent an order for execution being frustrated.

The District Court's power to grant Mareva-style relief against third parties was also considered in *Tagget v Sexton* [2009] NSWCA 91. In that matter, the Court of Appeal held that the District Court had no power under the District Court Act, or the UCPR to make a freezing order against a third party unless there was a process in that court which could ultimately lead to judgment against the third party. Although the Court held that there was an implied power to make the order, the District Court had gone beyond the scope of that power. The District Court now has the power to make freezing orders, including against third parties: UCPR r 25.11, 25.13.

The District Court also has jurisdiction to entertain equitable defences: ss 6–7 *Law Reform (Law and Equity) Act* 1972. The court cannot gain greater equitable jurisdiction by consent of the parties

(*Bourdon v Outridge* [2006] NSWSC 491 at [25]), but if a matter is transferred to it by the Supreme Court, it will have unlimited equitable jurisdiction: s 149 *Civil Procedure Act* 2005; *Paull v Williams* (unrep, 4/12/02, NSWDC) per Bell J. Once equitable jurisdiction is established, equity will prevail over the common law to the extent of any conflict or variance: s 5 *Law Reform (Law and Equity) Act* 1972, which applies to the District Court: *Yahl v Bridgeport Customs* (unrep, 31/7/84, NSWSC), although see the comments of Glass JA in *Joblin v Carney* (1975) 1 BPR 9642.

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

[5-3010] Specific grants of equitable jurisdiction

Temporary injunctions

There are essentially two broad classifications of injunctive relief that may be ordered in the District Court. The first is specifically provided for in s 140 of the Act.

Section 140 of the Act allows the court, in limited circumstances, to grant interlocutory injunctions, described as "temporary injunctions". Section 140(1) provides:

> The Court shall have jurisdiction to grant an injunction, to be called a temporary injunction, to restrain:
>
> (a) a threatened or apprehended trespass or nuisance, or
>
> (b) the breach of a negative stipulation in a contract the consideration for which does not exceed $20,000,
>
> in like manner, subject to this Subdivision, as the Supreme Court might grant an interlocutory injunction in like circumstances.

The power under s 140 is limited as to time; it can only be in force for 14 days in total: s 140(2). This is said to be designed to enable a party to maintain the status quo while they apply to the Supreme Court for injunctive relief until further order: s 140(3); *Pelechowski v Registrar, The Court of Appeal* (1999) 198 CLR 435 at [38]. An order cannot be a valid exercise of the power under s 140 unless by its terms it is limited to an express period not exceeding 14 days: *Pelechowski* at [38] and [123].

Injunction incidental to another power

The second source of power to grant an injunction is where it is ancillary to the court's power to hear a particular action either pursuant to s 46 of the Act, or, in very limited circumstances, the court's implied jurisdiction.

The key parts of s 46 are:

> (1) Without affecting the generality of Division 8, [in which s 140 is located] the Court shall, in any action, have power to grant any injunction (whether interlocutory or otherwise) which the Supreme Court might have granted if the action were proceedings in the Supreme Court.
>
> (2) In relation to the power of the Court to grant an injunction under this section:
>
> (a) the Court and the Judges shall, in addition to the powers and authority otherwise conferred on it and them, have all the powers and authority of the Supreme Court and the Judges thereof in the like circumstances,
>
> …
>
> (c) the practice and procedure of the Court shall, so far as practicable and subject to this Act and the rules, be the same as the practice and procedure of the Supreme Court applicable in the like circumstances…

The expression "action" means an action in the court but is defined to exclude actions under Pt 3 Div 8 (the court's equitable jurisdiction) and Pt 4 (criminal matters): s 4 of the Act; *Nelson v Fernwood Fitness Centre Pty Ltd* [1999] FCA 802 at [5]. The requirement that the jurisdiction be

exercised "in any action" has been construed strictly, and must be directly referable to a cause of action currently being maintained in the court under the jurisdiction conferred by s 44: *Pelechowski*, above, at [41]–[44], [51]–[52]. The majority of the High Court in that matter held that the power under s 46 was not available to grant a Mareva-style order after judgment had been pronounced, notwithstanding the fact that the notice of motion seeking the injunctive relief was filed before judgment was pronounced on the substantive claim.

Many common styles of injunctive relief can arise in the context of a District Court claim. For example, the District Court can grant a Mareva-style order (described as "freezing orders" in UCPR r 25.11) to restrain a party from dealing with an asset that is the subject of litigation in that court: *Frigo v Culhaci* (unrep, 17/7/98, NSWCA); see Pt 25 Div 2 of the UCPR. Where there is a threat of destruction of documents relevant to a cause of action brought under s 44, the court can grant an Anton Piller order (described as a "search order" in UCPR r 25.19). Once it is established that an action has been properly brought under s 44, the court's power to grant an injunction is not limited, and may be employed in a defensive manner to prevent the maintenance of a cause of action that equity would not allow: *Overmyer Industrial Brokers Pty Ltd v Campbell's Cash and Carry Pty Ltd* [2003] NSWCA 305 at [60].

The power to grant an injunction under s 46 is governed by the rules of court (UCPR rr 25.1–25.24) and the usual practice and procedure of the Supreme Court (s 46(2)(c) of the Act). The rules, which are drafted in permissive terms, do not extend the jurisdiction of the court (s 5(2) *Civil Procedure Act* 2005), so the requirement that an application for an injunction under s 46 arises "in an action" under s 44 remains critical: *Pelechowski v Registrar*, above at [44], and *Tagget v Sexton*, above at [57].

[5-3020] Specific equitable jurisdiction under s 134 of the Act

Last reviewed: March 2024

In addition to the power to grant injunctive relief, the court is specifically conferred with equitable jurisdiction under s 134(1) of the Act, which contains specific heads of power to hear claims based on equitable principles (in the most part within limited monetary constraints). Once it is demonstrated that an equitable claim is within s 134, the District Court has all of the equitable powers of the Supreme Court, including the power to grant injunctions. That power is not subject to the requirement that it be in an "action" under s 44 (although there must be a claim under s 134), unlike the ancillary power under s 46, which remains subject to the s 44 limitations. See also the comments of Leeming JA in relation to the District Court equitable jurisdiction in *Great Northern Developments Pty Ltd v Lane* [2021] NSWCA 150 at [83]–[101].

Equitable claims for money

Section 134(1)(h) grants the court power, up to the limit of the court's jurisdiction, in respect of "any equitable claim or demand for recovery of money or damages". Once an equitable claim for money is established, the District Court can grant equitable remedies including equitable compensation. This means that the court can order that an account be taken in equity (*Commonwealth Bank v Hadfield* (2001) 53 NSWLR 614) even though an order for an account will usually be separate from the substantive order requiring payment of so much as is determined to be owing. A claim for an indemnity is a claim or demand for recovery of money, and is covered by s 134(1)(h): *Kolavo v Pitsikas (t/a Comino and Pitsikas*) [2003] NSWCA 59. A claim for equitable damages arising from a breach of fiduciary duty will be within the court's power, notwithstanding the decision of the Federal Court in *Tzovaras v Nufeno Pty Ltd* [2003] FCA 1152 at [16], [38].

An equitable claim for subrogation may, in some circumstances, be a claim for recovery of money in equity (although some relief is available at common law: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [16]). A claim for contribution in equity (which should be distinguished from a claim for contribution in tort, which is a statutory remedy) or tracing would appear to come squarely within s 134(1)(h) of the Act. The power under this provision would also

extend to a claim for equitable compensation for the breach of an agreement that is only enforceable in equity. However, in some circumstances, equitable compensation will not be available unless an order for specific performance is ordered: *McMahon v Ambrose* [1987] VR 817.

A claim for promissory estoppel is not within the paragraph: *Bushby v Dixon Homes du Pont Pty Ltd* (2010) 78 NSWLR 111 at [26]. However, promissory estoppel may be pleaded as a defence, and s 6 of the *Law Reform (Law and Equity) Act* 1972 gives the court jurisdiction to deal with the equitable defence: *Bushby* at [27]–[28], [33].

Enforcement and redemption of securities

Under s 134(1)(a) of the Act the court has power to hear claims on the enforcement of securities where the debt is $20,000 or less. This includes the power, within this limit, to hear a suit on the equity of redemption, even where it is disputed: *Powell v Roberts* (1869) LR 9 Eq 169. The power in respect of foreclosure of a mortgage or enforcement of a charge would seem to cover contested applications relating to a mortgagee in possession and an action to restrain the appointment of a receiver (with the effect that the District Court has all of the power of the Supreme Court, but cannot hear actions exceeding $20,000). However, applications that arise indirectly from the enforcement of a mortgage, such as an action for account (*Commonwealth Bank of Australia v Hadfield*, above), will not be covered by the provision, with the result that the parenthetical exclusion in s 134(1)(h) does not apply and the jurisdiction to order an account can be exercised up to the $750,000 monetary limit.

Specific performance

Under s 134(1)(b) of the Act the court has power in relation to specific performance, rectification, delivery up and cancellation of agreements for sale and lease, subject to a $20,000 limit. This means that a claim based on a contract that is not for the sale or lease of property is outside s 134(1)(b) and would have to be cast as an equitable claim for money before the court can exercise its equitable jurisdiction under s 134(1)(h): *Central Management Holding Pty Ltd v Nauru Phosphate Royalties Trust* (unrep, 9/3/05, NSWDC). In the case of agreements for the lease of property, the $20,000 limit applies to the value of property, not the value of the leased land (*Angel v Jay* [1911] 1 KB 666), whereas in the case of sale, it is the price rather than the value.

Relief against fraud or mistake

A contract that is vitiated by fraud or mistake can be set aside in equity under s 134(1)(d) of the Act: *Stephenson v Garnett* [1898] 1 QB 677 at 681. However, it should be kept in mind that an action for damages caused by fraud is an action at common law (*Pasley v Freeman* (1789) 100 ER 450) and can be brought under s 44 of the Act up to the jurisdictional limit of the court. It is only where, by reason of the fraud, a party seeks relief other than damages (for example, rescinding a contract and putting the parties back into their pre-contractual position even though true restitution is impossible as was the case in *Alati v Kruger* (1955) 94 CLR 216) that recourse to equity will be necessary. Of course, the term fraud is used differently at common law to equity. In equity, relief is available in respect of many unconscionable gains (often called "equitable fraud", see generally, Leeming JA in *Great Northern Developments Pty Ltd v Lane* [2021] NSWCA 150 at [97]–[100]; ch 4 in J Glover, *Equity, Restitution and Fraud*, LexisNexis Butterworths, Chatswood, 2004) which would not be actionable at common law for want of actual intent to deceive or reckless indifference to the truth: *Derry v Peek* (1889) 14 App Cas 337. The reference to relief against fraud in s 134(1)(d) should not be taken as a reference to equitable fraud, but to the ordinary meaning of the term and thus requires both falsity and knowledge of the falsity: see the approach in *Commonwealth Bank of Australia v Hadfield*, above, at [56]. Claims based on breaches of fiduciary duties are not, therefore, excluded from s 134(1)(h).

Trusts

While it has been said that only the Supreme Court has jurisdiction to declare the existence of a constructive trust (*Deves v Porter* [2003] NSWSC 625 at [70]), the District Court has a specific

power in relation to the declaration of trusts and the execution of trusts where the trust fund does not exceed the $20,000 limit: s 134(1)(e) of the Act; *Clayton v Renton* (1867) LR 4 Eq 158 at 161; *Daniels v Purcell* (unrep, 2/3/05, NSWDC). The trust might not subsist over all of the property that is the subject of dispute, and the $20,000 limit is referable only to what is held in trust.

Estates and relationships

The District Court has a limited monetary jurisdiction to deal with most issues that arise in connection with deceased estates. This includes making orders under the *Family Provision Act* 1982, or the *Testator's Family Maintenance and Guardianship of Infants Act* 1916, s 134(1)(c) of the Act, even where that involves ordering a notional estate: *Birch v O'Connor* (2005) 62 NSWLR 316 at [12], [20]. The court can order the administration of estates if the estate does not exceed $20,000 (s 134(1)(f) of the Act), empowering the court to entertain equitable claims in relation to administrations: *Dobell v Parker* [1960] NSWR 188 at 64–65 per Hardie J. The District Court can also make an award for the distributive share under a will or intestacy: s 44(1)(c) of the Act. It has been said, in relation to similar provisions, that the onus is on the defendant to show that the value of the estate exceeds the jurisdiction: *Shepherd v Patent Composition Pavement Co* (1873) 4 AJR 143; *Martin v Keane* (1878) 14 VLR (E) 115.

For applications under the *Property (Relationships) Act* 1984, the District Court has a jurisdiction up to $250,000. However, there are restrictions on the court's ability to order constructive trusts based on the general equitable power based on the principles set out in *Baumgartner v Baumgartner* (1987) 164 CLR 137 at [32]–[33] and *West v Mead* [2003] NSWSC 161 at [52]–[64], as distinct from the statutory power. Outside of the operation of the *Property (Relationships) Act* 1984, the District Court lacks jurisdiction in equity to grant the order if the trust property exceeds $20,000 in value: *Deves v Porter* at [70]. However, once jurisdiction is established under the Act, the District Court has the power to make any declaration as to rights (even beyond $250,000) and can give orders in the nature of a constructive trust up to the limit of $250,000: *Bourdon v Outridge* [2006] NSWSC 491 at [20]–[21]. The comments of Campbell J in *Deves v Porter* at [70] were confined to the remedy of a constructive trust in equity, not statutory relief.

Effect of establishing jurisdiction

The effect of establishing jurisdiction under s 134(1) of the Act is that the District Court then has the powers of the Supreme Court when dealing with the proceedings, including powers to grant a declaration or injunction where incidental disposing of the cause of action which invoked s 134 occurs.

Declarations

The power of the District Court to give declaratory relief is an area that remains unsettled. Examples can be found of orders in the nature of declarations made in the District Court, but it is hard to see how most pure declarations could be directly referable or necessarily implied to a statutory grant of jurisdiction (although note that the court has a statutory power to make declarations in the exercise of some statutory powers, such as under the *Property (Relationships) Act* 1984: *Bourdon v Outridge*, above). While pure declaratory relief is a creature of equity, the court may need to make a declaration on the way to granting some other substantive relief, or to dispose of an equitable claim for which the court has jurisdiction. Power to make such incidental declarations will be established by reference to the substantive head of power being exercised by the court.

Purely declaratory relief, such as the construction of a contract or as to the position of a party under an insurance policy, will not be a claim for recovery of money under s 134(1) of the Act. It was on this basis that Johnstone J struck out a cross-claim seeking declaratory relief in *Ryner v E-Lawnet.com.au Pty Ltd* (unrep, 31/5/06, NSWDC). The authors of *Equity Practice and Precedents* express the view that this is the correct position because the language of s 134(1)(h) is only invoked in claims directly referable to a claim for money. It does not embrace all equitable remedies.

However, there have been a number of cases which suggest that District Court judges have the power to grant purely equitable relief. In *Kolavo v Pitsikas (t/as Comino and Pitsikas)* [2003] NSWCA 59, the court was dealing with a claim for negligence against a solicitor and barrister who had acted for the appellant in earlier unsuccessful litigation. Cripps AJA (with Stein and Santow JJA agreeing) allowed the appeal and ordered the lawyers to indemnify the unsuccessful litigant for costs incurred in the litigation. The power of the District Court to give a declaration was discussed in that case, but the ultimate order was in the nature of indemnity rather than being a declaration in the strict sense.

That decision has been taken to be authority for the proposition that the District Court has the power to give declaratory relief: *Burke v Pentax Pty Ltd* (unrep, 23/5/03, NSWDC). The authors of Equity Practice and Precedents express the view that *Kolavo* is not authority for that proposition because:

1. The relief that was ultimately granted in that case was not in the nature of a declaration, but an indemnity. If a declaration was needed (and it wasn't) it was incidental to that relief.
2. The principle relief in *Kolavo* was an indemnity, which was an equitable order for the payment of money. Once the District Court's power had been invoked by s 134(1)(h), the Court had the power to give any order in equity, including a declaration.

Procedural issues for declarations

Once a plaintiff has established a source of power for the District Court to grant a declaration, it must address the procedural issues. The plaintiff's onus of proof must be addressed having regard to the precise terms of the declaration sought: *Massoud v NRMA Insurance Ltd* (1995) 8 ANZ Ins Cas ¶61-257. A declaration that is loosely framed will be objectionable as to form: *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 at 579. The plaintiff must also persuade the court that the discretion should be exercised in its favour. Factors include the absence of any real purpose or utility (*Draper v British Optical Association* [1938] 1 All ER 115), or the suitability of an alternative remedy (*Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545), and in many cases there will need to be a contradictor: *Rosenthal v The Sir Moses Montefiore Jewish Home* (unrep, 26/7/95, NSWSC).

[5-3030] Defences

There is some disagreement in the textbooks as to the scope of the District Court's power to give effect to equitable defences. Sections 6–7 of the *Law Reform (Law and Equity) Act* 1972 provides:

> (6) Defence in an inferior court
>
> Every inferior court shall in every proceeding before it give such and the like effect to every ground of defence, equitable or legal, in as full and ample a manner as might and ought to be done in the like case by the Supreme Court under the Supreme Court Act 1970.
>
> (7) Jurisdiction as to relief not enlarged
>
> This Act does not enlarge the jurisdiction of any court as regards the nature or extent of the relief available in that court, but any court may, for the purpose of giving effect to sections 5 and 6, postpone the grant of any relief, or grant relief subject to such terms and conditions as the nature of the case requires.

These provisions are remarkably similar to ss 89–90 of the *Supreme Court of Judicature Act* 1873 (UK), which were considered by the English Court of Appeal in *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169. Willmer LJ held that the effect of the provision was that an equitable defence may be relied on to the limit of the County Court jurisdiction, and that the provisions drew a sharp distinction between an equitable defence and a counterclaim: *Kingswood Estate Co Ltd v Anderson* at 185–190. His Lordship classified the particular equity in question as an equitable right that could be set up as a defence without a counterclaim.

This was the approach taken by the Full Court of the Victorian Supreme Court (*Beech v Martin* (1886) 12 VLR 571) and is consistent with the comments at appellate level in NSW: *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 332. The suggestion in *Carter v Smith* (1952) 52 SR (NSW) 290 at 292–295 that such a defence is only available if it would entitle the defendant to a perpetual injunction does not reflect the current position. It follows that a defendant can raise an equitable estoppel or other equitable doctrine as a defence to an action, which can be maintained to the monetary limit of the District Court: *Yahl v Bridgeport Customs Pty Ltd* (unrep, 31/7/84, NSWSC). However, where there is a need to raise a counterclaim in order to establish the cause of action, the District Court would have to stay the action so that the cross-claim, or the entire matter, could be heard in the Supreme Court (assuming the equitable jurisdiction could not be otherwise established).

The authors of *Equity Practice and Precedents* disagree with the comments of the authors of *Meagher Gummow and Lehane's Equity: Doctrines and Remedies*, who suggested that the District Court would not follow *Kingswood Estate Co Ltd v Anderson*, above. The reasons for that view that *Kingswood Estate Co Ltd v Anderson* is right are:

1. *Kingswood* is consistent with appellate level authority in this country (*Beech v Martin*, above);
2. It finds some support in the comments of the Court of Appeal in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 332;
3. The fact that s 6 of the *Law Reform (Law and Equity) Act* 1972 applies in the Local Courts where there is no equitable jurisdiction to obtain substantive relief strongly suggests that Parliament intended to give a power to entertain defences that that were beyond any equitable power.

A similar view is taken in *Bushby v Dixon Holmes du Pont Pty Ltd* (2010) 78 NSWLR 111 at [29]–[33].

Legislation

- *Civil Procedure Act* 2005 ss 5, 144(2), 149
- *Contracts Review Act* 1980 s 7
- *District Court Act 1973* ss 4, 9, 44, 46, 134, 134B, 140
- *Family Provision Act* 1982
- *Law Reform (Law and Equity)* Act 1972 ss 5–7
- *Property (Relationships) Act* 1984
- *Testator's Family Maintenance and Guardianship of Infants Act* 1916

Rules

- UCPR rr 25.1–25.24

Further references

- E Finnane, HN Newton & C Wood, *Equity Practice and Precedents*, Thomson Reuters 2008, Ch 2
- RP Meagher, JD Heydon and MJ Leeming, *Meagher Gummow and Lehane's Equity: Doctrines and Remedies*, 4th edn, Butterworths LexisNexis, Chatswood, 2002, p 71

[The next page is 5551]

Child care appeals

[5-8000] The nature of care appeals

A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1) of the *Children and Young Persons (Care and Protection) Act* 1998 (the "Care Act"). However, if the decision is made by the President of the Children's Court, the appeal must be made to the Supreme Court.

Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Ch 5 and 6 of the Care Act (ss 43–109X): s 91(4). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

The provisions of the Care Act (Ch 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

Applications are sometimes made to the Supreme Court in its *parens patriae* jurisdiction by parties who are dissatisfied with decisions of the Children's Court or the District Court in relation to children. Parties are discouraged from attempting to bypass the statutory appeal mechanism from decisions of the Children's Court. Exceptional circumstances are required to be demonstrated for the Supreme Court to interfere with orders that have been made by judicial officers exercising specialist jurisdiction such as those in the Children's Court: *Re M (No 4) — BM v Director General, Department of Family and Community Services* [2013] NSWCA 97 at [21]-[23].

[5-8010] The Care Act

The Care Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department of Family and Community Services's powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the Children's Court, or the District Court (exercising Children's Court jurisdiction on appeal).[1]

The Care Act contains a small number of key concepts. They include:

- the need for care and protection
- removal of children
- parental responsibility
- permanency planning
  - involving restoration
  - involving out-of-home care
  - involving guardianship
  - involving adoption
- contact.

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1 The Hon J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008 (the "Wood Report") Recommendation 11.2.

[5-8020] The conduct of care appeals

A care appeal proceeds by way of a new hearing and fresh evidence, or evidence in addition to, or in substitution for, the evidence on which the order was made by the Children's Court: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).

The proceedings are to be conducted in closed court (s 104B), and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1). This prohibition extends to the publication or broadcasting of the name of the child or young person who is or has been under the parental responsibility of the Minister or in out-of-home care: s 105(1A). The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

There are exceptions, such as where a "young person" (ie a person aged 16 or 17: s 3) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3), or to the publication by the Coroners Court of its findings in an inquest concerning their suspected death: s 105(3)(a1).

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media: *AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd* (2008) 6 DCLR(NSW) 329.

Care proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1). They are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2). The court is both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured court setting and statutory context: *Re "Emily" v Children's Court of NSW* [2006] NSWSC 1009.

The court is not bound by the rules of evidence, unless it so determines (s 93(3)), but see *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 per Meagher JA at [79].

The standard of proof is on the balance of probabilities: s 93(4). The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

The provisions of the United Nation's *Convention on the Rights of the Child* 1989 ("UNCROC") are capable of being relevant to the exercise of discretions under the Care Act: *Re Tracey* (2011) 80 NSWLR 261; *Re Kerry (No 2)* (2012) 47 Fam LR 212.

However, in the decisions of *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 and *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88, failure to raise a specific point of differentiation between the Care Act and the UNCROC did not constitute error.

[5-8030] The guiding principles

Last reviewed: March 2024

The objects of the Care Act are as set out in s 8.

The Care Act is to be administered under the principle that the safety, welfare, and well-being of the child are paramount (the paramount concern): s 9(1). This principle is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

It is now well settled law that the proper test to be applied is that of "unacceptable risk to the child": *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 per Judge Marien at [61]; *NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221.

Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This test of whether there is an "unacceptable risk" of harm to the child is the sine qua non for the application of the Act: see *M v M* (1988) 166 CLR 69 at [25]. If ever in doubt, return to this principle for guidance.

For applications made on or from 15 November 2023, subject to the "paramountcy principle", functions under the Act must be in accordance with the principle of active efforts: s 9A(1), (5); Sch 3 Pt 14 cl 2(a). The "principle of active efforts" means making active efforts to prevent the child from entering out-of-home care, and in the case of removal, restoring the child to the parents, or if not practicable or in the child's best interests, with family, kin or community: s 9A(2). Active efforts are to be timely, practicable, thorough, address the grounds on which the child is considered to be in need of care and protection, conducted in partnership with the child, their family, kin and community, and culturally appropriate, amongst other things, and can include providing, facilitating or assisting with access to support services and other resources — considering alternative ways of addressing the needs of the child, family, kin or community: s 9A(3), (4).

Other, particular principles to be applied in the administration of the Act are set out in ss 9(2), 10, 11, 12 and 13. Reference should be made to the full text of these principles, which require, in summary, that:

- children are given an opportunity to express their view freely, and their wishes appropriately taken into account
- account is taken of culture, disability, language, religion and sexuality
- action taken is the least intrusive intervention in the life of the children and their family
- the name, identity, language, cultural and religious ties of children are preserved as far as possible
- any out-of-home care arrangements are to be made in a timely manner
- relationships with people significant to the children are to be preserved, unless contrary to their best interests.

Aboriginal and Torres Strait Islander principles

There are special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11 and 12. A process for out-of-home placement of an Aboriginal or Torres Strait Islander child is established: s 13.

Section 83A(3) provides, for care applications made on or after 15 November 2023, that a permanency plan for an Aboriginal and Torres Strait Islander child must comply with permanent placement principles, the Aboriginal and Torres Strait Islander Child and Young Persons Principle and the placement principles under s 13. The plan must also include a cultural plan that sets out how the child will maintain and develop connection with family, community and identity: s 83A(3)(b). For earlier applications, see former s 78A(3).

[5-8040] The need for care and protection

The basis for making a care order under the Care Act is a finding that the child is in need of care and protection: s 71. This is known as the "establishment" phase and is the trigger for the main operative provisions, such as removal (s 34), allocation of parental responsibility (s 79), and permanency planning: s 83.

"Care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". But the Care Act does specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

If the Director-General forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

Removal may be sought by seeking orders from the court (s 34(2)(d)), by the obtaining of a warrant (s 233), or, where appropriate, by effecting an emergency removal: s 34(2)(c). See also ss 43 and 44.

[5-8050] Parental responsibility

"Parental responsibility" means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3.

The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility: s 79(1).

[5-8053] Parent responsibility contracts

Last reviewed: March 2024

Under s 38E, breach of a parent responsibility contract ("PRC") does not give rise to a presumption that a child is in need of care and protection. Additionally, the applicability of PRCs extends to expectant parents: s 38A(1)(b).

[5-8056] Parent capacity orders

Last reviewed: March 2024

A parent capacity order ("PCO") can be used as a stand-alone provision, during proceedings or as a result of a breach of a prohibition order: s 91B. The threshold test set out in s 91E for the making of a PCO is lower than the threshold test for a care application: s 72. An application for a PCO can also be referred to a dispute resolution conference ("DRC"): s 91D.

In order to make a PCO there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child or young person at risk of significant harm. Secondly, the court must be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service: s 91E.

The Children's Court can make a PCO by consent: s 91F. This function may be exercised by a Children's Registrar in relation to an application made the Secretary: s 91B(a).

[5-8060] Permanency planning

Last reviewed: March 2024

After "establishment" the process moves towards "final orders". Prior to the making of final orders, the Director-General is required to undertake permanency planning for the child. The court must not make a final care order unless it expressly finds that permanency planning has been appropriately and adequately addressed. "Permanency planning" means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.

As part of the permanency planning, the Director-General is required to assess whether there is a realistic possibility of restoration of a child to the parent(s): s 83(1). There is no statutory definition of

the phrase "realistic possibility of restoration": *Department of Family and Human Services (NSW) re Amanda and Tony* [2012] NSWChC 13 at [29]–[32] and *DFaCS (NSW) re Oscar* [2013] NSWChC 1 at [29]–[34].

The court is to decide whether to accept that assessment: s 83(5). If the court does not accept the assessment of the Director-General, it may direct the Director-General to prepare a different permanency plan: s 83(6).

Before the court can make a final order approving a permanency plan involving restoration, within a reasonable period (which must not exceed 24 months: s 83(8A)), it must expressly find that there is a realistic possibility of restoration, having regard to two matters: the circumstances of the child; and secondly, any evidence that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child. It follows that when deciding whether to accept the assessment of the Director-General, the court must have regard to both those considerations: s 83(5).

"V V" v District Court of New South Wales [2013] NSWCA 469 is significant as it relates to two key legal principles. Specifically, the interpretation given to "circumstances of the child" under s 83(1)(a) and the need to provide reasons under s 79(3).

First, Barrett JA held that "circumstances of the child" under s 83(1)(a) should be given a wide interpretation. Barrett JA states at [68]:

> There is simply no valid basis for a construction that restricts the meaning of a child's "circumstances" and excludes from the concept of "circumstances" any aspects of the situation in which a child is placed, the setting in which he or she is living and the influences bearing upon his or her wellbeing. The term is a broad one that must, in the context, be construed broadly to encompass the whole of the child's situation.

Second, Barrett JA makes clear that judicial officers are required to consider the principles under s 79(3) and that their decision and reasons may be examined to determine whether they have done so: [84]–[85].

The Care Act provides for a hierarchy of permanency planning principles to guide decision making, entitled the "permanent placement principles": s 10A. The intent is to focus case planning on long-term options that would be more likely to offer the child and carers greater certainty and stability.

Permanent placement refers to a long-term placement following the removal of a child or young person from the care of a parent or parents that provides a safe, nurturing, stable and secure environment for the child of young person: s 10A(1).

The permanent placement principles provide that the first preference is for the child or young person to be restored to the care of his/her parent or parents so as to preserve the family relationship: s 10A(3)(a).

If restoration is not practicable or in the best interests of the child or young person, the second preference is to order guardianship to a relative, kin or other suitable person: s 10A(3)(b).

If neither of these options is practicable or in the best interests of the child or young person, the next preference is for the child to be adopted (excepting in the case of an Aboriginal or Torres Strait Islander child or young person): s 10A(3)(c).

Under s 78A(3) of the Care Act, a permanency plan for an Aboriginal or Torres Strait Islander child submitted to the Children's Court must address how the plan has complied with the placement principles in s 13 of the Care Act. Pursuant to s 83(7), the Children's Court must not make a final care order unless it expressly finds that "permanency planning for the child or young person has been appropriately and adequately addressed" and that prior to approving a permanency plan involving restoration, there is a realistic possibility of restoration within a reasonable period, having regard to the circumstances of the child or young person, and the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

In cases where restoration, guardianship and adoption are not practicable or in the best interests of the child or young person, the last preference is for the child to be placed under the parental responsibility of the Minister: s 10A(3)(d).

Where restoration, guardianship and parental responsibility to the Minister are not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person, the Aboriginal or Torres Strait Islander child or young person is to be adopted: s 10A(3)(e). *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 states the principles for the identification of an Aboriginal child for the purposes of the *Adoption Act*.

[5-8070] Final orders

Last reviewed: March 2024

There are two types of final orders. The first involves restoration to the persons (usually the parents) who enjoyed parental responsibility prior to removal. The second involves out-of-home care, which means residential care and control provided by others at a place other than the usual home: s 135.

Where the Director-General assesses that there is a realistic possibility of restoration within 24 months, a permanency plan involving restoration is submitted to the court: s 83(2). If the court expressly finds that the plan appropriately and adequately addresses permanency planning and that there is a realistic possibility of restoration, it can proceed to make final orders in accordance with the plan.

Where the Director-General assesses that there is not a realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Director-General may consider whether adoption is the preferred option: s 83(4).

Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the child are paramount. It is now well settled law that the proper test to be applied is that of "unacceptable risk" of harm to the child: *M v M*, above, at [25]. Whether there is an "unacceptable risk" is to be assessed from the accumulation of factors proved: *Johnson v Page*, above.

The permanency plan need not provide details as to the exact placement, but must provide sufficient detail to enable the court to have a reasonably clear understanding of the plan: s 83(7A). The care plan must make provision for certain specified matters: s 78. If a care plan made on or after 15 November 2023 is for an Aboriginal or Torres Strait Islander child, it must include a cultural plan to show how the connection with First Nation's family, community and identity will be maintained and developed: s 78(2A)(a); Sch 3, Pt 14 cl 2(c). The plan must be developed in consultation with the child, their parents, family and kin, and relevant First Nation's organisations and entities: s 78(2A)(b). The plan must comply with permanent placement principles, the Aboriginal and Torres Strait Islander Children and Young Persons Principles and the placement principles for Aboriginal and Torres Strait Islander children under s 13: s 78(2A)(c). For earlier applications, see former s 78A(3)(rep).

[5-8080] Contact

Last reviewed: March 2024

Importantly, the care plan involving removal must also include provision for appropriate and adequate arrangements for contact: s 78(2). In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance: s 86. Section 86 empowers the court to make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.

The court's power to make contact orders where there is no realistic possibility of restoration is confined. Accordingly, where restoration is not planned, the maximum period that may be specified in a contact order is 12 months: s 86(6). These reforms highlight the clear legislative and policy shift toward including contact arrangements in a care plan rather than in a court order.

The process for varying contact orders and making applications for contact orders following the conclusion of the initial proceedings are found in ss 86(1A); (1B); (1C); (1E) and (1F).

[5-8090] Variation of final orders

Last reviewed: March 2024

Applications for rescission or variation of care orders require the applicant to obtain leave, which will only be granted if there has been "significant change in any relevant circumstances" since the original order: s 90(2). The Care Act sets out a number of matters that the court must take into account before granting leave: s 90(2A). The primary considerations concern the views of the child or young person, the stability of present care arrangements, and, if the court considers that present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in his or her best interests: s 90(2B). Additional considerations are set out in s 90(2C).

A refusal of leave is an "order" for the purposes of s 91(1) of the Care Act: *S v Department of Community Services* [2002] NSWCA 151 at [53]. A refusal (or the granting) of leave may, therefore, be the subject of a statutory appeal to the District Court.

Once leave is granted, the Care Act goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

For a detailed discussion of s 90 applications, see *In the matter of Campbell* [2011] NSWSC 761 and *Kestle v Department of Family and Community Services* [2012] NSWChC 2.

Special provisions are set out in the *Children and Young Persons (Care and Protection) Regulation* 2022 in relation to the leave requirement in s 90(2) as it relates to guardianship orders: cl 4.

In *Re Mary* [2014] NSWChC 7, Blewitt ChM considered whether the decision of Rein J in *Re Timothy* [2010] NSWSC 524 was conclusive. Specifically, Blewitt ChM considered whether the Children's Court could amend an interim order without the need for an application to be made under s 90 of the Care Act. Blewitt ChM concluded that interim orders can be amended without the need for a s 90 application; it is not an essential requirement.

[5-8091] Variation of interim care orders

Section 90AA of the *Care Act* enables a party to care proceedings before the Children's Court to make an application to vary an interim care order during the proceedings (instead of having to seek leave to make an application under s 90). Section 90 does not apply to an application to vary an interim order.

[5-8093] Guardianship orders

Last reviewed: March 2024

Section 79A of the Act governs guardianship orders. The court may make an order allocating to a suitable person all aspects of parental responsibility for a child or young person who is in statutory or supported out-of-home care, or who it finds is in need of care and protection until the child or young person reaches 18 years of age: s 79A(2).

The court must be satisfied of each of the following (s 79A(3)):

- there is no realistic possibility of restoration of the child to the parents, and
- that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
- if the child or young person is an Aboriginal or Torres Strait Islander child or young person — permanent placement of the child or young person under the guardianship order is in accordance with the ATSICPP that apply to placement of such a child or young person in statutory out-of-home care under s 13, and
- if the child or young person is 12 or more years of age and capable of giving consent — the consent of the child or young person is given in the form and manner prescribed by the regulations.

Parental responsibility may be allocated jointly to more than one person under a guardianship order: s 79A(4).

A guardianship order cannot be made if it would be inconsistent with any Supreme Court order with respect to the child made under its custody and guardianship of children jurisdiction, or a guardianship order made by the Guardianship Tribunal: s 79A(5).

Unless varied or revoked under s 90, a guardianship order remains in force until the child reaches age 18: s 79A(6).

The court's power to order suitability reports or to undertake a progress review applies only to orders allocating parental responsibility under s 79, and not to orders allocating parental responsibility by guardianship order under s 79A: s 82(1).

[5-8096] Changes to supervision and prohibition orders

The maximum period of supervision has changed and the court may now specify a maximum period of supervision that is longer than 12 months (but does not exceed 24 months): s 76(3A).

The reforms have also impacted upon orders prohibition action (prohibition orders): s 90A. The changes include an extension to the class of persons subject to a prohibition order. The persons subject to a prohibition order can now include "any person who is not a party to the care proceedings" in addition to a parent of a child or young person: s 90A(1).

[5-8100] Costs orders

The Care Act gives the Children's Court a limited power to make an order for an award of costs. The Care Act provides that the Children's Court, and therefore the District Court, can only make an order for costs in care proceedings where there are exceptional circumstances: s 88. These must be seen as being case dependent in the context of the statutory scheme for child protection: *Re: A Costs Appellant Carer (a pseudonym) v The Secretary, Department of Communities and Justice* [2021] NSWDC 197 at [90].

The costs power does not extend to the making of an order against a non-party: *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

[5-8110] The Children's Court clinic

The Children's Court clinic is established under Pt 3A of the *Children's Court Act* 1987, and is given various functions designed to provide the court with independent, expert, objective, and specialist advice and guidance.

The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: Care Act s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54. In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

A clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, would not otherwise have the benefit of.

[5-8120] Alternative dispute resolution in care matters

The Children's Court has alternative dispute resolution processes. The dispute resolution conference ("DRC") model has now become an integral aspect of Children's Court proceedings. This includes Aboriginal care circles, which aim to encourage more culturally appropriate decision making for Aboriginal children and families involved in care and protection cases in the Children's Court, and external mediation.

Conferences are regularly conducted at the court by legally qualified Children's Registrars and are also trained mediators and adopt an advisory, not a determinative role: see s 65 of the Care Act.

Section 37(1A) requires the Secretary to offer the family of a child or young person alternative dispute resolution processes before seeking care orders from the Children's Court if the Secretary determines the child or young person is at risk of significant harm. However, the Secretary is not required to offer DRC if, in their opinion, that participation would not be appropriate due to exceptional circumstances (s 37(1B)), or if there are criminal proceedings or a police investigation and, considering advice by the Commissioner of Police, is of the opinion that it is not appropriate: s 37(1C).

The District Court, when conducting a care appeal, has all the functions and powers of the Children's Court, the District Court may refer an appeal at any time to a DRC.

Legislation

- *Children and Young Persons (Care and Protection) Act* 1998
- *Children's Court Act* 1987
- *Convention on the Rights of the Child* 1989 (UNCROC)

Rules and Practice Notes

- *Children and Young Persons (Care and Protection) Regulation* 2012
- Children's Court Rule 2000
- Children's Court Practice Notes 2, 3, 4, 5, 6 and 9
- Practice Note DC (Civil) No 5

Further references

- Children's Court of NSW website, including editions of Children's Law News, accessed 12/3/2024.
- Children's Court CaseLaw, accessed 12/3/2024.
- M Davis, Independent Review of Aboriginal Children in OOHC, *"Family is culture",* Review Report, 2019, p 42, accessed 12/3/2024.

- Judicial Commission of NSW, *Children's Court of NSW Resource Handbook*, 2013.
- The Hon J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, and other resources, accessed 12/3/2024.
- His Hon M Marien SC, *Care Proceedings and Appeals to the District Court*, Judicial Commission of NSW, District Court of NSW Annual Conference, April 2011, NSW. (This conference paper is available to judicial officers on the conference paper database through JIRS.)

[The next page is 5951]

The legal framework for the compensation of personal injury in NSW

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

Note: The figures in this chapter are current as at 1 October 2023. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act* 1987, Div 6–6B, Pt 3.

Note: The Personal Injury Commission was established on 1 March 2021 (s 6(1)). Guidance on the transitional provisions of the *Personal Injury Commission Act* 2020 (PIC Act) was provided in *Dimos v Gordian Runoff Ltd* [2023] NSWSC 1151 at [47]–[55] where the Court observed that the legislative intention is to preserve existing substantive rights. In relation to Sch 1, Div 4A, cl 14D: "unexercised rights" to commence non-court proceedings, the Court determined that when an application under s 62 of the *Motor Accidents Compensation Act* 1999 Act is made to the PIC and is an "unexercised right ", the application must be determined under the pre-existing regime: at [66].

[6-1000] Introduction

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

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

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

Workers' compensation—no fault schemes

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

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

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

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

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

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

[6-1010] General workers

Last reviewed: August 2023

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

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

- for workers with no current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 80% of their pre-injury average weekly earnings for weeks 14 to 130 (second entitlement period).
- for workers with current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings less current weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 95% of pre-injury average weekly earnings less current weekly earnings for weeks 14 to 130 (second entitlement period) provided the worker has returned to work for not less than 15 hours per week
  - those workers who are working less than 15 hours per week or have not returned to work are entitled to payments of up to 80% of their pre-injury average weekly earnings less current weekly earnings.
- after the second entitlement period (130 weeks) workers' entitlements to weekly benefits continue if they have no current work capacity or they have achieved an actual return to employment for at least 15 hours per week earning at least $211 per week.
- workers with current work capacity (other than a worker with high needs) must apply to the insurer for the payment of weekly benefits after 130 weeks.[6]
- benefits are limited to a maximum of five (5) years except for workers with high needs (defined as a worker with more than 20% permanent impairment), who are eligible to receive weekly payments until reaching Commonwealth retirement age, subject to ongoing work capacity assessments.
- workers with highest needs (more than 30% permanent impairment) are entitled to a minimum weekly payment of $955 per week (as at 1/4/2023). If the worker with highest needs is entitled to a lesser payment, the insurer is required to make payments up to the minimum amount. The amount is to be indexed in April and October of each year.
- weekly payments are capped at the maximum amount of $2423.60 (as at 1/10/2023).[7]

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

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

The pre-2012 scheme provides for:

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

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

- the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services[10]
- lump sum permanent impairment compensation dependent on the degree of the impairment[11]
- any reasonably necessary domestic assistance[12]
- compensation, in some circumstances, for gratuitous domestic assistance provided to the worker, and[13]
- compensation for property damage.[14]

In situations where a worker dies as the result of an accident or disease associated with his or her employment, the Act also provides for a lump sum death benefit.[15] This is currently $901,600 (as at 1/10/2023), and is to be apportioned between dependents,[16] or otherwise paid to the worker's legal personal representative.[17] Provision is also made for weekly payments for dependent children[18] and funeral expenses.[19]

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

The Personal Injury Commission resolves disputes in relation to workers compensation statutory entitlements, except for certain classes of injured person. The District Court of NSW has jurisdiction to resolve disputes about claims by coal miners, workers suffering dust diseases and volunteers.[23]

[6-1020] Dust disease workers

Last reviewed: August 2023

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

8 *Workers Compensation Act* 1987, s 35 prior to amendments made by Act 53 of 2012.
9 *Workers Compensation Act* 1987, s 37 prior to amendments made by Act 53 of 2012.
10 *Workers Compensation Act* 1987, s 60.
11 *Workers Compensation Act* 1987, s 66.
12 *Workers Compensation Act* 1987, s 60AA.
13 *Workers Compensation Act* 1987, s 60AA(3).
14 *Workers Compensation Act* 1987, Div 5 Pt 3.
15 See generally *Workers Compensation Act* 1987, Pt 3 Div 1.
16 *Workers Compensation Act* 1987, s 25(1)(a).
17 *Workers Compensation Act* 1987, s 25(1).
18 *Workers Compensation Act* 1987, s 25(1)(b) which sets a sum of $66.60 subject to indexation in accordance with *Workers Compensation Act* 1987, Pt 3 Div 6.
19 *Workers Compensation Act* 1987, s 26.
20 *State Insurance and Care Governance Act* 2015, Pt 3.
21 *State Insurance and Care Governance Act* 2015, Pt 2.
22 *Workers Compensation Act* 1987, Div 1A Pt 7.
23 *District Court Act* 1973, Div 8A Pt 3.

fault statutory scheme is established under the *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) (the "1942 Act"), which is administered by the icare dust diseases care and also known as the Dust Diseases Authority ("DDA").[24]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[25] by the Medical Assessment Panel, which is also established under the 1942 Act. Decisions of the Medical Assessment Panel and of the DDA are subject to appeal to the District Court.[26]

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

- indexed weekly payments where a worker is rendered totally or partially disabled due to a dust disease, paid at the rate of the worker's current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of $550.80 per week, depending on the extent of the disability;[27]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[28]
- payment for the commercial provision of domestic assistance;[29] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[30]

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

- an indexed lump sum payment which is presently $403,450 (as at 1/10/2023); and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $332.80 per week (as at 1/10/2023),[31] which continues until re-marriage or the commencement of a de facto relationship,[32] or until the death of the spouse; and [33]
- a weekly payment to each surviving dependent child, currently payable at $168.20 per week (as at 1/10/2023),[34] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[35]

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

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

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

The 1942 Act provides the DDA with mechanisms for reducing payments made to an eligible claimant in certain circumstances. If a worker or a worker's spouse is qualified to receive a government pension, the board can adjust the weekly payments to ensure they will still be entitled to receive that pension.[36] Additionally, where the claimant is entitled to receive compensation from another source, the board can require a person to take all appropriate and reasonable steps to claim compensation from that other source and, if he or she fails to do so, it can reduce the dust disease compensation that would otherwise be payable.[37] It is an offence to fail to inform the DDA that a person is receiving compensation under another Act, ordinance, or law of the Commonwealth, or of another State or Territory or of another country.[38]

There are cases where a person who contracted a dust disease, including an asbestos-related disease, in the course of his or her work, will not receive workers' compensation benefits. Such people include employees whose employers did not make contributions to the NSW workers' compensation scheme (such as Commonwealth employees[39]) or independent contractors who were not covered by the workers' compensation scheme.[40] In such cases their dependants will similarly be unable to receive the statutory benefits that are available upon the victim's death.

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

Common law damages—fault-based liability

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

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

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

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

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

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

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

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

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

- a ceiling on the calculation of damages for past and future economic loss by a requirement to disregard any amount by which the victim's net weekly earnings would have exceeded a sum currently fixed at $5461;[41]
- a threshold on the recoverability of damages for non-economic loss (that is compensation for the victim's pain and suffering, loss of bodily function, loss of enjoyment of life, loss of expectation of life, and disfigurement), dependent on the assessment of, or agreement that, there is permanent impairment of greater than 10%;[42]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[43]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[44]
- an exclusion of the damages payable for the loss of the services of a person;[45]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[46] in place of the 3% discount previously applicable at common law;
- an exclusion of the recovery of interest on damages awarded for non-economic loss and attendant care services, and a qualified right to interest in relation to other damages awards;[47] and
- an exclusion of the award of exemplary or punitive damages.[48]

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

Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[51]

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

Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or

41 *Motor Accidents Compensation Act* 1999, s 125; Motor Accidents Compensation (Determination of Loss) Order 2009, O 3.
42 *Motor Accidents Compensation Act* 1999, ss 131, 132.
43 *Motor Accidents Compensation Act* 1999, s 134; Motor Accidents Compensation (Determination of Loss) Order 2009, O 4.
44 *Motor Accidents Compensation Act* 1999, s 141B. No compensation is to be paid unless services were, or will be, provided for at least 6 hours per week, and for a period of at least 6 consecutive months, and the amount of compensation awarded for attendant care services must not exceed the average weekly total earnings in NSW.
45 *Motor Accidents Compensation Act* 1999, s 142.
46 *Motor Accidents Compensation Act* 1999, s 127(2).
47 *Motor Accidents Compensation Act* 1999, s 137. Interest is not payable unless the defendant has been given sufficient information to enable a proper assessment of the claim and the defendant has had a reasonable opportunity to make an offer of settlement, but has not done so, and in some other specific circumstances involving settlement offers.
48 *Motor Accidents Compensation Act* 1999, s 144.
49 *Motor Accidents Compensation Act* 1999, Pt 4.3.
50 *Motor Accidents Compensation Act* 1999, s 108. See Pt 4.4 for details of the claims assessment process.
51 *Motor Accidents Compensation Act* 1999, s 109.

where the injury or death arose as the result of a blameless accident.[52] In these cases the accident is deemed to have been caused by the fault of the owner or driver of the relevant vehicle, provided it was the subject of motor accident insurance cover.

In addition, the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) has established a statutory compensation scheme that provides compensation for severe motor accident injury victims and that applies regardless of fault.[53] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[54]

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

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

The Act provides for the payment of no fault statutory benefits for persons injured in a motor accident as defined in s 1.4, however those benefits are restricted for persons at fault. The statutory benefits include weekly compensation and treatment and care costs for varying periods, depending on whether the person was at fault and the extent of the impairment suffered. Statutory benefits are not payable if compensation under the *Workers Compensation Act* 1987 is payable in respect of the injuries.[55] Statutory benefit payments are reduced after 52 weeks for contributory negligence, if applicable.[56] A claim for statutory payments must be made within 3 months of the motor accident.[57]

Damages are payable for persons who were not at fault and have more than threshold injuries. A "threshold injury" is defined as a soft tissue injury and a minor psychological or psychiatric injury that is not a recognised psychiatric illness.[58] Damages are restricted to past and future economic loss unless the permanent impairment as a result of the injuries suffered is more than 10% and then non-economic loss damages to compensate pain and suffering and loss of amenities of life are available up to a maximum of $605,000.[59]

Statutory benefits are payable for reasonable funeral expenses if the death of a person results from a motor accident. "The death of a person" includes a reference to the loss of a foetus of a pregnant woman, whether or not the pregnant woman died and regardless of the gestational age of the foetus.[60]

For actions commenced prior to 28 November 2022, a claim for damages could not be made until 20 months after the motor accident, unless the claim related to a death or where the extent of permanent impairment was greater than 10% and all claims for damages had to be made within 3 years of the motor accident. A claim for damages could not be settled within 2 years of the motor accident unless the extent of permanent impairment was greater than 10%.[61]

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

If there is a dispute as to the extent of a person's permanent impairment a court or Member of the Personal Injury Commission may refer a claimant for assessment by a medical assessor. The certificate of a medical assessor is prima facie evidence of the extent of permanent impairment as

52 *Motor Accidents Compensation Act* 1999, Pt 1.2.
53 *Motor Accidents (Lifetime Care and Support) Act* 2006, s 4.
54 See *Motor Accidents (Lifetime Care and Support) Act* 2006, s 58; Lifetime Care and Support Guidelines 2018—Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme, accessed 20 April 2022.
55 Note that journey claims were removed by the 2012 workers' compensation amendments.
56 *Motor Accident Injuries Act* 2017, s 3.38(1) (previously 26 weeks, amendment commenced 1 April 2023).
57 *Motor Accident Injuries Act* 2017, s 6.13(1).
58 *Motor Accident Injuries Act* 2017, s 1.6 (previously "minor injury", changes to terminology commenced 1 April 2023), "soft tissue injury" is separately defined in s 1.6(2).
59 *Motor Accident Injuries Act* 2017, ss 4.11, 4.13, 4.22, as at 1 October 2022.
60 *Motor Accident Injuries Act* 2017, s 3.4(4), commenced 29 March 2022.
61 Sections 6.14(1), 7.33 and 6.23(1) were repealed on 28 November 2022.

a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[62] A court can reject the contents of a certificate on the grounds of denial of procedural fairness but only if the admission of the certificate would cause substantial injustice.

When assessing damages consideration must be given to the steps taken by the claimant to mitigate their loss and any other reasonable steps that could have been taken, including by undergoing treatment and undertaking rehabilitation.[63] Contributory negligence applies to the assessment of damages, which must be found where drugs, alcohol or the failure to wear a seatbelt or helmet have been a factor in the accident or injury.

A claimant is not entitled to commence court proceedings until the claim has been assessed by a Member of the Personal Injury Commission, or the Member has issued a certificate that the claim is exempt.[64] Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[65] An insurer may require a claimant to commence proceedings and the claimant must do so within 3 months of the notice, or the claim is deemed to have been withdrawn.[66] A court may grant leave to reinstate the claim if the claimant provides a full and satisfactory explanation for the delay in commencing the proceedings. If a claimant provides significantly new evidence in court proceedings, the claim must be referred back to the claims assessment process and the proceedings adjourned until it is complete.[67]

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

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

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

- damages for economic loss (past and future loss of earnings or of earning capacity) and loss of expectation of financial support are capped, with the maximum net weekly earnings that may be recovered currently being three times average weekly earnings;[68]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[69]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[70]
- damages for loss of employer superannuation contributions are limited to the relevant percentage of the damages payable for the deprivation and impairment of the plaintiff's earning capacity on which the entitlement to those contributions is based;[71]

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

- damages for non-economic loss can only be awarded if the severity of the non-economic loss is at least 15% of the most extreme case; and where the non-economic loss is equal to or greater than 15% of a most extreme case, damages are to be awarded in accordance with a table to a maximum award of $705,000;[72]
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[73]
- interest cannot be awarded on damages for non-economic loss, gratuitous attendant care services or loss of capacity to provide gratuitous domestic services to the plaintiff's dependants;[74] and
- exemplary, punitive or aggravated damages cannot be awarded.[75]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[76] Damages cannot be recovered for pure mental harm, arising from mental or nervous shock in connection with another person's death or injury, unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim.[77]

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

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

[6-1060] Claims by injured workers—general

In addition to the entitlement for workers' compensation outlined above, an injured worker is also entitled to pursue common law damages, as modified by the 1987 Act against the party whose negligence or other wrongful act or omission led to the injury.[79]

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

The worker's claim for loss of economic capacity is confined to the recovery of past lost earnings and future loss due to the deprivation or impairment of the worker's earning capacity.[81]

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

In awarding such damages, the court is required to disregard the amount (if any) by which the worker's net weekly earnings would have exceeded the amount that is the maximum amount of weekly statutory compensation payable in respect of total or partial incapacity, currently $2341.80.[83]

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

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

Interest on damages is not payable unless certain conditions are satisfied.[84]

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

- the worker ceases to be entitled to any further compensation under the 1987 Act in respect of the relevant injury including compensation that has not yet been paid;[85]
- any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is to be paid or credited to the person who paid the compensation;[86] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[87]

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

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

1. Damages in respect of:
   - past and future medical, hospital, rehabilitation and related expenses;
   - any paid and gratuitous attendant care services that are received by the plaintiff consequent upon the injury;[88]
   - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[89]
   - any loss of the plaintiff's earnings to the date of trial; and
   - any loss of future earning capacity.
2. Damages for non-economic loss—including pain and suffering, loss of amenities and loss of expectation of life.
3. Interest—on past losses to the time of judgment or settlement.[90]

Successfully completing such an action, either by settlement or by judgment, during the plaintiff's lifetime, extinguishes the possibility of common law claims being brought after death, including claims by that person's estate, or by his or her dependants.[91] It does not, however, bar dust diseases victims or their dependants from claiming statutory dust diseases workers' compensation benefits, where the victim's disease was work related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,[92] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

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84 *Workers Compensation Act* 1987, s 151M.
85 *Workers Compensation Act* 1987, s 151A(1)(a).
86 *Workers Compensation Act* 1987, s 151A(1)(b). The position in relation to estate actions and dependency actions is considered later: para 4.48–4.51 and para 4.57–4.58.
87 *Workers Compensation Act* 1987, s 151A(1)(c).
88 *Civil Liability Act* 2002, ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
89 *Civil Liability Act* 2002, s 15B. These are also known as *Sullivan v Gordon* damages.
90 See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
91 See, eg, *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.
92 *Workers Compensation Act* 1987, s 151A(1)(a). See above, para 1.54.

As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, and non-exclusive jurisdiction in proceedings for contribution between defendants, and questions arising under relevant policies of insurance.[93] It has jurisdiction over any injuries caused by a "dust-related condition", which is defined in the *Dust Disease Tribunal Act* 1989 (NSW) as meaning:

- a disease specified in Schedule 1, or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.[94]

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

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

Pneumoconiosis is any "disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis".[95] The DDT's jurisdiction, therefore, includes diseases caused by asbestos dust, as well as a range of other diseases and conditions caused by exposure to industrial dusts.

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

- the use, by leave, of historical and general medical evidence admitted in other cases;[96]
- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;[97]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[98]

93 *Dust Diseases Tribunal Act* 1989, s 10.
94 *Dust Diseases Tribunal Act* 1989, s 3. For example occupational asthma caused by a dust capable of causing dust disease: *Manildra Flour Mills v Britt* [2007] NSWCA 23.
95 A R Gennaro, A H Nora, J J Nora, R W Stander and L Weiss (ed), *Blakiston's Gould Medical Dictionary*, 4th edn, McGraw-Hill, 1979, p 1068.
96 *Dust Diseases Tribunal Act* 1989, s 25(3).
97 *Dust Diseases Tribunal Act* 1989, s 25A.
98 *Dust Diseases Tribunal Act* 1989, s 25B.

- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;[99]
- the calculation of future losses by reference to a 3% actuarial discount table;[100]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[101]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[102] and
- s 13(6) of the *Dust Diseases Tribunal Act* 1989 (NSW) which provides:

> Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.[103]

There are also two substantive law differences:

- general damages survive the death of the claimant and may be recovered by the person's legal personal representative; and[104]
- the ability to award provisional damages in relation to an established dust-related condition, reserving the right to claim, additional damages, if the claimant later develops another dust-related condition. This is an exception to the usual principle that damages are awarded on a "once and for all" basis.[105]

The recovery by a worker of compensation from one source may affect his or her ability to recover from another source. A recipient of benefits under the dust diseases workers' compensation scheme cannot be required to repay anything to the DDA if he or she also receives compensation benefits for the same injury from another source.[106] In this respect, the dust diseases workers' compensation scheme is unlike the general workers' compensation scheme where repayment can be required if, for example, the injured worker recovers common law damages for the same injury.[107] In addition, unlike the general workers' compensation scheme,[108] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[109]

If a worker has received workers' compensation benefits prior to judgment in a common law action, any weekly benefits that have been received are to be taken into account and deducted from the common law damages for loss of earning capacity or economic loss recovered by the injured person or his or her estate.[110] In addition, where a worker has an entitlement to statutory workers'

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99 *Dust Diseases Tribunal Act* 1989, s 41.

100 No discount rate is provided for in any relevant legislation, therefore the common law rate of 3% applies: *Todorovic v Waller* (1981) 150 CLR 402.

101 *Dust Diseases Tribunal Act* 1989, s 12A.

102 See *Civil Liability Act* 2002, ss 15A and 15B. Although damages for loss of capacity to provide domestic services are available in both dust diseases cases and actions under the *Civil Liability Act*, there are some restrictions imposed on recovery of such damages in motor accidents claims: ss 15B(8), (9). Additionally, while damages for gratuitous domestic assistance are limited to recovery for 40 hours per week of care (s 15(4)), there is no equivalent maximum number of hours in dust diseases cases (see s 15A(2)).

103 *Dust Diseases Tribunal Act* 1989, s 13(6). Although the occasion for its application will only arise in exceptional circumstances: *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 and *Browne v Cockatoo Dockyard Pty Ltd* (1999) 18 NSWCCR 618.

104 *Dust Diseases Tribunal Act* 1989, s 12B

105 *Dust Diseases Tribunal Act* 1989, s 11A.

106 See *Workers' Compensation (Dust Diseases) Act* 1942, s 8AA(4).

107 *Workers Compensation Act* 1987, s 151A(1)(b).

108 See *Workers Compensation Act* 1987, s 151A(1)(a).

109 *Workers' Compensation (Dust Diseases) Act* 1942, s 8E.

110 *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.

compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[111]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[112]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[113] Such cases are likely to be determined according to the common law principles, unaffected by Pt 3 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), which has been repealed and only replaced for proceedings subject to the *Civil Liability Act* 2002 (NSW).[114]

Post-death claims

[6-1080] Estate actions

The legal personal representative of the estate of a deceased person who was injured as the result of the wrongful act of another, can bring an action to recover common law damages on behalf of the estate, or continue an action already commenced by the deceased, provided the deceased had a cause of action. Such an estate action is not, however, available if the deceased commenced and completed an action for the recovery of such damages before dying.

This type of action is based on the survival of causes of action legislation that was introduced in NSW by the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) (the "1944 Act").[115] Similar provisions exist in other common law jurisdictions. Prior to its introduction any cause of action that was vested in the deceased died with that person.[116]

In an estate action, the economic loss damages recoverable comprise:[117]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[118] and provided by, the deceased to other people, prior to death;[119]
- the loss of the deceased's earning capacity to the date of death; and
- funeral expenses.[120]

The damages recoverable by the estate, in an estate action, do not include any damages for the loss of the deceased's earning capacity past the date of his or her death, (that is, during the "lost years"),[121] nor do they include exemplary damages.[122]

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111 See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.

112 *Dust Diseases Tribunal Act* 1989, s 12D.

113 *Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.

114 *Civil Liability Act* 2002, Pt 3. It is also noted that, as a consequence of *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97, such damages are not recoverable from the Asbestos Injuries Compensation Fund, which is established to fund the liabilities of former James Hardie subsidiaries (see para 2.106–2.107). This does not, however, preclude proceedings against employers or insurers or other co-defendants.

115 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(1).

116 The rule has been traced as far back as 1611: *Pinchon's Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860, although various statutory and common law exceptions were created in the intervening years. For the history of the common law with respect to fatal accidents and the survival of causes of action, see: P H Winfield, "Death as Affecting Liability in Tort" (1929) 29 *Columbia Law Review* 239. See also: England and Wales, Law Revision Committee, Interim Report (1934).

117 See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.

118 *Civil Liability Act* 2002, s 15A, also known as *Griffiths v Kerkemeyer* damages.

119 *Civil Liability Act* 2002, s 15A, also known as *Griffiths v Kerkemeyer* damages.

120 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(c).

121 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(a)(ii).

122 *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(2)(a)(i).

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[123]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[124] including damages for the loss of the deceased's expectation of life, can be awarded, but only if proceedings for damages had been commenced by the injured person during his or her lifetime.[125] There is no restriction on the award of interest on damages for past economic loss. The entitlement to interest in such cases differs from that applicable to claims under the other compensation schemes.[126]

[6-1090] Dependency actions

The legal personal representative of a deceased person can also bring an action under the 1897 Act, on behalf of specified family members,[127] for compensation for the loss of support that they sustain, consequent upon the death of a person who died as the result of the wrongful act of another.[128] Only one such dependency action can be brought.[129]

The damages recoverable in such an action, for the benefit of any eligible claimant, are limited to the loss of that dependant, that arose from the loss of the expectation of the deceased's financial support,[130] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[131] Although the relevant provision does not explicitly limit the damages recoverable in this way,[132] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[133] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[134]

The measure of damages available is the extent of the support that is lost by the dependant from the time of death, reduced by benefits obtained by the dependant as a consequence of the death, other than those benefits that are specifically excluded under s 3(3) of the 1897 Act.

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[135] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[136]

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123 The rationale for the non-survival of damages for non-economic loss in estate actions is that the estate, as an "impersonal body", ought not receive damages for the pain and suffering of the deceased: NSW, Legislative Assembly, *Parliamentary Debates*, 18 October 1944, p 523 (V Treatt).

124 See, eg, *Novek v Amaca Pty Ltd* [2008] NSWDDT 12 [53], where such interest was awarded in an estate action. Interest on non-economic loss damage is not available in proceedings under the civil liability, motor accidents and non-dust workers' compensation schemes.

125 *Dust Diseases Tribunal Act* 1989, s 12B.

126 *Motor Accidents Compensation Act* 1999, s 137(4); *Workers Compensation Act* 1987, s 151M(4); *Civil Procedure Act* 2005, s 100(4).

127 *Compensation to Relatives Act* 1897, s 4.

128 The rights conferred under the *Law Reform (Miscellaneous Provisions) Act* for the benefit of the estate of a deceased person operate in addition to, not in derogation of, any rights conferred under the *Compensation to Relatives Act* 1897: *Law Reform (Miscellaneous Provisions) Act* 1944, s 2(5).

129 *Compensation to Relatives Act* 1897, s 5.

130 *De Sales v Ingrilli* (2002) 212 CLR 338 at [91].

131 *Compensation to Relatives Act* 1897, s 3(2).

132 *Compensation to Relatives Act* 1897, s 3(1).

133 For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.

134 *Compensation to Relatives Act* 1897, s 4(1).

135 *Compensation to Relatives Act* 1897, s 3(1).

136 *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Co Ltd v Gentile* [1914] AC 1024, 1041.

Dependency actions are available in relation to each of the categories of liability previously mentioned. Once again, such proceedings are determined by the Supreme or District Courts, save for dust disease dependency actions which are determined in the DDT.

The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.[137]

Proceedings under the 1897 Act brought in the DDT are subject to the unmodified common law and, as a consequence, it has been accepted that damages for the dependant's future loss of support are calculated by reference to the 3% actuarial tables rather than the 5% tables that are applied in relation to claims by dependants under the other schemes.[138]

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137 *Walden v Black* [2006] NSWCA 170 at [96].

138 See *Civil Liability Act* 2002, ss 11A(1), (2), 14; *Motor Accidents Compensation Act* 1999, s 127(1)(b), (c); *Workers Compensation Act* 1987, ss 151E(1), (3), 151J.

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