Civil Trials Bench Book

Judicial Commission of New South Wales

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Currency

Update 60, June 2025

[1-0600] Legal aid and pro bono procedures

At **[1-0610] Court-based scheme** *Jeffreys v Sheer* [2025] NSWCA 6 and *Renshaw v NSW Lotteries Corp Pty Ltd* [2021] NSWCA 41 have been added regarding the pro bono scheme being a precious and limited resource. *Jeffreys v Sheer* has also been added as an example of an unsuccessful referral.

[1-0800] Unrepresented litigants and lay advisers

At **[1-0840] Assistance of lay advocates** *Sinanovic v Bone* [2025] NSWSC 144 has been added as an example of a circumstance in which a distrust of, or an aversion to lawyers was held to be an insufficient reason to permit a lay advocate to represent a litigant.

Two articles have been added to further references: "Sovereign citizens: ideology, impacts and judicial responses" by the Honourable Peter Johnson SC, published in the *Judicial Quarterly Review* and "What do judicial officers need to know about sovereign citizens?" by Professor Michele Pathé, published in the *Judicial Officers' Bulletin*.

[2-6300] Judgments and orders

At **[2-6410] Written reasons** and **[2-6420] Deferred reasons** *Rock v Henderson (No 2)* [2025] NSWCA 47 has been added to clarify that the obligation to give reasons is as soon as reasonably practicable after judgment is delivered. *Mulvena v Government Insurance Office of NSW* (Court of Appeal (NSW), unrep, 16 June 1992) is also referred to.

Three articles from the *Handbook for Judicial Officers* on judgment writing and the giving of reasons have been added to further references.

[2-6600] Setting aside and variation of judgments and orders

At **[2-6680] The slip rule** *Aurora Australasia Pty Ltd v Hunt Prosperity Pty Ltd (No 2)* [2025] NSWCA 62 has been added on the slip rule extending to the correction of typographical errors.

[2-6900] Summary disposal and strike out applications

At **[2-6920] Summary dismissal** *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 and *Haigh v Haddad* [2025] NSWCA 28 have been added as examples of abuse of process in which there has been an attempt to re-litigate issues which have already been determined in previous proceedings.

[2-7600] Vexatious proceedings

At **[2-7620] Vexatious proceedings order** *Proietti v Proietti* [2025] NSWCA 11 has been added to clarify that an application to vary or set aside an order under *Vexatious Proceedings Act 2008*, s 9 may not be used to bring a de facto appeal.

[4-1500] Privilege

At **[4-1535] The inconsistency test — s 122(2)** *Schmuelly v Elrob Construction Group Pty Ltd (waiver of privilege)* [2025] NSWSC 25 has been added as an example in which client legal privilege was waived under *Evidence Act 1995*, s 122 due to an affidavit made by the defendants filed in support of a motion to vacate the hearing.

See also **[4-1589] Exclusion of evidence of matters of state — s 130** which has been renamed. *Monteiro v State of NSW* [2025] NSWSC 235 has been added, in which the NSW Supreme Court found the public interest in preserving the confidentiality of the information and the confidentiality of the personal details of any individual who provided that information significantly outweighed the public interest in admitting the information into evidence, or else making it available to the plaintiff

for use more generally in the proceedings. The claim related to public interest immunity with respect to the redacted parts of documents in relation to an Extended Supervision Order which Community Corrections had responsibility for overseeing.

[5-7000] Intentional torts

At **[5-7115] Justification** has been updated to include a summary of the two limbs ((a) and (b)) of the s 99(1) of the LEPRA test. *State of NSW v Randall* [2017] NSWCA 88 and *Emde v NSW* [2025] NSWCA 41 have been added on interpretation of s 99(1)(b) such that the state of satisfaction required can only be successfully challenged if it was manifestly unreasonable, or "arbitrary, capricious, irrational or not bona fide".

At **[5-7118] Judicial immunity** *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3, in which the High Court held that the common law of Australia affords the same immunity from suit to judges of inferior courts as it does to judges of superior courts, has been added. *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 is also referred to.

At **[5-7130] Proceedings initiated by the defendant** *Rock v Henderson (No 2)* [2025] NSWCA 47 has been added for its confirmation that any extension of the tort of malicious prosecution to civil proceedings would require significant justification. In this case, it was held that the case for extending the tort of malicious prosecution to encompass proceedings seeking an AVO under the *Crimes (Domestic and Personal Violence) Act 2007* was not established.

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

At **[6-1010] General workers** and **[6-1020] Dust disease workers** the workers compensation amounts have been updated.

[8-0000] Costs

At **[8-0030] Departing from the general rule: depriving a successful party of costs** *Channel Seven Sydney Pty Ltd v Mahommed (No 2)* (2011) 80 NSWLR 210 and *El Assaad v Al Haje (No 2)* [2025] NSWCA 17 have been added on determining whether the final judgment was no more favourable than the Calderbank offer and the inclusion of post-judgment interest. Multiple cases have been added on factors relevant to the question whether a rejection of an offer is unreasonable.

At **[8-0130] Basis for assessment: ordinary and indemnity costs** *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354 and *Liu v Lam (No 2)* [2025] NSWSC 264 have been added regarding decisions to order indemnity costs due to unreasonable conduct including knowingly and deliberately giving false evidence.

Foreword

A new regime of civil court procedure in New South Wales was introduced by the enactment of the *Civil Procedure Act 2005* and the Uniform Civil Procedure Rules. The object of this Act and Rules, re-enacting as a statute the overriding purpose first adopted as a rule of the Supreme Court, is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings". Over the years numerous practices have developed to guide judges in achieving this overriding purpose.

The function of this Bench Book is to provide guidance for judicial officers in the conduct of civil proceedings, from preliminary matters to the conduct of final proceedings and the assessment of damages and costs. The Bench Book does not seek to be encyclopaedic, but to provide concise statements of relevant legal principles, references to legislation, sample orders for judicial officers to use where suitable and checklists applicable to the various kinds of issues that arise in the course of managing and conducting civil litigation.

The authors of the Bench Book have striven to ensure that the sample orders they suggest are in accordance with the law and are easily understood and unambiguous. These orders are provided by way of guidance only and any judicial officer is free to depart from the suggested order as he or she thinks fit, provided the orders are given are in accordance with the law. Failure to make an order in accordance with the suggested form should not, of itself, be regarded as a ground of appeal.

The *Civil Trials Bench Book* is a work in progress. New chapters will be added as they are prepared and the Bench Book will be updated regularly. The Judicial Commission welcomes comments as to the scope and content of this Bench Book, with a view to ensuring that it effectively performs its task in the administration of civil trials.

The *Civil Trials Bench Book* has been prepared for use by judicial officers in New South Wales. It constitutes a major contribution by the Judicial Commission of New South Wales to the administration of justice of this State. I congratulate and thank the members of the Committee who produced the work, under the Chairmanship of the Honourable James Wood AO QC.

The Honourable JJ Spigelman AC
Chief Justice of New South Wales, 2008–2011

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- M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn, Thomson Reuters, 2017

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How to use this Bench Book

The *Civil Trials Bench Book*, or any section of it, can be read in its entirety or dipped into as necessary — for example, when in court or during a break in court proceedings.

To enable speedy access, there is a detailed Contents List at the front of each chapter, and an Index, a Table of Cases and a Table of Statutes at the back of the Bench Book. In addition, liberal use has been made of bullet points and bold type throughout the Bench Book. Precise cross references (including hyperlinks for the "online" version) have been provided wherever appropriate.

Your feedback

The Judicial Commission of New South Wales welcomes your feedback on how we can improve the *Civil Trials Bench Book*.

The Commission is particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific sections of other Bench Books, discussion or research material.

Please send your comments, by mail, to:

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Disqualification for bias

[1-0000] Introduction

Bias may involve actual or apprehended bias.

[1-0010] Actual bias

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

[1-0020] Apprehended bias

Last reviewed: March 2025

The test for determining whether a judge should disqualify himself or herself by reason of apprehended bias is the objective "double might" test: "whether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide [emphasis added]": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; *Charisteas v Charisteas* (2021) 273 CLR 289 and *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [50], [175], [292]; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 255 CLR 135. The resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place: *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 at [41]–[43] (citing *Ebner* at [7]–[9], [33]).

A finding of apprehended bias is not to be reached lightly: *Polsen v Harrison* [2021] NSWCA 23 at [46], citing *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 371; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [56].

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

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

Attributes of fair-minded lay observer

The "fair-minded lay observer" who is central to an assessment of apprehended bias is a hypothetical figure founded in the need for public confidence in the judiciary. The fair-minded lay observer will not be unduly sensitive or suspicious, nor complacent. The fair-minded lay observer will admit human frailty and not reasonably apprehend bias from a short and emotional exchange taken out of context and weighed in isolation. The fair-minded lay observer will understand that interventionist comments and conduct by the judge are often motivated by the judge's desire to understand the

evidence and to advance the trial process. While the reasons given by the judge for refusing to disqualify him or herself are relevant, the fair-minded lay observer will give them little weight: *Polsen v Harrison* [2021] NSWCA 23 at [46]; *BW v Secretary, Department of Communities and Justice* [2024] NSWSC 1354 at [143].

The fair-minded lay observer is taken to have knowledge of the legal, statutory and factual context in which the decision is to be made: *BW v Secretary, Department of Communities and Justice* at [144] citing *Isbester v Knox City Council* (2015) 255 CLR 135 at [23]. For example, the fact that the Children's Court is required, to some extent, to inquire, means that it may be more difficult to establish a reasonable apprehension of bias: *BW v Secretary, Department of Communities and Justice* at [144] citing *SZBLY v Minister for Immigration and Citizenship* [2007] FCA 765 at [25].

[1-0030] Procedure

Last reviewed: March 2025

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

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

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

The procedure to determine bias in a multi-member court is not settled: see obiter dicta in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 where Kiefel CJ and Gageler J considered the objection to jurisdiction on the ground of apprehension of bias ought to have been considered and determined by the Full Court rather than by the individual judge alone; Gordon, Edelman, Steward and Jagot JJ considered that the judge the subject of the recusal application should consider the issue first, personally and independently of other members of the court; and Gleeson J found it unnecessary to express an opinion as the matter was the subject of possible law reform.

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

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

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

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

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

Generally an application should be made as soon as reasonably practicable after the party seeking disqualification becomes aware of the relevant facts. Otherwise the right to do so may be waived: *Vakauta v Kelly* (1989) 167 CLR 568; *Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWCA 260; *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 per Basten JA at [23]–[34]; *Rouvinetis v Knoll* [2013] NSWCA 24 at [37]–[38].

Where there are matters that might properly arise for consideration, which are known to the judge, it is desirable that they be drawn to the attention of the parties, even if it is believed that they are aware of them: *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 and *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168 at [105]–[107]. As to the relevance of non-disclosure to issues of apprehended bias, see *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (in liq)* [2011] NSWCA 176 at [20]–[24]; see also *Maules Creek Coal Pty Ltd v Environment Protection Authority* (2023) 112 NSWLR 507 where at [112]–[113] it was held (citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [69]–[70]) that "judges should disclose matters if there is a serious possibility that they are potentially disqualifying".

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

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

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

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

In *NSW v JR* [2024] NSWCA 308, during the trial, counsel for the appellant objected to the trial judge's interventions but expressly declined to make a recusal application. Due to the appellant's forensic decision not to make a recusal application, the Court held that the appellant could not now assert that the trial judge's interventions prior to the exchange with counsel were not the subject of a waiver. Further, the appellant should be taken to have waived its right to object to the trial judge's further interventions on the ground of apprehended bias, given that it did not subsequently make a recusal application before the end of the trial, having earlier disavowed making such an application: at [280]–[281]. In the result, the trial judge's conduct did not meet the "undemanding test in *Ebner*": at [285].

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

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

Last reviewed: March 2025

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

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

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

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

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

(f) The mere fact that a judge has made an adverse decision or decisions against a party is not a sufficient reason for the judge to disqualify himself or herself from dealing with subsequent applications concerning the same party. The test for apprehended bias is concerned with prejudice and partiality, not an individual litigant's expectations or predictions as to the outcome of the case: *Mohareb v NSW (No 2)* [2024] NSWCA 69 at [11].

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

(h) The fact that the judge more than 14 years previously had shared chambers and associated in a professional capacity with a legal representative involved in a case was not a ground for

disqualification: *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 at [25]–[27], [29]. However the existence of a close personal relationship between a trial judge and a Crown prosecutor who had advised on the bringing of the charges in question was a ground for disqualification: *Gleeson v DPP (NSW)* [2021] NSWCA 63 at [29]. As to a party being a member of the trial court, see *Rouvinetis v Knoll* [2013] NSWCA 24.

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

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

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

(l) The fact that the judge has previously appeared as counsel against the appellant in a conviction appeal gave rise to disqualification, particularly as the earlier prosecution was connected with the case before the court: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148.

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

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

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

[1-0050] Circumstances arising during the hearing

Last reviewed: March 2025

The conduct of the trial judge involving adverse observations, in relation to one party's case, or in relation to witnesses called by that party, especially where adverse findings are also made against that party or witnesses without proper substantiation, may lead to disqualification, see *Mistral International Pty Ltd v Polstead Pty Ltd* [2002] NSWCA 321 and *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407, see also *Vakauta v Kelly*, above, where remarks made by the trial judge critical of evidence given by the defendant's medical witnesses, in previous cases, which were effectively revived by what was said in the reserved judgment, arose for consideration. See also *Heywood v Local Court of NSW* [2024] NSWSC 1047, in which the cumulative effect of exchanges between the magistrate and the applicant's counsel during the trial supported a conclusion that a fair-minded lay observer may reasonably apprehend that given the magistrate's apparent animus, contempt and disdain for the applicant's counsel, and to a lesser extent, her solicitor, he might be unable to put aside a mindset unfavourable to the applicant to a degree compatible with the dispassionate resolution of the case. The magistrate on occasion belittled, derided, hurried, harassed, "warned" and at one

point threatened counsel with physical removal from the Court, remarks that went well beyond case management, occasional flares of ill-temper, misunderstandings or redirection of counsel to relevant issues: [131], [138]. The magistrate was required to remain even-handed, and to avoid any sarcasm or belittling of counsel even though the way counsel chose to voice his concerns was offensive, supercilious and unprofessional: [132]. The fact the magistrate's hostility was directed towards the applicant's legal representatives and not her personally was not the point: [134].

It does not, however, follow that trial judges must sit in stony silence, without exposing their views, at risk of being accused of bias. The expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias; whether judicial interventions and observations exceed what is proper and reasonable expression of tentative views is a matter of judgment taking into account all of the circumstances of the case: *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 at [112]. The full context in which the judge made their remark must be considered rather than selective quoting or "cherry-picking" of aspects of the transcript: *Crackin' Snack Pty Ltd v Gameking Australia Pty Ltd* [2024] NSWCA 182 at [85], [92]. Genuine engagement and debate about critical issues is permissible: *Re Keely; Ex p Ansett Transport Industries (Operations) Pty Ltd* [1990] HCA 27; *Barbosa v Di Meglio* [1999] NSWCA 307 and *Odtojan v Condon* [2023] NSWCA 129 at [45]–[46], and "critical, strong and candid" judicial statements will not necessarily lead to a finding of bias: *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* at [180]; see also *NSW v Madden* (2024) 113 NSWLR 509 at [108]. However, undue interference by a judge, for example, in questioning parties or witnesses, or in taking up the arguments of one party, may cross the line, as can expressions of opinion as to the likely outcome of the case prior to the conclusion of the evidence and submissions. For guidelines concerning the extent to which judicial intervention is or is not permissible, see *Galea v Galea* (1990) 19 NSWLR 263 at 281–282 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen*, above.

An apprehension of bias may arise in inquisitorial proceedings, including from the way the judge questions a witness: *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [29]–[31]; *BW v Secretary, Department of Communities and Justice* [2024] NSWSC 1354 at [144], [292]–[294], [347]. All the alleged occasions relied on must be viewed as a whole: *BW v Secretary, Department of Communities and Justice* at [347].

The fact that the judge has had communication with a party, a witness or a legal representative, at or about the time of the hearing, in the absence of, and without the consent or approval of the other party, can also lead to disqualification: *Re JRL Ex p CJL*, above. See also *Royal Guardian Mortgage Management Pty Ltd v Nguyen*. As to inappropriate contact or communication between the judge and a party's barrister during proceedings and while judgment was reserved which would cause a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the matter, see *Charisteas v Charisteas* (2021) 273 CLR 289 at [12], [15], [21]–[22].

In *Maules Creek Coal Pty Ltd v Environment Protection Authority* (2023) 112 NSWLR 507, the judge had a brief private meeting in chambers with a person mistakenly thought to be a law student, but who, unknown to the judge, was a longstanding and active campaigner against Maules Creek Coal and whose interests were aligned with the Environment Protection Authority. Nothing of substance connected to the case was discussed. The Court of Appeal held at [106]–[108] that the circumstances did not suffice to establish that the fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions the judge was to decide.

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

> [21] There should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties

to those proceedings. Particularly in relation to written communications, given the ubiquity and speed of emails, the precise terms of any proposed communication with a judge's chambers should be provided to the other parties for their consent.

There are four exceptions to this:

1. trivial matters of practice, procedure or administration (eg the start time or location of a matter, or whether the judge is robing)
2. ex parte matters
3. where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (eg for the filing of material physically or electronically with a judge's associate), and
4. exceptional circumstances.

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

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

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

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

[1-0060] Judicial immunity from suit

Last reviewed: March 2025

No action lies against a judge for damages in consequence of bias, in respect of acts done in the performance of judicial duties: *Gallo v Dawson* (1988) 63 ALJR 121 and *Yeldham v Rajski* (1989) 18 NSWLR 48. The Registrar has the same protection and immunity by reason of s 44C of the *Judicial Officers Act 1986* (NSW). There is no difference between the scope of immunity afforded to superior court judges and inferior court judges for actions arising out of acts done in exercise or purported exercise of their judicial function or capacity: *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3 at [112]–[113] and see generally.

[1-0080] Further references

- B Cairns, "Bias and procedural fairness at trial" (2021) 9 *Journal of Civil Litigation and Practice* 182
- J Sackar, "Disqualification of judges for bias", January 2018, accessed 11/11/2024

- Australian Law Reform Commission, *Without fear or favour: judicial impartiality and the law on bias,* Report No 138, 2021
- S Gageler, "Judicial legitimacy", paper presented at the 2022 Australian Judicial Officers Association Colloquium, Hobart, 7/10/2022, accessed 11/11/2024.

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Media access to court records, exhibits and judgment remarks

[1-0200] Principle of open justice

> Whatever [the media's] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them: *R v Davis* (1995) 57 FCR 512 at 514.

Rule 36.12 of the UCPR, which applies to the Supreme Court, District Court and Local Court, allows any person, upon payment of the prescribed fee, to obtain a copy of a judgment or order from the registrar, unless the court orders otherwise. Additionally, the registrar may provide to a non-party "appearing to have a sufficient interest in the proceedings" a copy of any pleading or other document filed in the proceedings. The legislation does not define "sufficient interest". In the context of s 22(1)(a) of the *Defamation Act 1974* (rep) and the defence of qualified privilege (s 30 of the *Defamation Act 2005*), having a "sufficient interest" was understood as "not simply a matter of curiosity, but a matter of substance apart from its mere quality as news": *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 per Hunt J at p 40.

The principle of open justice will guide the courts in determining whether to grant the media access to court records and exhibits. The Court of Appeal has held that open justice is a principle, not a freestanding right, and that there is no common law right for a non-party to obtain access to a court document filed in proceedings and held as part of the court record: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512. The policy that guides the courts is the demand that the judicial process be open to public scrutiny, but only to the extent necessary for the public to scrutinise the judicial process itself: *John Fairfax Publications Pty Ltd v Ryde Local Court*, above, per Spigelman CJ at [29]–[31].

Considering an application by the media for access to court records and exhibits requires a balancing act. The principle of open justice must be balanced against other principles of justice which protect the interests of parties to litigation. In *eisa Ltd v Brady* [2000] NSWSC 929 at [36], Santow J said that none of these principles has a priori ascendancy, but must be tested on a case by case basis "against that overriding purpose of the interests of justice". In *Australian Securities and Investments Commission v Rich* (2001) 51 NSWLR 643, Austin J identified eight considerations which qualify the principle of open justice:

(a) the principle of prematurity, in the sense that evidence has not been tested or answered. In the pre-trial phase, the principle of open justice will serve less as a basis for permitting access to documents as these may be amended, struck out, objected to and rejected: see *Australian Securities and Investments Commission v Rich* [2002] NSWSC 198 per Barrett J at [10] and *eisa Ltd v Brady*, above, per Santow J at [22]. However, when the court makes significant orders on an ex parte application, the basis for the making of the orders must be available so the court is accountable for what it has done: *Australian Securities and Investments Commission v Rich*, above, at [26].

(b) The principle of trial by media before material can be tested in open court in public proceedings.

(c) The possibility of abuse of the absolute privilege afforded by s 27 of the *Defamation Act 2005* for a "fair" report of proceedings in a court. If the court prematurely made available to the media documents containing damaging allegations not read in open court, this may unfairly prejudice those who are the subject of the allegations with no redress in defamation: see *eisa Ltd v Brady*, above, at [19]–[20].

(d) Any legitimate public interest in releasing material weighed against the urges of prurience.

(e) Surprise or ambush which might undermine a negotiated position.

(f) The risk of misleading reporting.

(g) The fact that the evidence is hearsay should not dissuade a judge from making it available.

(h) The need to protect commercial confidentiality.

Ensuring opportunities for fair reporting of legal proceedings by the press was seen as an aspect of the principle of open justice in *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 and *Australian Securities and Investments Commission v Michalik* [2004] NSWSC 966. In the interests of accurate reporting, it is undesirable that the media relies on the parties for information about the case: see *Linter Group Ltd (in liq) v Price Waterhouse* [2000] VSC 90 per Harper J.

If file material has been admitted into evidence, the principles of open justice are engaged. Unless evidence of apprehended particular or specific harm or damage has been accepted or there is a non publication order in force, leave to inspect should generally be granted: *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

A further qualification to the principle of open justice is the so-called *Harman* principle whereby there is an implied undertaking that a party and their legal representatives are constrained from using documents produced on discovery or subpoena for a collateral purpose: *Home Office v Harman* [1983] 1 AC 280; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155. Hence, the media cannot be placed in a position superior to that of a party and a party must show special circumstances before leave will be granted permitting the collateral use of documents: *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 per Mason P at 549.

[1-0210] Supreme Court procedure

Media access to court files in the Court of Appeal and each of the Divisions of the Supreme Court is governed by Practice Note SC Gen 2 "Access to Court Files", effective 1 March 2006.

Clause 5 of the Practice Note provides that:

> A person may not search in a registry for or inspect any document or thing in any proceedings except with the leave of the Court.

An application by the media for access to material held by the court in the proceedings must be made in the form attached to the Practice Note. The applicant must demonstrate that access should be granted and state the reasons why access is desired.

Access

The discretionary basis upon which leave is granted or withheld is stated in the Practice Note. Clause 6 provides that access to material in any proceedings is restricted to the parties, unless leave is granted by the court.

Access will normally be granted to the media to:

- pleadings and judgments in proceedings that have been concluded, except in so far as a confidentiality order has been made
- documents that record what was said or done in open court
- material, including evidence in electronic mediums such as video and audio tapes, DVDs and CD roms, that was admitted into evidence, and
- information that would have been heard or seen by a person present in open court: Practice Note cl 7.

The judge or registrar dealing with the application for leave may refuse access to documents falling into these categories if the judge or registrar considers that the material or portions of it should be kept confidential: Practice Note cl 7.

Access to other material is granted only if the judge or registrar is satisfied that "exceptional circumstances" exist: Practice Note cl 7. The Practice Note explains the reasons for this. In relation to affidavits and witness statements filed in proceedings, these are often never read in open court, either because they contain matter that is objected to and rejected, or because the proceedings have settled before coming on for hearing. Affidavits, statements, exhibits and pleadings "may contain matter that is scandalous, frivolous, vexatious, irrelevant or otherwise oppressive". Rule 4.15 of the UCPR allows the court to order this type of matter to be struck out of a document: Practice Note cl 14. Access is not normally allowed to materials prior to the conclusion of the proceedings because material that is ultimately not read in open court or admitted into evidence would be seen: Practice Note cl 15. In addition to demonstrating that "exceptional circumstances" warrant the granting of access at a stage before any final hearing, an applicant must overcome the objection of all parties: see *eisa Ltd v Brady*, above.

There may be good reason for refusing access even where material has been read in open court or is included in pleadings:

> Material that has been rejected or not used or struck out as being scandalous, frivolous, vexatious, irrelevant or otherwise oppressive, may still be legible. Where access to material would be otherwise unobjectionable, it may concern matters that are required to be kept confidential by statute … or by public interest immunity considerations: Practice Note cl 16.

Incidental and inherent jurisdiction

Section 23 of the *Supreme Court Act 1970* provides that "the Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

In *Hammond v Scheinberg* (2001) 52 NSWLR 49, Hamilton J held that, notwithstanding the provisions of Practice Note No 97 (a predecessor to Practice Note SC Gen 2), in the conduct of proceedings, the trial judge has power in the inherent jurisdiction of the court, or under s 23, to determine all matters relating to access to be given to any person to the material in evidence in the trial, including transcripts of evidence, affidavits and exhibits.

In the circumstances of this case, an application by two of the plaintiffs that the court give notice to the parties in accordance with Practice Note 97 before allowing further media access to the affidavits read in court, Hamilton J held that it was within the general powers of the court to allow media access to affidavits read in evidence in the court, but not to exhibits provisionally admitted into evidence. Hamilton J rejected the submission that access be granted only in accordance with the procedure prescribed by Practice Note 97.

Exceptional circumstances in which access has been granted

(a) Media access to two affidavits in the court file, one of which had not been read in open court, was granted in *Australian Securities and Investments Commission v Michalik*, above. Access was granted subject to the names of potential witnesses in possible proceedings by ASIC against the defendants being omitted or masked. In granting media access, Barrett J weighed the public interest in "the due and orderly conduct of investigations by law enforcement agencies" with the public interest in the maintenance of the fundamental privilege against self-incrimination at [8].

(b) Media access to affidavits and exhibits arising from an application for ex parte orders prohibiting the defendants from disposing of their assets was granted in *Australian Securities and Investments Commission v Rich*, above. Austin J considered that none of the eight qualifying principles, listed above, justified refusing access to the affidavits in absolute terms. In applying the principle of open justice, Austin J granted access to the affidavits and exhibits which his Honour relied upon in deciding to grant ex parte relief. Access was granted subject to certain deletions of confidential information which were not relied upon. Access was granted

to exhibits relating to board papers and minutes of a meeting which, while they were of a commercially confidential nature, were relevant to the decision to grant relief. Access to information about the financial assets of the first, second and third defendants, against whom ex parte orders were made, was also granted.

(c) In *Australian Securities and Investments Commission v Adler* [2001] NSWSC 644, the statement of claim was released to the media on the basis that the subject matter of the statement of claim was already in the public arena, having been released by ASIC, and there would be no material prejudice to a fair trial.

(d) Media access to the pleadings in the proceedings was granted in *Idoport Pty Ltd National Australia Bank Ltd v National Australia Bank Ltd* [2000] NSWSC 769. Einstein J was satisfied that exceptional circumstances existed on the basis of the "crucial significance of the administration of justice taking place in open court"; the fact that the pleadings would be referred to often in the course of the hearing; and the fact that the statement of claim was already in the public domain at [24].

Circumstances in which access has been refused

(a) In *eisa Ltd v Brady*, there was sufficient justification for Santow J to deny the media access to the pleadings at an interlocutory stage of the proceedings. Serious allegations of breaches of the Corporations Law had been made which were "vigorously opposed". It would be premature to release the allegations to the media before they could be tested in open court. Furthermore, their release could prejudice early settlement and prejudice the reputations of those the subject of the allegations without redress in defamation. The general nature of the allegations, but not the contents of the statement of claim, was already in the public domain and their premature release was objected to by all the parties.

(b) In *Stonham v Legislative Assembly* (No 1) (1999) 90 IR 325, a Full Bench of the Industrial Relations Commission of NSW refused the media access to pleadings at an interlocutory stage, made in the context of investigative journalism. The Full Bench held that the purpose of full and fair reporting would be best served if the dissemination of information occurred as part of ordinary court proceedings where, after objection, documents were read in open court. There was the further risk of trial by media if premature access were granted to the documents.

(c) In *Australian Securities and Investments Commission v Michalik*, above, access to the exhibits to one affidavit and search warrants annexed to the other affidavit was refused on the basis that the public interest in open justice would not be materially prejudiced.

(d) In *Australian Securities and Investments Commission v Rich*, above, media access to annexures to exhibits containing tables of financial information was denied as the release of these might give a competitive advantage to other operators in the telecommunications market. Access was also denied to exhibits relating to board papers and board minutes of meetings which contained some confidential information and which were not relevant to the decision to grant ex parte relief. Access was denied to annexures containing information about the assets of the 10th, 11th and 12th defendants as no application for ex parte relief was sought against these interests and the principle of privacy was taken into account.

(e) Access to an amended statement of claim in the pre-trial stage of the proceedings was refused in *Australian Securities and Investments Commission v Rich*. No exceptional circumstance was identified by Barrett J to warrant granting access to the plaintiff's "entirely untested and unchallenged" allegations which had not yet been aired in court or may never be in their current form.

[1-0220] District Court procedure

Media access to District Court records is governed by the District Court Rules 1973, Pt 52, r 3 and Practice Note No 11 "Access to Court Files by Non-Parties", effective 9 August 2005. Part 52, r 3

provides that a non-party may not search a court file except by leave of the court. Access to material in any proceedings will only be granted with the leave of the court (para 2). An application by a non-party for access to material held by the court must be in the form attached to the Practice Note. The applicant must demonstrate that access should be granted and state the reasons why access is desired.

Unless the judge or registrar dealing with the application considers that the material should be kept confidential, access will normally be granted to the media to material falling into the following categories:

- pleadings and judgments in proceedings that have been concluded, except in so far as a confidentiality order has been made
- documents that record what was said or done in open court
- material that was admitted into evidence, and
- information that would have been heard or seen by a person present in open court: Practice Note cl 2.

Access to other material will not be allowed unless a registrar or judge is satisfied that "exceptional circumstances" exist. Access is restricted in this way because affidavits and witness statements filed in proceedings are often never read in open court, either because they contain matter that is objected to and rejected, or because the proceedings have settled before coming on for hearing. Affidavits, statement, exhibits and pleadings may contain matter that is "scandalous, frivolous, vexatious, irrelevant or otherwise oppressive". Rules 4.15 and 14.28 of the UCPR allow the court to order that this type of matter be struck out of a document. Access is not normally allowed to materials prior to the conclusion of the proceedings because material that is ultimately not read in open court or admitted into evidence would be seen: Practice Note cl 4.

For material that has been read in open court or is included in pleadings, there may be good reason to refuse access. There may be public interest immunity or confidentiality considerations or material which has been struck out as being scandalous, frivolous, vexatious, irrelevant or otherwise oppressive may still be legible: Practice Note cl 5.

[1-0230] Local Court procedure

Media access to Local Court records is governed by Pt 8, r 8.10(3) of the Local Court Rules 2009. That rule provides that a person who is not a party to the proceedings may, with leave of the Magistrate or registrar, have access to a copy of the court record or transcript of evidence or, on payment of a fee, obtain a copy thereof.

[1-0240] Broadcast of judgments

The *Courts Legislation Amendment (Broadcasting Judgment) Act 2014* provides for a presumption in favour of the recording and broadcast of certain judgments of the District Court or Supreme Court given in open court.

It does so by amending the *Supreme Court Act 1970* by the insertion of a new "Part 9A — Broadcast of judgments" (Sch 2) and by amending the *District Court Act 1973* by the insertion of a new "Part 5 — Broadcast of judgments" (Sch 1).

Except for a small number of court specific provisions the Parts are identical. They apply to proceedings in the relevant court other than those set out in SCA s 126(1) or DCA s 177(1). Part 9A extends to proceedings in the Court of Criminal Appeal.

Sections 126 and 177 both exclude proceedings held in closed court, proceedings under the *Bail Act 2013* and proceedings under the *Crimes (Forensic Procedures) Act 2000*. In both sections there is provision that the Part not apply to a class of proceedings excluded by regulations made under

the Acts. In addition, s 126 excludes proceedings in exercise of the parens patriae jurisdiction of the Supreme Court and proceedings under the *Crimes (High Risk Offenders) Act 2006*. Section 177 excludes proceedings on appeal under the *Children (Criminal Proceedings) Act 1987* or *Children and Young Persons (Care and Protection) Act 1998*.

A person may apply to the court in proceedings to which the Parts apply for the court to permit the recording of judgment remarks of the court that are made in those proceedings: SCA s 128(1); DCA s 179(1).

Sections 9 and 9A of the *Court Security Act 2005* prohibit the use of recording devices in courts and the broadcasting of court proceedings from a court room except, amongst other circumstances, when expressly permitted by a judicial officer.

Subsection (2) (SCA s 128(2), DCA s 179(2)) provides that, if an application is made, the court is to permit the recording of the judgment remarks of the court and their broadcast by one or more media organisations, unless the court is satisfied that an exclusionary ground referred to in subsection (3) is present and that it is not reasonably practical to implement measures, when recording or broadcasting the judgment remarks, to prevent the broadcast of any thing that gives rise to the exclusionary ground.

The exclusionary grounds are set out in subsection (3). It should be noted that exclusionary grounds (3)(d) does not attract consideration of possible preventative measures.

Subsection (4) forbids images that may identify persons of the class referred to in the subsections. Subsection (5) empowers the court, on the application of a relevant person or of its own motion, to make orders for the purpose of preventing the recording or broadcast of any thing that gives rise to an exclusionary ground or a contravention of subsection (4).

Subsection (7) provides that nothing in SCA s 128 (or DCA s 179) limits the circumstances in which the court may decide to permit the recording or broadcasting of judgment remarks of the court or the person to whom the court, subject to the rules, decides to grant permission to record or broadcast judgment records of the court.

The judgment remarks of the court in relation to a criminal trial mean the delivery of the verdict and any remarks made by the court when sentencing the accused person that are delivered or made in open court. In relation to any other proceeding, the phrase means any remarks made by the court in open court when announcing the judgment delivered in the proceedings: SCA s 127; DCA s 178.

Supreme Court Rules (Amendment No 426) 2014 makes provision in respect of making an application for permission to record or broadcast and the manner in which judgment remarks may be recorded. Part 3 of the District Court Rules 1973 makes similar provisions in respect of the District Court except that the application is made to the Court's Media Coordinator.

Part 13 r 2 of the Supreme Court Rules 1970 provides that an application is to be made by sending an email to the Media Manager. The email is to include as an attachment a completed application in the form published on the court's website.

Part 13 r 3 makes, amongst other things, provision for the number of persons that may be involved, the nature of equipment used, and the burden of the cost involved.

Part 13 r 5 provides that the news media organisation must, as soon as practicable after the recording is made, make it available to other news media organisations. In the case of a live broadcast the news media organisation must ensure that any other such organisation wishing to broadcast has equal access at the same time to the live feed.

Legislation

- *Bail Act 2013*
- *Children (Criminal Proceedings) Act 1987*

- *Children and Young Persons (Care and Protection) Act 1998*
- *Court Security Act 2005*, ss 9, 9A
- *Courts Legislation Amendment (Broadcasting Judgment) Act 2014*
- *Crimes (Forensic Procedures) Act 2000*
- *Crimes (High Risk Offenders) Act 2006*
- *Defamation Act 2005*, ss 27, 30
- *District Court Act 1973*, Pt 5, s 177(1), s 178, ss 179(1), (2), (3), (4), (7)
- *Supreme Court Act 1970*, Pt 9A, s 23, s 126(1), ss 128(1), (2), (3), (4), (7)

Rules

- UCPR rr 4.15, 14.28, 36.12
- District Court Rules 1973, Pt 3, Pt 52 r 3
- Local Court Rules 2009, Pt 8
- Supreme Court Rules 1970, Pt 13, rr 2, 3, 5
- Supreme Court Rules (Amendment No 426) 2014

Practice Notes

- Practice Note SC Gen 2 "Access to Court Files" (Supreme Court)
- Practice Note No 11 "Access to Court Files by Non-Parties" (District Court)

Further references

- JJ Spigelman, "The principle of open justice: a comparative perspective" (2006) 29(2) *UNSW Law Journal* 147
- A Cannon, "Policies to Control Electronic Access to Court Databases" (2001) 11(2) *JJA* 100
- JJ Spigelman, "Seen to be Done: the Principle of Open Justice" (2000) 74 *ALJ* 290
- JJ Spigelman, "Seen to be Done: the Principle of Open Justice — Part II" (2000) 74 *ALJ* 378

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Closed court, suppression and non-publication orders

[1-0400] The principle of open justice

Last reviewed: March 2025

The principle of open justice is one of the most fundamental aspects of the system of justice in Australia and the conduct of proceedings in public is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public: *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 (CA) per Spigelman CJ at [18].

There are a number of statutory exceptions to this principle and the most significant of these are discussed at [1-0410], [1-0430] and [1-0440]. These exceptions can be divided into three broad groups: those conferring a power on a court to make suppression or non-publication orders in particular circumstances, those requiring or enabling the closing of a court and those that either require the making of an order for non-publication or prohibit publication of information.

The various statutory provisions protect the privacy interests of particular participants in the court system. Privacy interests are also the concern of the Supreme Court of New South Wales "Identity theft prevention and anonymisation policy" 2010 (accessed 2/8/2011), which provides guidance as to the publication of personal or private information in court judgments, and must be adhered to by a judge's staff and the staff of the Reporting Services Branch.

It is generally desirable that consideration of whether orders should be made under any of the statutory provisions be dealt with at the outset of the proceedings, and, when a prohibition is to remain in force (as it often does) to advise everyone, including the entire jury panel, of the legal position.

Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence (adopted by District Court of NSW and Land and Environment Court of NSW), commenced 3/2/2025, at [9A], provides that information subject to non-publication or suppression orders, the implied (*Harman*) undertaking not to use information produced under compulsion for any purposes extraneous to the proceedings without the leave of the Court, material produced on subpoena, or any material that is the subject of a statutory prohibition upon publication must not be entered into any Gen AI program unless the legal practitioner is satisfied that the information:

(a) will remain within the controlled environment of the technological platform being used and that the platform is the subject of confidentiality restrictions on the supplier of the relevant technology or functionality to ensure that the data is not made publicly available and is not used to train any large language models

(b) is to be used only in connection with that proceeding (unless otherwise required or permitted by law to be disclosed or required to be reviewed by a law enforcement agency for policy purposes),

(c) is not used to train the Gen AI program and/or any large language model.

See also Industrial Relations Commission of NSW Practice Note No 33 — Use of Generative Artificial Intelligence, commenced 19/2/2025, at [10].

[1-0410] Court Suppression and Non-publication Orders Act 2010

Last reviewed: December 2024

The *Court Suppression and Non-publication Orders Act 2010* commenced on 1 July 2011 and confers broad powers on courts to make suppression or non-publication orders: s 7. Such orders may be made at any time during proceedings or after proceedings have concluded: s 9(3).

The two types of orders are defined in s 3. A "non-publication order" prohibits or restricts the publication of information (but does not otherwise prohibit or restrict the disclosure of information), and a "suppression order" prohibits or restricts the disclosure of information (by publication or otherwise).

"Party" is broadly defined in s 3 and includes the (alleged) complainant or victim in criminal proceedings, and any person named in evidence given in proceedings.

Effect is given to the open justice principle in s 6 of the Act which requires a court deciding whether to make a suppression or non-publication order, to take into account that "a primary objective of the administration of justice is to safeguard the public interest in open justice".

Section 6 should not impede the court from making an order when it is of the opinion that one of the grounds in s 8 is made out. Its importance will vary depending on the extent that any such order will interfere with the principle of open justice: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [9]. In *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136, the Court of Appeal rejected a submission that this meant that the principle of open justice under s 6 does not need to be considered if one of the grounds in s 8 is established. The court held that first, s 6 imposes an obligation upon the court in unambiguous language, reinforcing the common law position and there is nothing in the language of s 8 to entitle a court to disregard that obligation. Second, s 8(1)(e) proceeds on the basis that the public interest in open justice is not disregarded, but rather, needs to be substantially outweighed if that paragraph is to be satisfied; see *Misrachi v The Public Guardian* [2019] NSWCA 67 at [11]. Third, s 12(2) requires the duration of an order to be limited "for no longer than is reasonably necessary to achieve the purpose for which it is made". That limitation reflects the ongoing importance of safeguarding the public interest in open justice: *DRJ v Commissioner of Victims Rights* at [30], [33], [38].

Power to make orders

While s 7 empowers a court to make suppression or non-publication orders, the section, and the Act, is silent on the question whether an order under s 7 can bind third parties. It was assumed in the *Court Suppression and Non-publication Orders Bill* 2010, NSW, Legislative Assembly, Debates, 29 October 2010, p 27195, that the power under s 7 can extend to "bind all members of the public". At common law, there were conflicting views as to whether a court could make non-publication orders binding on anyone not present in the courtroom: see, for example, *Hogan v Hinch* (2011) 243 CLR 506 at [23]; *Commissioner of Police NSW v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 at [43]–[44]; and *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [89]. Section 7 resolved that conflict in favour of a wide power: *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [25].

A limitation on that power based upon Constitutional validity previously arose from Sch 5 of the *Broadcasting Services Act 1992* (Cth): *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*, above, at [81]–[96]. Schedule 5, cl 91 of the *Broadcasting Services Act 1992* (Cth), was replaced (as of 23 January 2022) by s 235 of the *Online Safety Act 2021* (Cth), which is in the same form.[1]

A court can make a suppression or non-publication order on its own initiative or on application by a party to the proceedings: s 9. Those persons entitled to be heard on an application include, in s 9(2)(d), a "news media organisation".

Suppression or non-publication order must be "necessary"

Section 8(1) of the Act sets out the grounds upon which an order can be made and each is prefaced in terms of "necessity". At common law, necessity arose only in "wholly exceptional" circumstances: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [45] per Spigelman CJ. A "high level of strictness" applied in determining whether it was really necessary to exercise

1 The *Online Safety (Transitional Provisions and Consequential Amendments) Act 2021*, Sch 2, cl 30, which repealed Sch 5 of the *Broadcasting Services Act 1992*, commenced 23 January 2022.

the power to suppress disclosure or publication: *O'Shane v Burwood Local Court (NSW)* (2007) 178 A Crim R 392 at [34]; *John Fairfax Publications Pty Ltd v Ryde Local Court* at [40]-[45]. In *BUSB v R* (2011) 209 A Crim R 390, Spigelman CJ addressed the test of necessity in the context of a screening order and said where the test impinged on a fundamental principle of the administration of criminal justice, in that case the right to confront accusers, "the test must be applied with a higher level of strictness": at [33].

However, see the discussion as to the meaning of "necessary" in s 8 in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* at [45]–[51]. Bathurst CJ agreed at [8] that the meaning of "necessary" depends upon its context and upon the particular grounds relied upon and the factual circumstances giving rise to the order in question. The Chief Justice said: "Although it is not sufficient, in my opinion, that the orders are merely reasonable or sensible, I agree that the word 'necessary' should not be given a narrow meaning." Undue weight should not be placed upon practices which preceded the commencement of the Act: *State of NSW v Plaintiff A* [2012] NSWCA 248 at [94].

Under s 8(1), an order may be made when the court thinks it is necessary:

(a) to prevent prejudice to the proper administration of justice,

(b) to prevent prejudice to the interests … in relation to national or international security,

(c) to protect the safety of any person,

(d) to avoid causing undue distress or embarrassment to a party to, or witness in, criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Div 10 of Pt 3 of the *Crimes Act 1900*),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

The correct approach to the interpretation of s 8(1)(c) of the *Court Suppression and Non-Publication Orders Act 2010* is the "calculus of risk" approach [not "probable harm"], which requires the nature, imminence and degree of likelihood of harm to the relevant person when determining whether an order is necessary to protect the safety of the person: *AB (A pseudonym) v R (No 3)* (2019) 97 NSWLR 1046 at [55]-[58]; *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [26]–[27], [36]–[37]. There is nothing in the statutory wording of the section to indicate that it is intended to be limited to physical safety. The wording is apt to include psychological safety, including aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm, consequent on the worsening of a psychiatric condition: *AB (A pseudonym) v R (No 3)* at [59]. The judge may also have regard to the nature of the case when assessing if s 8(1)(c) is made out: see *WJT v Trustees of the Marist Brothers & Trustees of the Roman Catholic Church for the Diocese of Parramatta* [2024] NSWSC 983 at [64], in which the plaintiff was a victim of historical child sexual abuse and had produced evidence about his medical condition, specifically his mental health.

In sexual assault proceedings, a court may make an order under s 8(1)(d) only if there are exceptional circumstances: s 8(3). See See *Qiangdong Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159, where it was said reluctance at being publicly associated with a criminal trial was not a basis for a non-publication order: at [49]–[51].

Section 8(1)(e) permits an order when the court thinks it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

For a detailed examination of s 8 see *Reinhart v Welker* [2011] NSWCA 425. For issues on the construction of s 8(1)(c), see *D1 v P1* [2012] NSWCA 314 at [49]–[55]. Some species of litigation are inimical to the notion that anything that occurs in a court should be publicly available. Examples includes injunctions to prevent publication of confidential information, or a trade secret,

or disputes as to privilege. It is also clear the interests of justice to which the court may have regard when determining an application for a non-publication order include those beyond the immediate litigation. Examples include orders which, if not made, will deter future applicants from coming forward: *DRJ v Commissioner of Victims Rights* at [36]–[39]. Adoption applications are also ordinarily heard in the absence of the public.

Take-down orders

The internet has created challenges in criminal and civil jurisdictions when a court is considering the kinds of non-publication and suppression orders that might be directed to the media or other publishers of online content. In the criminal justice system, the overriding need to protect the fairness of a trial may result in "take-down" orders of specified content from the internet. Jurisdictional questions and questions about the efficacy of such orders may arise. See further *Criminal Trial Courts Bench Book* at [1-354].

A take-down order will fail the necessity test under s 8(1) if it is futile. However, an order will not necessarily be futile merely because the court is unable to remove all offending material from the internet or elsewhere, or the material is available on overseas websites: *AW v R* [2016] NSWCCA 227 at [17]; *Nationwide News Pty Ltd v Quami* (2016) 93 NSWLR 384 at [83]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76].

When information on the internet is involved, relevant internet service providers must be identified and given the opportunity to remove relevant material before an order is sought. The test of necessity will not usually be satisfied unless such a request has been made and the parties, after a reasonable opportunity, have failed, or have indicated they do not intend, to remove the relevant material: *Fairfax Digital* at [98].

A take down order may be made as a means of preventing the continuation of scandalising contempt. There is no reason to refuse to make the order because it may be an ineffective way to stop the scandalising behaviour, if it goes only part of the way to remedying the perceived problem; or if it is only of limited utility: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [25]; *AB (A pseudonym) v R (No 3)* [2019] NSWCCA 46 at [116]–[117]. In *Dowling*, the court upheld a finding of contempt against the applicant for breach of non-disclosure and suppression orders when he published allegations on his website and uploaded to YouTube an audio visual recording of court proceedings and provided a hyperlink to the recording on his website.

Once a ground under s 8(1) is made out, the court has no discretion to refuse to make the order; it must be made: *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [33]; *AB (A pseudonym) v R (No 3)* [2019] NSWCCA 46 at [117]–[118].

Content of suppression and non-publication orders

See also Checklist for suppression orders in *Criminal Trial Courts Bench Book* at [1-359].

An order must specify:

- the grounds on which it was made: s 8(2)
- any exceptions or conditions it is subject to: s 9(4)
- the information to which it applies: s 9(5)
- the place to which it applies, which may be anywhere in the Commonwealth. An order can only apply outside New South Wales where the court is satisfied that it is necessary to achieve the purpose of the order: s 11
- the period for which the order applies: s 12.

In certain circumstances, it may be necessary to take appropriate steps to ensure the media is notified of either a suppression or non-publication order. In the Supreme and District Court this is done by the associate notifying the Supreme Court's Public Information Officer.

The appropriate treatment of judgments relating to suppression matters is discussed in *D1 v P1 (No 2)* [2012] NSWCA 440 at [6]–[7].

Review and appeals

Orders made under the Act are subject to review and, by leave, appeal: ss 13–14. The court that made the order can review it on its own initiative, or on the application of a person entitled to apply for review: s 13(1).

An appeal, by leave, may be heard against a decision concerning an order: s 14(1). The powers of an appellate court on review are set out in s 14(4). An appeal is by way of rehearing and fresh evidence may be given: s 14(5). The hearing on appeal is a hearing de novo: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* at [7].

[1-0420] Common law in relation to suppression and non-publication orders

In *BUSB v R* (2011) 209 A Crim R 390, which concerned the District Court's power to make screening orders, Spigelman CJ confirmed that the implied powers of a court are directed to preserving its ability to perform its functions in the administration of justice: at [28]. The *Court Suppression and Non-publication Orders Act 2010* does not limit or otherwise affect any inherent jurisdiction a court has to regulate its proceedings or deal with contempt of court: s 4.

Given the broad power conferred by the Act and given the myriad statutory provisions concerning the suppression or non-publication of material and the circumstances in which a court might be closed, it is difficult to determine what of the common law remains effective. The common law in relation to the open justice principle and the test of necessity will still inform the relevant parts of the Act.

[1-0430] Other statutory provisions empowering non-publication orders

The *Court Suppression and Non-publication Orders Act 2010* does not limit the operation of a provision under any other Act permitting a court to make orders of this kind: s 5. The following provisions empower a court, in specified circumstances, to make suppression or non-publication orders. This list is not exhaustive.

Evidence (Audio and Audio Visual Links) Act 1998, s 15 empowers a "recognised court" to prohibit or restrict the publication of evidence given in the proceedings or the name of a party to or witness in the proceedings.

Surveillance Devices Act 2007, s 42(5)–(6) require a court to make an order prohibiting or restricting publication of information revealing details of surveillance device technology or methods of installation, use or retrieval of devices, unless the interests of justice otherwise require.

Evidence Act 1995, s 126E(b), in Pt 3.10 Div 1A entitled "Professional confidential relationship privilege" empowers a court to make suppression orders where the court forms the view such an order is necessary to protect the safety and welfare of a "protected confider" (defined in s 126A(1)). Given such an order constitutes a diminution of the operation of the principle that justice should be administered in open court, the justification for such an exception should be narrowly construed: *Nagi v DPP* [2009] NSWCCA 197 at [30].

Lie Detectors Act 1983, s 6(3) provides that a court may forbid publication of unlawfully obtained evidence from lie detectors.

In adoption information proceedings, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person: s 186(2) of the *Adoption Act 2000*.

The Supreme Court may order the non-publication of any report relating to the evidence or other proceedings or of any order made on an application for the appointment of a receiver under

s 107(2) of the *Conveyancers Licensing Act 2003*. A similar power to make non-publication orders is conferred by s 140(2) of the *Property and Stock Agents Act 2002* in relation to an application for the appointment of a receiver.

Other statutory provisions include:

- family law provisions like s 121 *Family Law Act 1975* (Cth)
- child protection provisions like s 29(1)(f) and s 105 *Children and Young Persons (Care and Protection) Act 1998*, and s 25 *Status of Children Act 1996*
- minors protection provisions like s 43(5) *Minors (Property and Contracts) Act 1970*
- health law related provisions like Sch 2, cl 7 of the *Mental Health Act 2007*.

[1-0440] Self-executing provisions

A number of statutory provisions prohibit the publication of information in particular circumstances. Listed below are some examples of such provisions:

- *Evidence Act 1995*, s 195 prohibits the publication of prohibited questions (either disallowed under s 41 or because an answer would contravene the credibility rule or it was a question to which the court refused to give leave under Pt 3.7 "Credibility"). The express permission of the court is required before such prohibited questions can be published.
- *Status of Children Act 1996*, s 25 prohibits the publication of particulars identifying any person by, or in relation to whom, an application for a declaration of parentage or for an annulment order (in relation to parentage) under Pt 3 Div 2 or Div 3 of the Act, has been brought.

Court Security Act 2005, s 9A(1) provides that a person must not use any device to transmit sounds or images from a room or other place where a court is sitting to any person or place outside; by posting entries containing the sounds, images or information on social media sites or any other website or broadcasting or publishing by means of the Internet; or by making the sounds, images or information accessible to any person outside that room or other place. Note the exceptions in s 9A(2).

[1-0450] Closed court

Pursuant to s 71 CPA, civil proceedings may be conducted in the absence of the public in certain circumstances, including where the presence of the public would defeat the ends of justice (s 71(b)), if the business does not involve the appearance before the court of any person (s 71(e)), or if the court thinks fit (s 71(f)). Other designate circumstances are outlined in s 71.

An order to close the court is considered a serious departure from the principle of open justice and should not be made if some less drastic mechanism, such as the use of pseudonyms or sealed envelopes would achieve the necessary purpose. Orders to close the court may be made subject to certain conditions.

An order to close the court to protect trade secrets or confidential commercial information may be valid in certain exceptional circumstances: *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 per Street CJ at 307. The validity of the order was not really determined in that case, as the parties did not dispute that aspect of the earlier proceedings. However, on appeal, the request to close the court to protect confidential commercial information was refused. It was decided that the confidentiality could be maintained by avoiding detailed reference to the information during the appeal and other such strategies without having to close the court: *David Syme & Co Ltd v General Motors-Holden's Ltd* per Street CJ at 296–297.

Legislation

- *Adoption Act 2000*, s 186(2)
- *Children and Young Persons (Care and Protection) Act 1998*, ss 29(1)(f), 105
- CPA, s 71
- *Conveyancers Licensing Act 2003*, s 107(2)
- *Court Security Act 2005*, s 9A
- *Court Suppression and Non-publication Orders Act 2010*, ss 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14
- *Evidence Act 1995*, ss 41, 126A, 126E(b), 195
- *Evidence (Audio and Audio Visual Links) Act 1998*, s 15
- *Family Law Act 1975* (Cth), s 121
- *Lie Detectors Act 1983*, s 6(3)
- *Mental Health Act 2007*, Sch 2, cl 7 (repealed)
- *Minors (Property and Contracts) Act 1970*, s 43(5)
- *Online Safety Act 2021* (Cth), s 235
- *Property and Stock Agents Act 2002*, s 140(2)
- *Status of Children Act 1996*, s 25
- *Surveillance Devices Act 2007*, s 42(5)-(6)

Practice notes

- District Court General Practice Note 2 — Generative AI Practice Note
- Industrial Relations Commission of NSW Practice Note No 33 — Use of Generative Artificial Intelligence (Gen AI)
- Land and Environment Court Practice Note — Use of Generative Artificial Intelligence (Gen AI)
- Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence (Gen AI).

Further references

- J Spigelman, "Seen to be done: the principle of open justice" (2000) 74 *ALJ* 290 (Pt 1) and 378 (Pt 2)
- B Fitzgerald and C Foong, "Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications" (2013) 37 *Aust Bar Rev* 175.

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Legal aid and pro bono procedures

[1-0600] Pro bono schemes in NSW

Where a litigant appears unrepresented and indicates that he or she is unable to afford private representation, the litigant may be referred to any one of a number of bodies who provide legal advice or representation in appropriate circumstances, generally subject to a means test and an assessment of the merits of the applicant's case. In other cases, it may be appropriate to gently identify the advantages of the litigant having professional assistance and indicate where such assistance may be obtained; but if the litigant indicates that he or she wishes to present the case in person, either through mistrust of the profession or for other reasons, the issues should not be pushed, lest it engender suspicion that the court is unwilling to hear the case impartially, a common problem in the case of the vexatious or querulous litigant. Refer to "Pro bono schemes in NSW" on the Publications menu on JIRS for further information.

Such bodies include:

- **NSW Legal Aid Commission**

  Central Sydney Legal Aid Office (Head Office)
  323 Castlereagh Street, Haymarket 2000
  Telephone: 9219 5000
  Website: www.legalaid.nsw.gov.au

  Pursuant to the *Legal Aid Commission Act 1979*, a personal may apply to the Commission for legal aid. The application must be made in the manner and form approved by the Commission: s 31. Applicants must fill out a Legal Aid application form, which can be obtained from any Legal Aid office, from duty lawyers at local courts or by contacting LawAccess NSW on 1300 888 529 or accessing www.lawaccess.nsw.gov.au.

- **New South Wales Bar Association — Legal Assistance Referral Scheme (LARS)**

  Selborne Chambers
  174 Phillip Street, Sydney 2000
  Telephone: 9232 4055
  Website: www.nswbar.asn.au

  Note: The Bar Association has specifically requested that applicants not be directed to attend its offices.

  The scheme only applies to legal proceedings being heard in NSW. When deciding whether to provide assistance under the scheme, the NSW Bar Association considers a number of factors, including the applicant's financial resources, whether they have been refused legal aid or assistance elsewhere, and the general nature of the matter. The Scheme does not accept applications from members of the public without a referral letter from the Court, a legal practitioner or a community legal centre.

- **New South Wales Bar Association — Duty Barrister Scheme**

  Selborne Chambers
  B/174 Phillip Street, Sydney 2000
  Telephone: 9232 4055
  Email: enquiries@nswbar.asn.au

  The Duty Barrister Scheme is an initiative of the NSW Bar Association which has introduced the scheme to particular Local Courts to help people who cannot afford a lawyer, who do not qualify for legal aid and who have a matter before the court on the day. The duty barrister can provide legal advice and argue the case in court.

- **The Law Society of New South Wales — Pro Bono Scheme**

  The Pro Bono Scheme
  Law Society of New South Wales
  Lower Ground Floor, 170 Phillip Street, Sydney 2000
  Telephone: 9296 0364; 9926 0355
  Website: www.lawsociety.com.au

  To qualify for the scheme, applicants must have been refused by Legal Aid; satisfy the scheme's means test; and have reasonable prospects of success. The matter must also fall within an area covered by the scheme. Enquiries may be directed through one of these agencies: LawAccess NSW, community legal centres, legal advice centres, private legal practices, welfare agencies or the Legal Aid Commission.

- **Justice and Equity Centre**

  Level 5, 175 Liverpool St
  Sydney NSW 2000
  Website: https://jec.org.au

  The Justice and Equity Centre (formerly the Public Interest Advocacy Centre) is an independent, not-for-profit law and policy organisation, committed to social justice and addressing disadvantage. Their focus is on cases that can lead to systemic change and will have widespread benefit.

[1-0610] Court-based scheme

Last reviewed: June 2025

Division 9 of Pt 7 of UCPR provides for court appointed referral for legal assistance in proceedings in the Supreme Court, District Court and Local Court.

The purpose of the Division is to facilitate, where it is in the interests of the administration of justice, the provision of legal assistance to litigants who are otherwise unable to obtain assistance: r 7.33(2). The pro bono scheme is "a precious and limited resource. It depends on the goodwill of the profession which should not be abused": *Jeffreys v Sheer* [2025] NSWCA 6 at [32]; *Renshaw v NSW Lotteries Corp Pty Ltd* [2021] NSWCA 41 at [11].

The provision of legal assistance is not intended to be a substitute for legal aid (r 7.33(3)), and a referral is not an indication that the court has formed an opinion on the merits of a litigant's case.

A litigant may be a party to proceedings, a person served with a subpoena or a person who has applied to be joined in proceedings: r 7.34.

The principal registrar of the Supreme Court (or any registrar of that Court nominated by the Principal Registrar), the registrar in a proclaimed place in the case of the District Court or the registrar of a Local Court may maintain a list of barristers or solicitors who have agreed to participate in the scheme in relation to that court (the Pro Bono Panel): r 7.36.

If satisfied that it is in the interests of the administration of justice, the court may, by order, refer a litigant to the registrar for referral to a barrister or solicitor on the panel for legal assistance: r 7.36(1). *Renshaw v NSW Lotteries Corporation Pty Ltd* [2021] NSWCA 41 at [10]–[12] sets out considerations relevant to assessing this test including the person's means, needs and capacity, the nature of the proceedings, and the likely availability and utility of legal assistance. The interests of justice include not only the interests of the applicant but also the interests of the other parties and the court: *Hetherington-Gregory v All Vehicle Services (No 2)* [2012] NSWCA 257 at [6].The court may not refer a litigant for assistance under this rule if the litigant has obtained assistance under a previous referral at any time during the immediately preceding period of 3 years unless the court is satisfied that there are special reasons that justify a further referral: r 7.36(2A). The court may

note limitations on the referral as occurred in *Norman v Wall* [2020] NSWSC 129 where the referral was limited to advising the named plaintiffs on the viability of the cause of action in tort, breach of fiduciary duty and or breach of trust, and to assist with drafting any amended statement of claim: at [17]. See also *Norman v Wall (No 6)* [2020] NSWSC 1211.

The power may be exercised in the absence of the public and without any attendance by or on behalf of any person: r 7.36(3). The court may take into account (r 7.36(2)):

- the means of the litigant
- the capacity of the litigant to obtain legal assistance outside the scheme
- the nature and complexity of the proceedings
- any other matter that the court considers appropriate.

In *Longin v Tomordi; Longin v Department of Communities and Justice* [2024] NSWSC 1248, the judge made an order for the plaintiff to be referred under r 7.36 in the interests of the administration of justice, despite the fact the plaintiff was an admitted barrister with a current practising certificate. The judge made this decision based on the means of the plaintiff (despite having "misgivings" about some of the plaintiff's evidence of her impecuniosity), the plaintiff's apparent difficulty in obtaining legal assistance, the nature of the proceedings (involving serious allegations of domestic violence and sexual assault by the defendant) and the "chequered" procedural history of the matter: at [29], [31]–[32].

A referral may be made for the following kinds of assistance (r 7.37):

- advice in relation to the proceedings
- representation on directions hearing, interlocutory or final hearing, arbitration or mediation
- drafting or settling of documents to be filed or used in the proceedings
- representation generally in the conduct of the proceedings or of part of the proceedings.

Once an order is made the registrar must attempt to arrange the legal assistance, however, the referral can only be made to a panel member who has agreed to accept it. If the registrar is unable to do so within 28 days of the referral, the registrar may make an order terminating the referral: r 7.36(4A).

A panel member having accepted a referral must give assistance in accordance with it (r 7.38) and can cease that assistance only:

- in the circumstances set out in any practice rules governing professional conduct that apply to the panel member
- with the written agreement of the litigant,
- with the leave of the registrar.

If a panel member ceases to provide legal assistance he or she must inform the registrar in writing within seven days: r 7.39(2).

Rule 7.40 sets out the procedure for, and matters to be considered upon, an application to the registrar for leave to cease to provide legal assistance.

A panel member may only recover costs that another person is required to pay in an order for costs in favour of the litigant: r 7.41(1) and (2). A panel member may request the litigant to pay disbursements (r 7.42) and must account to the litigant for any money received in respect of disbursements so paid: r 7.41(2).

The process of granting a referral is administrative rather than judicial, however, the court must be satisfied that it is in the interests of the administration of justice to do so: *Nuha Ibrahim Dafaalla v*

Concord Repatriation General Hospital [2007] NSWSC 602 at [5]. See *Hetherington-Gregory v All Vehicle Services (No 2)* [2012] NSWCA 257 for an example where the court was not persuaded that it was in the interests of justice (including the dictates of justice identified in part in CPA s 58) to refer the applicant to the Pro Bono Panel as there did not appear to be reasonable prospects of success. See also *Phu v NSW Department of Education and Training* [2011] NSWCA 119; *Potier v Arnott* [2012] NSWCA 5; *Iqbal v Hotel Operations Solutions Pty Ltd* [2022] NSWCA 88 at [13]–[17]; *Amgad v Cairns* [2022] NSWCA 101 at [19]–[21] and *Allchin v Hunter Water Corp (No 2)* [2024] NSWCA 315 at [28]. In *Jeffreys v Sheer* [2025] NSWCA 6, the judge refused a request that the appellant be referred under r 7.36 as it was not in the interests of justice: at [33]. The fact the appellant had exhausted his financial resources was the result of choices he had made, including choosing to direct $1.4 million into his businesses and spending large sums on his family and a holiday. The judge was not satisfied the appellant had no capacity at all to obtain paid representation. The appellant was intelligent and articulate, and better equipped to conduct his appeal without professional legal assistance than many self-represented litigants, and the case was a commercial one where the issues involved appeared to be relatively straightforward: at [29]–[31].

For a case in which a referral for assistance by way of representation on the hearing of an appeal was made, see *Rouvinetis v Knoll* [2012] NSWCA 125.

Legislation

- *Civil Procedure Act 2005*
- *Legal Aid Commission Act 1979*

Rules

- UCPR Pt 7 Div 9, rr 7.33–7.42

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Unrepresented litigants and lay advisers

[1-0800] Introduction

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

[1-0810] The role of the court

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

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

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

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

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

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

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

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

[1-0820] Permissible intervention or assistance

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

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

By way of guidance:

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

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

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

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

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

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

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

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

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

and to gently identify the advantages of the litigant having professional assistance. In many instances there may be no entitlement either to legal aid or pro bono representation, and the unrepresented litigant may, in any event, prefer to present the case in person, either through mistrust of the profession, or for other reasons. In such a case, the issue should not be pushed, lest it engender suspicion concerning the willingness of the court to hear the case impartially, an inevitable problem in the case of the vexatious or querulous litigant.

(j) If the litigant in person is so disadvantaged by mental incapacity as to lack competency to manage his or her own affairs, then the court should appoint a tutor, or stay the proceedings until the litigant is competent, or until a tutor can be appointed: *Murphy v Doman* (2003) 58 NSWLR 51.

(k) An unrepresented litigant needs leave under the UCPR r 7.3 to obtain the issue of a subpoena.

(l) As to the costs recoverable by a successful litigant in person, see *Cachia v Hanes* (1994) 179 CLR 403.

(m) A solicitor acting for himself or herself will not generally be afforded the latitude allowed to an unrepresented litigant: *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78.

[1-0840] Assistance of lay advocates

Last reviewed: June 2025

The public interest in ensuring that litigation is conducted by those who are qualified, properly accredited and insured, who owe a professional duty to assist the court, and who are subject to an ethical and disciplinary code, will normally preclude representation by unqualified persons.

It has been recognised that, in exceptional circumstances, it has been appropriate for the court to grant leave so as to permit a person who is not an admitted legal practitioner, holding a practising certificate, to represent a litigant: *Damjanovic v Maley* (2002) 55 NSWLR 149; *O'Toole v Scott* [1965] AC 939. This has been regarded as an incident of the inherent right of the court in regulating its own proceedings, although it was also the subject of express provision in the *District Court Act 1973* (s 43(i) now repealed): see *Damjanovic v Maley*, above at [33]–[34].

Where the discretion has been preserved, it is to be exercised sparingly, particularly by higher courts, and it will normally be confined to a situation of emergency, such as the illness of the unrepresented party, or unexpected language difficulties: for example, *Portelli v Goh* [2002] NSWSC 997.

Considerable caution needs to be exercised where it appears that the lay advocate is making a practice of seeking to represent unrepresented litigants: *D v S (rights of audience)* [1997] Fam Law 403 and *Noueiri v Paragon Finance Plc (No 2)* [2001] EWCA Civ 1402.

The circumstance that the litigant has a distrust of, or an aversion to lawyers has been held to be an insufficient reason (*Teese v State Bank of New South Wales* [2002] NSWCA 219; *Sinanovic v Bone* [2025] NSWSC 144 at [38]–[40]); as has the fact that the litigant had known difficulties with the language: *Damjanovic v Maley*, above.

A party cannot, by way of power of attorney, grant a lay advocate a right to appear in court, on his or her behalf: *Giniotis v Farrugia* (unrep, 19/8/85, NSWCA).

It has been suggested that where an application is to be made for lay representation, then it should be made before the hearing, supported by appropriate evidence: per Hodgson JA in *Teese v State Bank of New South Wales*, above.

For a discussion on the policy and discretionary considerations arising, see *Damjanovic v Maley*, above, at [37]–[86] and *Scotts Head Development Pty Ltd v Pallisar Pty Ltd* (unrep, 6/9/94, NSWCA).

[1-0850] McKenzie friend

A McKenzie friend has no right to appear as an advocate, or to address the court on behalf of the unrepresented litigant. The role of such a person is confined to providing assistance and advice to the unrepresented litigant in conducting the case: *R v Bow County Court; Ex parte Pelling* [1999] 4 All ER 751; and see *Damjanovic v Maley* at [63].

While it appears that the use of a McKenzie friend does not depend upon the court granting leave, there is a discretion to prevent a person continuing to act in that capacity, for example, if that person is acting contrary to the efficient administration of justice: *Noueiri v Paragon Finance Plc (No 2)*, above. In *Satchithanantham v National Australia Bank Ltd* [2009] NSWCA 268 a husband was not permitted to act as a McKenzie friend for his wife where his claimed undue influence upon her was an issue at the trial.

[1-0860] Amicus curiae

For a discussion of the circumstances in which the court may allow amicus curiae representation, see the judgment of Kirby P in *Breen v Williams* (1994) 35 NSWLR 522 at 532–533.

[1-0863] Role of represented litigant and its legal representative

Section 56(3) of the CPA imposes a duty upon a party and its legal representatives, when opposed to an unrepresented litigant, to assist the court to understand and give full and fair consideration to the submissions of that litigant and to refer the court to evidence in the proceedings that is relevant to the submissions: *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181 at [41], [42].

[1-0865] Splintered advocacy

Last reviewed: September 2024

A litigant has no entitlement to address, whether by oral or written submissions, or otherwise conduct the case at a time when represented before the court: *Malouf v Malouf* (2006) 65 NSWLR 449 at [170], [179]. As stated by French CJ, Hayne, Kiefel and Bell JJ in *Patel v The Queen* (2012) 247 CLR 531 at [114] (applied in *Khatib v DPP (NSW)* [2023] NSWCA 324 at [52]), "it is a cardinal principle of litigation … that parties are bound by the conduct of their counsel".

A court may, in its discretion, allow such an address, for example, if impecuniosity or accident left the litigant without representation on a particular occasion: *Malouf v Malouf*, above, at [174]. As to the undesirability of splintered advocacy, see *Malouf* at [169]–[179]; *Khatib*, above, at [51].

A court may permit a lawyer to address on a point of law, as amicus curiae, however, such a lawyer has no entitlement to charge a fee and the client cannot recover costs in respect of the lawyer's assistance: *Malouf* at [175].

[1-0870] Employed solicitors

Contrary to the view once taken, (for example, *Beaton v McDivitt* (1985) 13 NSWLR 134), employed solicitors now have a full right of appearance as advocates and do not require the leave of the court. This initially arose by reason of s 87 of the *Legal Profession Act 2004* (now repealed), and the definition provision in s 4, which did not differentiate in its definition of a barrister and solicitor between those who hold restricted and unrestricted practising certificates.

[1-0880] Companies and corporations

For the right to representation, which applies in relation to companies within the meaning of the *Corporations Act 2001* (Cth), and for corporations other than a company within the meaning of that

Act, see the UCPR r 7.1(2)–(4). See also the UCPR r 7.2 as to the requirement for filing an affidavit as to the authority of a Director or authorised person to commence or carry on proceedings in the Supreme or District Courts.

[1-0890] Local Court

See the UCPR r 7.1(5) for the entitlement of commercial agents or sub agents, and of licensed real estate agents, strata management agents and on-site residential property managers to commence and carry on the proceedings, referred to in this Rule, in the Local Court.

For the position of companies and corporations, see the UCPR at r 7.1(2)(b) and (4)(c).

Legislation

- CPA, s 56(3)
- *Evidence Act 1995*, Pt 3.10, ss 29, 132, 192
- *Judiciary Act 1903* (Cth), s 78
- *Legal Profession Act 2004* (now repealed), ss 4, 87

Rules

- UCPR rr 7.1, 7.2, 7.3

Further references

- "Representing yourself: information for self-represented litigants (litigants in person) in civil proceedings", Supreme Court NSW website, accessed 30/5/2025
- Australian Institute of Judicial Administration, *Litigants in person management plans: issues for courts and tribunals*, Australian Institute of Judicial Administration, Carlton, Vic, 2001, accessed 30/5/2025
- L Byrne and CJ Leggat, "Litigants in person — procedural and ethical issues for barristers" (1999) 19(1) *Australian Bar Review* 41
- Dr G Lester, "The vexatious litigant" (2005) 17(3) *JOB* 17
- E Kyrou, "Managing litigants in person" (2013) 25(2) *JOB* 11
- Judicial Commission of NSW, Equality before the law Bench Book, Section 10, "Self-represented parties"
- P Johnson, "Sovereign citizens: ideology, impacts and judicial responses" (2025) 2(4) *Judicial Quarterly Review* 95
- M Pathé, "What do judicial officers need to know about sovereign citizens?" (2025) 37(2) *JOB* 13.

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Interpreters

[1-0900] Introduction

Over 300 languages are spoken in Australian households, and one fifth of Australians speak a language other than English at home according to the 2016 Census.[1] This means judicial officers will encounter litigants and witnesses who will require the assistance of an interpreter both in the preparation of evidence such as affidavits and to give their evidence in court. In this context "languages" includes Auslan and other methods of communication by deaf or mute persons. "Interpreting" refers to the spoken word and "translating" refers to written text.

Interpreters have a part to play in the preparation of affidavits relating to oral communications in a foreign language. It is not uncommon to have an affidavit sworn or affirmed by a deponent who is competent in English and a foreign language concerning an oral communication in the foreign language. In the affidavit, expressed in English, the deponent asserts that particular conversations occurred and sets out an English translation of the alleged conversations. In effect, the deponent is interpreting the words used in the foreign language without proper evidence as to the competence of the deponent to provide such an interpretation. More importantly, however, the words actually used in the foreign language may be critical. In such circumstances, it may be desirable for the court to have a competent independent interpreter to translate the words alleged to have been used in the foreign language: see *Maria Coppola v New South Wales Trustee and Guardian as Administrator of the Estate of the Late Giuseppina Buda (No 2)* [2019] NSWSC 948 at [16]–[25] and *Sun v Chapman* [2021] NSWSC 955 at [16]–[17].

[1-0910] Legal issues

Meeting the needs of culturally and linguistically diverse persons in legal proceedings raises numerous practical and legal issues. These include:

- Procedural fairness requires litigants to be "linguistically present" in addition to being physically present: see, for example, *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 (NSWCA).
- Section 30 *Evidence Act 1995* (NSW) provides:

> 30 Interpreters
>
> A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

[1-0920] Resources

The Council of Chief Justices of Australia and New Zealand has approved the Judicial Council on Cultural Diversity's (JCCD) *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. The standards contain sections including "Plain English Strategies", "Four-part test for determining need for an interpreter" and "What judicial officers can do to assist the interpreter". The Recommended National Standards can be found on the JCCD website at https://jccd.org.au/publications/ (accessed 25 February 2022). See also an explanatory article in the *Judicial Officers' Bulletin*: S Olbrich, "Recommended National Standards for working with interpreters in courts and tribunals" (2018) 30 *JOB* 36.

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1 ABS, "2016 Census: Multicultural media release" at www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3, accessed 23/7/2019.

An Addendum to the *Recommended National Standards for Working with Interpreters in Courts and Tribunals* has been published.

Information on working with interpreters can also be found in the *Equality before the Law Bench Book* at [3.3].

[1-0930] Implementation

The Uniform Civil Procedure Rules were amended on 8 November 2019 to insert Pt 31, Div 3 (r 31.55–31.64). This provides for rules concerning interpreters based on the JCCD's Model Rules set out in the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. The rules apply in all NSW civil proceedings. The application of the *Evidence Act 1995* is unaffected by the amendments.

The amended rules also provide for the Court Interpreters' Code of Conduct at Sch 7A of the UCPR.

Practice Note SC Gen 21 — Interpreters in Civil Proceedings commenced operation on 4 March 2020 and applies to all civil proceedings commenced after its commencement and to any existing proceedings which the court directs should be subject to the Practice Note, in whole or in part. This Practice Note implements and applies the National Standards.

Practice Notes

- Supreme Court General Division — SC Gen 21

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Procedure generally

para

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Case management

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

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

[2-0010] Overview

Last reviewed: March 2025

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

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

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

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

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

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

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

Emphasis is laid on the elimination of delay (s 59) and the proportionality of costs to the importance and complexity of the subject matter in dispute (s 60); see *Cheng v Motor Yacht Sales Australia Pty Ltd t/as the Boutique Boat Company* (2022) 108 NSWLR 342 at [20].

The court may give directions as to practice and procedure generally and may make a range of orders including dismissing proceedings where there has been a failure to comply with a direction: s 61. For example, see *Zhou v Birriga Holding Pty Ltd* [2024] NSWSC 1425 in which the plaintiff's claim was dismissed pursuant to s 61(3)(a) due to the plaintiff's failure to comply with multiple pre-trial directions and "radio silence" leading up to the hearing, along with failure to attend the hearing, despite the plaintiff paying into Court $350,000 security for costs three weeks prior to the commencement of the final hearing: at [105]–[109].

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

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

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

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

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

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

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

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

[2-0020] General principles

Last reviewed: May 2023

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

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

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

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

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

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

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

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

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

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

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

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

Legislation

- CPA ss 14, 16, 56–63, 64, 86

Rules

- UCPR rr 2.1, 2.3, 12.7

Practice Notes

Supreme Court

Common Law Division

General SC CL 1

Administrative Law and Industrial Law List SC CL 3

Defamation List SC CL 4

Urgent matters in the Common Law Division SC CL 5

Possession List SC CL 6

Professional Negligence List SC CL 7

Equity Division

Case Management SC Eq 1

Admiralty List SC Eq 2

Commercial List and Technology and Construction List SC Eq 3

Corporations List SC Eq 4

District Court

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

Case management in country sittings DC (Civil) No 1A

Online courts DC (Civil) No 1B

Defamation DC (Civil) No 6

Court approval of settlement DC (Civil) No 7

Local Court

Case Management of Civil Proceedings in the Local Court Practice Note Civ 1 of 2024

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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

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Alternative dispute resolution

[2-0500] Introduction

Last reviewed: September 2024

Alternative dispute resolution, including mediation and arbitration, should be encouraged where appropriate to facilitate the "just, quick and cheap resolution" of the dispute, in accordance with the overriding purpose rule in s 56 of the CPA.

Part 4 of the CPA provides for court-ordered mediation and Pt 5 provides for court-referred arbitration.

Part 20 of the UCPR, "Resolution of proceedings without hearing", applies to matters referred for mediation or arbitration. Practice Note SC Gen 6 explains the court's mediation procedures under Pt 4 of the Act. Parts 4 and 5 do not apply to proceedings of the Local Court sitting in its Small Claims Division due to the operation of s 4 of the CPA and Sch 1 to the UCPR. See also Local Court Practice Note Civ 1 at [8].

[2-0510] Mediation

Compulsory court-referred mediation has been available as "an integral part of the Court's adjudicative processes" since 2000, see J Spigelman "Mediation and the Court" (2001) 39 (2) *LSJ* 63. Part 5 CPA provides for mediation of proceedings. Section 25 of the CPA defines mediation as:

> a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

[2-0520] Exercise of discretion

Mediation may be appropriate for the following, amongst other, reasons:

- to preserve the commercial and/or personal relationships of the parties and to reduce the risk of an appeal,
- to define the contested issues, in accordance with s 61 of the CPA, should the matter proceed to litigation,
- to settle the facts, and
- to limit the court's role to determining only liability or quantum of damages.

The court may make an order under s 26 to refer any proceedings before it, or part thereof, to mediation if "it considers the circumstances are appropriate". The practice note makes it clear that mediation is not appropriate in all proceedings; however, the parties may agree to mediation, nominate a mediator and request the court to make the appropriate orders at any time: Practice Note SC Gen 6 cl 7. The court may order mediation on its own motion, on the motion of a party, or on referral by a registrar: Practice Note SC Gen 6 cl 8. The court may also refer the parties to the registrar or other court officer for an information session to discuss the suitability of the dispute for mediation: Practice Note SC Gen 6 cl 8.

The exercise of the court's discretion is not dependent on the parties' consent: s 26(1). However the parties are not forced to settle and may generally continue the litigation without penalty, but this is subject to the parties: see "Parties' obligation of good faith" at [2-0540] below.

The court's discretion under s 26 is "very wide and the Court should approach an application for an order without any predisposition, so that all the relevant circumstances going to the exercise of the discretion may properly be taken into account": *Higgins v Higgins* [2002] NSWSC 455 at [6]. By way of guidance:

(a) The existence of a dispute resolution clause in a contract is of marginal relevance to the question whether the court should order mediation. The question of referral has to be determined by reference to the circumstances which exist at the time of the proceedings and not at the time the parties contracted: *Morrow v chinadotcom Corp* [2001] NSWSC 209 at [43].

(b) An earlier unsuccessful attempt at mediation, and the costs to be incurred if a second mediation is ordered, is a relevant factor to consider: *Harrison v Schipp* [2002] NSWCA 27 and *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd* [2004] NSWSC 1050.

(c) The opposition of one or both of the parties to a court-ordered mediation is a relevant consideration, but is not conclusive: *Harrison v Schipp*, above; *chinadotcom corp v Morrow* [2001] NSWCA 82. The compulsory referral power is directed to disputants "who are reluctant starters but may become willing participants": Spigelman J "Mediation and the Court" (2001) 39 (2) *LSJ* 63 at 65. See, for example, *Remuneration Planning Corp Pty Ltd v Fitton* [2001] NSWSC 1208.

(d) Compulsory mediation has been considered appropriate in disputes between family members and friends, and between former business partners, where the court is persuaded that mediation offers a plausible prospect of success: *Higgins v Higgins*, above; *Yoseph v Mammo* [2002] NSWSC 585; *Singh v Singh* [2002] NSWSC 852.

(e) In defamation proceedings, the court held that a mediation conducted in good faith could result in a public vindication of the plaintiff: *Waterhouse v Perkins* [2001] NSWSC 13.

[2-0530] Appointment of mediator

The parties may agree to the mediator. If there is no agreement, the court may select the mediator or appoint a person to conduct the mediation in accordance with the Joint Protocol procedures detailed in Practice Note SC Gen 6 (issued 9 March 2018). The court may refer the proceedings to a registrar to conduct a short information session about the benefits of mediation.

Court registrars or officers may be certified as qualified mediators by the Chief Justice. The Court has a Joint Protocol arrangement (set out in paragraphs 19-35 of Practice Note SC Gen 6, above) with five mediation provider organisations suitable to mediate Supreme Court cases as follows:

- the NSW Bar Association
  https://nswbar.asn.au/using-barristers/alternative-dispute-resolution/baradr-approved-mediators
- the Law Society of New South Wales
  https://www.lawsociety.com.au/sites/default/files/2018-12/Mediators%20Panel.pdf
- the Resolution Institute
  https://www.resolution.institute/
- the Australian Commercial Disputes Centre
  https://www.disputescentre.com.au/
- the Australian Branch of the Chartered Institute of Arbitrators
  https://www.ciarb.net.au/

[2-0535] Community Justice Centres Act 1983

The court may refer proceedings or parts of proceedings for mediation under the *Community Justice Centres Act 1983*: CPA s 26(2A). No dispute shall be accepted for mediation without the consent of the Director of Community Justice Centres: s 20(3) *Community Justice Centres Act*.

Section 20A of that Act provides for disputes which have been referred by an order of a court or tribunal under a provision of another Act or statutory rule. The Director may accept or decline to accept such a dispute: s 20A(2). If the Director accepts the dispute, he or she must report as to the outcome: s 20A(5). If the Director declines the dispute, he or she must give notice of the decision and the reasons therefore: s 20(6).

[2-0540] Parties' obligation of good faith

Section 27 of the CPA creates an obligation on the parties to participate in a referred mediation in good faith. There is, however, no sanction for failure to comply with s 27 except semble, a stay of proceedings where a plaintiff is in default (*Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996), or an adverse costs order being made against the obstructive party in later court proceedings: *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*, above, at [92], Einstein J suggested that the requirement of good faith is directed to the conduct of the parties, rather than mere attendance at the process and identified at [156], without being exhaustive, the core content of an obligation to negotiate or mediate in good faith.

[2-0550] Enforceability of mediated agreements

The court may make orders giving effect to any agreement or arrangement arising out of the mediation: s 29(1). However, this does not affect any other agreement or arrangement that may be made in relation to the dispute: s 29(3).

Evidence may be called from the mediator in support of an application to give effect to an agreement arising out of a mediation: ss 29(2) and 31(b).

Whether an agreement reached at mediation is final and immediately binding to resolve proceedings, rather than conditional or an in-principle agreement, will depend on the parties' objective intentions as disclosed by the facts and circumstances including how the terms of the agreement are expressed to the parties: *Masters v Cameron* (1954) 91 CLR 353 at 360; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at [634]. In *BJP1 v Salesian Society (Vic)* [2021] NSWSC 241 at [88]–[91], the mediated agreement was held to be immediately binding and conclusive as the plaintiff's solicitors were properly and adequately instructed and authorised to enter into a full and final settlement of the proceedings which they confirmed to the mediator and the defendant; and the plaintiff's solicitors' correspondence indicated they had entered into a "full and final settlement".

[2-0560] Costs

The costs of mediation may be met by the parties as agreed among themselves, or as ordered by the court: s 28. The court may request that the Chief Executive Officer of the nominated mediation association consider providing the mediation on a reduced or no fee basis: see cll 25 and 29 of the Practice Note SC Gen 6. See [8-0180] item 7 "Costs reserved, or costs orders with liberty to apply".

[2-0570] General

Mediation proceedings attract the same privilege with respect to defamation as judicial proceedings and, except with the consent of all relevant persons, nothing said at, or document prepared in relation to, a mediation session is admissible in any subsequent proceedings, other than proceedings under s 29 for enforcement of any agreement arising out of the mediation session: CPA s 30. As to the mediator's duty of confidentiality, see CPA s 31.

[2-0580] Sample orders

Order for referral to mediation

1. Pursuant to s 26 of the *Civil Procedure Act 2005*, the issues identified in the Schedule hereto are referred to mediation.
2. Parties are reminded of the obligation to mediate in good faith imposed by s 27 of the Act.
3. The mediator shall be [*name*] or the mediator shall be agreed by the parties or, failing agreement, will be appointed by the court, selected from two nominees put forward by each party.
4. The parties are to deliver to the mediator forthwith a sealed copy of this order.
5. The mediation is to be completed by [*date*].
6. The parties are to provide a copy of the pleadings to the mediator within seven days of this order.
7. Unless otherwise agreed or ordered by the court, the parties are to be jointly and severally liable for the costs of the mediation including the fees of the mediator.
8. The matter is listed for further directions on [*date*].

[2-0585] Arbitration

Part 5 CPA provides for court-referred arbitration of proceedings. There is funding available in the Supreme Court for this. It is advisable to check the status of such funding in the Supreme Court with the Executive Director/Principal Registrar before referring a case for arbitration. The District Court no longer runs an arbitration scheme. The Local Court runs an arbitration scheme funded by the court. The Department of Justice pays the arbitrator according to a scale of fees. The criteria for a case to be referred for arbitration is confined to the following:

- the case does not involve complex issues of law or fact
- the hearing time is 3 hours or less
- the case does not involve allegations of fraud.

The court will choose an arbitrator from a list of arbitrators appointed by the head of jurisdiction.

[2-0588] Jurisdiction and rules of evidence

Section 37(1) provides that the jurisdiction conferred on the arbitrator for referred proceedings is part of the jurisdiction of the court that referred the proceedings. The arbitrator may exercise all the functions of the court but only for the purpose of determining the issues in dispute in referred proceedings, for the making of an award in the referred proceedings and related purposes: s 37(2) and (4). While proceedings are before an arbitrator, a tribunal has no jurisdiction in respect of any issue in dispute in the proceedings being arbitrated: s 37(5).

Subject to the uniform rules, evidence in referred proceedings before an arbitrator is to be given and received in the same way as it would be given and received before the referring court: s 51(1). Referred proceedings are taken to be judicial proceedings for the purposes of s 327 (Offence of perjury) of the *Crimes Act 1900*: s 51(4).

[2-0590] Exercise of discretion

The court may make an order under s 38(1) of the CPA to refer to determination by an arbitrator:

(a) a claim for damages or other money, or

(b) a claim for any equitable or other relief ancillary to a claim for the recovery of damages or other money.

Before making an order for arbitration, s 38(2) provides that the referring court must:

(a) consider the preparations made by the parties for the hearing of the proceedings: s 38(2)(a),

(b) as far as possible deal with all matters that may be dealt with by the court on application to the court before the hearing of the proceedings: s 38(2)(b), and

(c) give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings: s 38(2)(c).

The court may not make an order referring proceedings under s 38(3) if:

(a) no issue in the proceedings is contested or judgment in the proceedings has been given or entered and has not been set aside: s 38(3)(a),

(b) the proceedings involve an allegation of fraud or are proceedings of the Local Court sitting in its Small Claims Division, unless the parties consent or the court finds there are special circumstances justifying the referral: s 38(3)(b) and UCPR r 20.8, and

(c) cause is shown why the proceedings should not be referred: s 38(3)(c).

The fact that a jury has been requisitioned by a party does not preclude the possibility of a referral to arbitration, as a party aggrieved by an arbitrator's award is entitled to a rehearing, and where a jury has been requisitioned, this would include a jury trial: *Karkoulas v Newmans of Kogarah Pty Ltd* [2000] NSWCA 305.

The court should refrain from referring proceedings to arbitration where the amount in issue is small compared to the legal costs likely to be involved in the arbitration and any subsequent litigation, and arbitration is unlikely to resolve the dispute: *Troulis v Vamvoukakis* (unrep, 27/2/97, NSWCA). In the Local Court generally, only straightforward matters, estimated to take less than four hours, are referred to arbitration.

In practice, referrals to arbitration are made by the relevant registrar having regard, inter alia, to the state of the court's list and funding available.

[2-0595] Arbitrations under the *Commercial Arbitration Act 2010*

The *Commercial Arbitration Act 2010* (CAA) provides for the resolution of commercial disputes for both court-referred and private arbitrations . The functions of an arbitral tribunal must be exercised, so that the paramount object of the CAA is achieved. The paramount object of the CAA stated in s 1C is "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense". The Act aims to achieve this by:

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsec (3) and such safeguards as are necessary in the public interest), and

(b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.

The CAA is substantially based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission in 2006).

[2-0598] Role of the court under the *Commercial Arbitration Act*

Where litigation is brought in a matter the subject of an arbitration agreement, a court must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed: s 8 CAA. In construing the terms of an arbitration agreement, the court will have regard to the context and purpose of the deeds, including the circumstances in which they were made as reflected in the text of the deeds: *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [27]; [36]; [83]. In *Rinehart*, the High Court dismissed an appeal to the validity of settlement deeds containing arbitral clauses and stayed the proceedings pending arbitration. The evident object of the deeds was to maintain confidentiality and ensure no further public airing of claims brought by the appellants. It was inconceivable that a party to the deed could have thought that any challenge to it would be determined publicly in court: at [44]–[49].

Section 9 CAA provides that "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure". As this section is confined to interim measures designed to facilitate and protect the arbitration process, s 9 does not confer any jurisdiction on a court: *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 at [57], [62].

If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination: s 14(1) CAA.

If the parties do not agree on the termination and a controversy remains concerning any of the grounds specified in s 14(1), any party may request the court to decide on the termination of the arbitrator's mandate: s 14(2). Section 14(2) is directed to a particular controversy and the decision of the court resolves that controversy. The court's decision under s 14(2) is final and not subject to an appeal: s 14(3); *Ku-ring-gai Council v Ichor Constructions Pty Ltd* at [67]–[75]; [87]; [88]. The legislature intended only a limited form of review should be available under the Act: at [71].

[2-0600] Finality of arbitrator's award

Subject to a party applying for a rehearing, the arbitrator's award is taken to be "final and conclusive" and a judgment of the referring court. Where it is made by consent of all parties it is effective on the date it is received from the arbitrator by the referring court. Otherwise, the award is final at the expiry of 28 days after it is sent to all the parties: s 40 of the CPA.

There is no relief from an award by way of appeal, new trial or judicial review, unless relief is sought on the ground of lack of jurisdiction or a denial of natural justice: s 41 of the CPA.

[2-0610] Rehearings

A person aggrieved by an award may apply by way of notice of motion for a full or limited rehearing: CPA s 42 and UCPR r 20.12(1). If application is made for a rehearing before the award takes effect, that is, within the 28-day period, the court *must* order a rehearing: s 43(1). The court *must* decline to order a rehearing if the amount claimed or the value of the property does not exceed the jurisdictional limit of the Local Court when sitting in its Small Claims Division: s 43(2). The jurisdictional limit is currently $10,000. The court may decline to order a rehearing if the applicant failed to attend the arbitration hearing without good cause: s 43(3). The court may direct that the rehearing be a full rehearing or limited rehearing as it thinks appropriate, regardless of the applicant's request: s 43(4). In the absence of a direction under s 43(4), the rehearing is to be a full rehearing: s 43(5). An order for a limited rehearing must specify the aspects which are to be the subject of the rehearing, whether by reference to specific issues in dispute, or otherwise: s 43(6). In particular, the rehearing may be limited to the issues of liability or quantum. The court may amend an order for rehearing at any time before or during a rehearing: s 43(7).

If a full rehearing is ordered, the arbitrator's award ceases to have effect and the court must hear and determine the proceedings as if they had never been referred to the arbitrator: s 44(1). If a limited rehearing is ordered, the award is suspended and the court must hear and determine the limited matters in dispute. The court may then reinstate the award with any modifications it deems appropriate: s 44(2)(c).

The practice is for the arbitrator's award and the request for the rehearing to be placed in the file in a sealed envelope. This should not be opened until judgment on the rehearing has been delivered, at which stage it will often become necessary to refer to it on the question of costs. However, a court is not required to disqualify itself from rehearing proceedings if it becomes aware of the nature or quantum of the arbitrator's award: r 20.12(4).

No reference can be made to the evidence given before the arbitrator unless the material is tendered by consent: *Courtenay v Proprietors Strata Plan No 12125* (unrep, 30/10/98, NSWCA).

[2-0620] Costs of rehearing

The court may make a costs order in respect of both the referred proceedings and the rehearing: s 46.

Under the old scheme (s 18C of the *Arbitration (Civil Actions) Act 1983*), if the applicant did not obtain a result "substantially more favourable" than that at arbitration, then the applicant would be ordered to pay the costs of other parties to the proceedings. Section 46 of the CPA does not include the "substantially more favourable" test, however, the court is entitled to promote the fact that the scheme of arbitration is intended to be a final hearing. Hence, costs may be awarded against a party who does not assist the court in furthering this scheme, for example, by not calling available evidence at arbitration for tactical reasons, but reserving the evidence for the rehearing: see *MacDougall v Curleveski* (1996) 40 NSWLR 430 and *Quach v Mustafa* (unrep, 15/6/95, NSWCA). In *Chiha v McKinnon* [2004] NSWCA 273 it was held that, where in a personal injuries case, a defendant improves its position on a rehearing (for example, in having the damages reduced) but the plaintiff is nevertheless successful in the proceedings, the plaintiff should not be ordered to pay the costs of the arbitration or rehearing as the plaintiff still has to prove his or her case in the rehearing. Orders for costs in favour of the defendants in such circumstances would unreasonably encourage defendants not to accept arbitration awards because they would have the opportunity of obtaining orders for costs from the plaintiffs, even if the plaintiffs were successful in the rehearings, and unreasonable pressure would be put on plaintiffs to make safe offers of compromise and to accept settlements.

In exercising the discretion to make an order for costs, such order "must be fair and just in all the circumstances of the case": *Howard v Telstra Corporation Ltd* [2003] NSWCA 188 per Young CJ in Eq at [14].

Legislation

- *Civil Procedure Act 2005* Pt 4 (ss 25–34), Pt 5 (ss 35–55)
- *Civil Dispute Resolution Act 2011* (Cth)
- *Commercial Arbitration Act 2010* (NSW), ss 14, 17J, 27D
- *Community Justice Centres Act 1983*, ss 20, 20A
- *Courts and Crimes Legislation Further Amendment Act 2010*
- *Courts and Other Legislation Further Amendment Act 2011*
- *Courts and Other Legislation Further Amendment Act 2013*

Rules

- UCPR Pt 20, Div 1 rr 20.1–20.7, Div 2, rr 20.8–20.12

Further references

- TF Bathurst, "The future of alternative dispute resolution" (2020) (Autumn) *Bar news* 50
- U Tahur, "Does mandatory ADR impact on access to justice and litigation costs?" (2019) 30 *ADJR* 31.
- D Spencer "Mandatory mediation and neutral evaluation: a reality in New South Wales" (2000) 11 *ADJR* 237
- J J Spigelman "Mediation and the Court" (2001) 39 (2) *LSJ* 63

Practice Notes

- Supreme Court — Mediation SC Gen 6
- Local Court Practice Note Civ 1

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Amendment

[2-0700] Court's power of amendment

The court may, at any stage of the proceedings, on application by any party or of its own motion, order that any document in the proceedings be amended, or that any party have leave to amend any document in the proceedings, in either case, in such manner as the court thinks fit: CPA s 64. Such amendment may have the effect of adding or subtracting a cause of action which has arisen after the commencement of the proceedings or correcting a mistake in the name of a party (s 64(3), (4)), but the section does not apply to the amendment of a judgment, order or certificate: s 64(5).

[2-0710] General principles

Subject to the dictates of justice described in s 58 of the CPA, all necessary amendments shall be made for the purpose of determining the real questions raised by, or otherwise depending upon, the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings: s 64(2).

Prior to the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (*Aon*), the common law position was that case management was not an end in itself, but an important and useful aid for ensuring the prompt and efficient disposal of litigation: *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 154. However *Aon* disapproved *JL Holdings,* which predated the statutory enactment of principles of case management: at [6], [30]; [93], [111].See also *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 at [28]–[29]. Prior to the enactment of case management principles, it was more readily assumed that an order for costs occasioned by the amendment would overcome the injustice to the amending party's opponent: *Cropper v Smith* (1884) 26 Ch D 700.

In *Aon* at [96], the plurality held that the approach taken by the plurality in *JL Holdings* proceeded upon an assumption that a party should be permitted to amend to raise an arguable issue subject to the payment of costs occasioned by the amendment. So stated, it suggested that a party has something approaching a right to an amendment. The plurality in *Aon* held that is not the case. The "right" spoken of in *Cropper v Smith* needs to be understood in the context of that case and the case management rule, which required amendment to permit the determination of a matter already in issue. It is more accurate to say that parties have the right to invoke the jurisdiction and the powers of the court in order to seek a resolution of their dispute. Subject to any rights to amend without leave given to the parties by the rules of court, the question of further amendment of a party's claim is dependent upon the exercise of the court's discretionary power: at [96]. The reference in r 21 of the Court Procedures Rules 2006 (ACT) to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs: at [98].

[2-0720] Amendment of pleadings

A plaintiff may make one amendment to a statement of claim within 28 days after the date on which the statement of claim was filed, but not after a date has been fixed for trial (subject to the power of the court to otherwise order). The defendant may amend his or her defence within 14 days after service of the amended statement of claim (UCPR, r 19.1); but the court may disallow any such amendment: r 19.2.

[2-0730] Grounds for refusal of amendment

An amendment to a pleading will be refused if a party has deliberately framed his case a particular way and the opponent may have conducted his case differently had the new issues been previously raised: *Burnham v City of Mordialloc* [1956] VLR 239; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255. In particular, a late application to add a limitation defence may be refused if the parties have, until that stage, fought the case on other grounds: *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189.

Other matters which may result in refusal of the amendment include:

- that the amendment is so futile that it would be struck out if it appeared in an original pleading: *Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) Pty Ltd* [2006] NSWSC 1073
- that it will require a further hearing after judgment has been reserved
- that the application is made mala fides
- inadequate explanation for the delay to amend pleadings at a late stage: *Aon Risk Services Australia Ltd v Australian National University*: at [103]
- that an order for costs is not sufficient to cure any prejudice to another party to the proceedings: *Heath v Goodwin* (1986) 8 NSWLR 478, *Aon Risk Services Australia Ltd v Australian National University*, or
- that the application of case management principles so requires: see *Hannaford v Commonwealth Bank of Australia* [2014] NSWCA 297 at [14]–[21].

[2-0740] Pre-judgment interest

An amendment to the originating process so as to claim pre-judgment interest should normally be allowed: *Heath v Goodwin*, above.

[2-0750] Amendment to conform with evidence

If there emerges at the conclusion of the evidence facts which, if accepted, establish a cause of action factually different from the cause of action which the plaintiff has sued upon, then such issue must be considered by the tribunal of fact and the pleadings should be amended in order to make the facts alleged and the particulars precisely conform to the evidence which has emerged: *Leotta v Public Transport Commission of N*SW (1976) 50 ALJR 666 at 668. In the case of particulars, amendment, although desirable, is not essential: *Dare v Pulham* (1982) 148 CLR 658 at 664.

[2-0760] Effective date of amendment

As a general rule, an amendment, duly made, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends. Formerly, an originating process (statement of claim or summons) could not be amended so as to add or substitute a new cause of action which did not exist at the date of the commencement of the proceedings: *Baldry v Jackson* [1976] 2 NSWLR 415 at 419.

Section 64(3) of the CPA now expressly authorises an amendment to an originating process which adds or substitutes a cause of action arising after the commencement of the proceedings and provides that, in such cases, the date of commencement of the proceedings is to be taken to be the date on which amendment is made.

Section 64(4) authorises an amendment if there has been a mistake in the name of a party. In such a case, the amendment takes effect from the date of the original document which it amends: *East West Airlines Ltd v Turner* (2010) 78 NSWLR 1.

[2-0770] Adding a party

UCPR r 19.2(4) provides that if a person is added as a party under that rule, the date of commencement of proceedings in relation to that party is to be taken to be the date on which the amended document is filed, and that is the relevant date for the purpose of computing the limitation period: *Fernance v Nominal Defendant* (1989) 17 NSWLR 710.

[2-0780] Limitation periods

Last reviewed: March 2025

Because an amendment is deemed to date from the date of the original document, there was a "settled rule of practice" that an amendment would not be permitted when it prejudiced the rights of the opposite party as existing at the date of such amendment: *Weldon v Neal* (1887) 19 QBD 394 at 395. In particular, that an amendment would not be allowed to an originating process which set up a cause of action which was statute-barred at the time of the amendment.

This "settled rule of practice" was abrogated by the former SCR Pt 20 r 40 and DCR Pt 17 r 4 which were in similar, though not identical, terms. Those rules have now been replaced by s 65 of the CPA which is as follows:

> (1) This section applies to any proceedings commenced before the expiration of any relevant limitation period for the commencement of the proceedings.
>
> (2) At any time after the expiration of the relevant limitation period, the plaintiff in any such proceedings may, with the leave of the court under section 64(1)(b), amend the originating process so as:
>
> (a) to enable the plaintiff to maintain the proceedings in a capacity in which he or she has, since the proceedings were commenced, become entitled to bring and maintain the proceedings, or
>
> (b) to correct a mistake in the name of a party to the proceedings, whether or not the effect of the amendment is to substitute a new party, being a mistake that, in the court's opinion, is neither misleading nor such as to cause reasonable doubt as to the identity of the person intended to be made a party, or
>
> (c) to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process.
>
> (3) Unless the court otherwise orders, an amendment made under this section is taken to have had effect as from the date on which the proceedings were commenced.
>
> (4) This section does not limit the powers of the court under section 64.
>
> (5) This section has effect despite anything to the contrary in the *Limitation Act 1969*.
>
> (6) In this section, "originating process", in relation to any proceedings, includes any pleading subsequently filed in the proceedings.

Apart from the fact that the relevant provisions are now contained in the Act rather than in the rules, the effect appears to be the same.

The former provisions were discussed and applied in a number of cases including *McGee v Yeomans* [1977] 1 NSWLR 273; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166; and *Seas Sapfor Ltd v Far Eastern Shipping Co* (1995) 39 NSWLR 435.

The present provisions were discussed and applied in *Greenwood v Papademetri* [2007] NSWCA 221. In that case it was held that s 65(2)(b) permits multiple parties to replace a single party, and that a plaintiff may make a mistake in the name of a party, not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name, but also because the plaintiff mistakenly believes that a person who assumes a particular description

bears a certain name. See *Mitry v Business Australia Capital Finance Pty Ltd (in liq)* [2010] NSWCA 360 for a case where a liquidator sued in his own name to recover a debt due to the company, thereby failing to bring the action in the name of the company. This was truly "a mistake in the name of a party" in the sense contemplated by s 65(2)(b): at [43].

Determining whether there is the same "cause of action" and whether the new cause of action arises on "the same (or substantially the same) facts" for the purposes of CPA s 65(2)(c) is a question of qualitative evaluation, which will involve questions of degree: *Commonwealth of Australia v Winston* [2024] NSWCA 277 at [130]; Leeming JA stated eight applicable principles at [135]–[147] to this enquiry. This case involved personal injuries resulting from a collision between two warships during a training exercise in the South China Sea in 1969. The plaintiff brought a claim in negligence, filed in 2019 and for which he was granted an extension of time in 2021 (under s 60I of the *Limitation Act 1969*), then he supplied a further amended pleading in 2024 which introduced a host of new issues arising out of the events of the days preceding the collision. The Court of Appeal held that the plaintiff was not pleading the same cause of action as the original statement of claim and nor was he pleading a cause of action which rose out of the same or substantially the same facts, so in the circumstances of the case, s 65(2)(c) was not engaged: [157]. As s 65 did not apply, the new cause of action was statute barred before the proceedings commenced. The new issues introduced by the plaintiff could fairly be described as not arising out of substantially the same facts for reasons including the new allegations being temporally earlier; the allegations involving different people; and the relatively extensive nature of the new allegations compared to the concision of the original statement of claim: at [153]. And, most importantly, the new issues were qualitatively different from the navigational issues to which the statement of claim was confined: at [154]–[157].

Greater Lithgow City Council v Wolfenden [2007] NSWCA 180 makes it clear that the specific provisions of s 65 do not limit the general power conferred by s 64. Under s 64 an amendment may be allowed even if its effect is to add a statute-barred cause of action which does not satisfy the provisions of s 65. See also *East West Airlines Ltd v Turner* (2010) 78 NSWLR 1.

A particular limitation in Federal legislation, such as s 34 of the *Civil Aviation (Carriers' Liability) Act 1959*, which requires proceedings under that Act to be commenced within two years, will prevail over State legislation, such as the CPA s 65 (*Air Link Pty Ltd v Paterson* (2005) 79 ALJR 1407), so as to prevent an amendment to plead a new cause of action which is statute-barred at the time of the amendment. In that case, however, it was held that the proceedings had been validly commenced under the *Civil Aviation (Carriers' Liability) Act* within the time fixed by that Act, although no reference had been made to the Act.

[2-0790] Costs

When leave to amend is granted, it is usually on terms that the party seeking leave pay the costs of the other parties caused by the amendment. This includes costs thrown away by the amendment and costs of any consequential amendments by the other parties.

[2-0800] Sample orders

1. I grant leave to the [*party*] to amend his/her/its [*document for example, statement of claim*] by [*set out the amendment, for example, "deleting in paragraph 5 the words and figures* [.....] *and inserting in lieu there of the words and figures* [.....]"]

   or

   in accordance with the document initialled by me and placed with the papers.

2. Such an amendment to be effected by 5:00 pm on [*date*].
3. [*If the amendment may require a response by any other party*] I grant leave to the [*other party*] to file and serve an amended [*document*] by 5:00 pm on [*date*].
4. I order the [*party*] to pay the costs occasioned by the amendment [*or otherwise as appropriate*].

[2-0810] Amendment of judgments

See section "Setting aside and variation of judgments and orders" at [2-6600].

Legislation

- CPA ss 56, 57, 58, 64, 65
- UCPR rr 19.1–19.6

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Search orders

Acknowledgement: the following material was originally prepared by the Honourable Justice P Biscoe of the Land and Environment Court and updated by Judicial Commission staff.

Portions of this chapter are adapted with permission from Chapter 7 of P Biscoe, Freezing and Search Orders: Mareva and Anton Piller Orders, 2nd edn, LexisNexis Butterworths, Australia, 2008.

[2-1000] Introduction

Search orders are governed by detailed rules in UCPR Pt 25, Div 3 (rr 25.18–25.24) and Practice Note SC Gen 13 ("PN 13") available on the Supreme Court website at http://supremecourt.justice.nsw.gov.au/.

The practice note applies to the Court of Appeal and, Equity and Common Law divisions of the Supreme Court and includes example forms of ex parte orders which are complex. They should not be significantly varied without good reason.

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.

[2-1010] Search orders

Search orders are also known as Anton Piller orders. The title "search orders" follows the title used in the English rules. The original name "Anton Piller order" derives from the seminal case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

The object of a search order is to preserve evidence needed to prove the applicant's claim which is in danger of destruction, concealment or removal from the jurisdiction. It does so by ordering the respondent to permit the applicant's representatives and an independent supervising solicitor to enter, search, copy documents and remove property from the respondent's premises for safekeeping. A species of discovery of the most extreme kind, it lies at the limit of a court's civil jurisdiction. The heartland of the search order is copyright infringement and breach of confidence.

A search order is normally obtained ex parte without notice to the respondent and before service of the originating process, because notice or service may prompt the feared destruction or disappearance of evidence.

The execution of a search order is a serious invasion of people's privacy. While it is an important tool in ensuring that evidence is preserved so that justice may be done, such orders should only be made on an ex parte basis if the applicant discharges their duty of candour so that the court is fully appraised of all relevant matters to the exercise of its discretion in such an important decision. The need for candour is particularly acute on duty judge applications, where judges often have insufficient time to review affidavits and documentary evidence in detail: *Showcase Realty Pty Ltd v Nathan Circosta* [2021] NSWSC 355 at [36].

The characteristics of a search order are secrecy, mandatory form and virtually immediate execution. A search order does not permit forcible entry. In that crucial respect it differs from a search warrant. A search party encountering resistance to entry or search must depart: *Anton Piller KG v Manufacturing Processes Ltd* at 61. The main sanction for disobedience to a search order is contempt of court.

Concern about the draconian effect of search orders, and the fact that they are made against respondents who have not been notified or heard, have led to detailed safeguards being built into the example form of order in Practice Note 13.

Although a search order is normally ex parte and granted before service of the originating process, it has also been granted after judgment in order to obtain documents essential to the execution of

the judgment where there was a serious risk that a respondent would remove or destroy them in order to frustrate enforcement: *Distributori Automatici Italia SPA v Holford General Trading Co* [1985] 1 WLR 1066.

[2-1020] Requirements

The court may make a search order if the following requirements set out in r 25.20 are satisfied (they are modelled on those stated in *Anton Piller* per Ormiston LJ):

(a) an applicant seeking the order has a strong prima facie case on an accrued cause of action;

(b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and

(c) there is sufficient evidence in relation to a respondent that

(i) the respondent possesses important evidentiary material; and

(ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceedings before the court.

In every case, the court will balance the strength of the case, the seriousness of the damage, the gravity of the risk of destruction, and the potential injury to the defendant. These are factors to be taken into account in the exercise of a discretion, rather than essential proofs: *Brags Electrics Ltd v Gregory* [2010] NSWSC 1205 at [18]. See *Global Medical Solutions Australia v Axiom Molecular* [2012] NSWSC 1262 at [11]–[24] for an example of how the court weighed these considerations in determining that the requirements of r 25.20 had been made good. The crux of the evidence required to obtain a search order often concerns the third requirement that there is a "real possibility" that the respondent might destroy the material or cause it to be unavailable for use unless an ex parte order is made. This will usually require clear evidence of matters such as dishonesty, fraud or contumacy or the transitory nature of the respondent's business, but such cases may be quite common.

[2-1030] Safeguards

Safeguards for the protection of respondents have been built into the example form attached to Practice Note 13. The most important is the appointment of one or more independent solicitors to supervise the search and report to the court. This is a mandatory requirement and the only safeguard expressly mentioned in the rules: r 25.23. Other safeguards appear in the example form and are mentioned in Practice Note 13. The responsibilities of a supervising solicitor are set out in the example form and are summarised in Practice Note 13 [11] as follows:

[2-1040] Sample orders

(a) serve the order, the notice of motion applying for the order (if applicable), the affidavits relied on in support of the application, and the originating process;

(b) offer to explain, and, if the offer is accepted, explain the terms of the search order to the respondent;

(c) explain to the respondent that he or she has the right to obtain legal advice;

(d) supervise the carrying out of the order;

(e) before removing things from the premises, make a list of them, allow the respondent a reasonable opportunity to check the correctness of the list, sign the list, and provide the parties with a copy of the list;

(f) take custody of all things removed from the premises until further order of the Court;

(g) if the independent solicitor considers it necessary to remove a computer from the premises for safekeeping or for the purpose of copying its contents electronically or printing out information in documentary form, remove the computer from the premises for that purpose, and return the computer to the premises within any time prescribed by the order together with a list of any documents that have been copied or printed out;

(h) submit a written report to the Court within the time prescribed by the order as to the execution of the order; and

(i) attend the hearing on the return day of the application, and have available to be brought to the Court all things that were removed from the premises. On the return day the independent solicitor may be required to release material in his or her custody which has been removed from the respondent's premises or to provide information to the Court, and may raise any issue before the Court as to execution of the order.

The applicant's solicitor is required to undertake to the court to pay the reasonable costs and disbursements of the independent solicitor and any independent computer expert: PN 13 example form Sch B [1].

[2-1050] Sample orders

Undertakings given to the Court by the applicant:

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

Other safeguards for the respondent include the following:

- The respondent is not required to permit anyone to enter the premises until the independent solicitor serves the order and affidavits and the respondent is given an opportunity to read the order. If requested, the independent solicitor must explain the terms of the order: PN 13 example form [11].
- Before permitting entry to the premises by anyone other than the independent solicitor, the respondents for a time (not exceeding two hours from the time of service or such longer period as the independent solicitor may permit) may seek legal advice, may ask the court to vary or discharge the order, and (provided the respondent is not a corporation) may gather together anything which the respondent believes may tend to incriminate the respondent or make the respondent liable to a civil penalty and hand them to the independent solicitor. Similarly the respondent may gather together any documents that passed between you and your lawyers for the purpose of obtaining legal advice or for which legal professional privilege or client legal privilege is claimed and hand them to the independent solicitor: PN 13 example form [12].
- Documents for which privilege is claimed which have been handed to the instructing solicitor must be delivered to the court on the return date without having been inspected by anyone: PN 13 example form [13].

- Ordinarily a search order should be served between 9 am and 2 pm on a business day in order to permit the respondent more readily to obtain legal advice, and must not be executed at the same time as execution of a search warrant: PN 13 [13] and [14].
- Anything the subject of a dispute as to whether it is a thing the subject of the search order must promptly be handed by the respondent to the independent solicitor for safekeeping pending resolution of the dispute or further order of the court: PN 13 example form [15].
- The premises must not be searched and things removed except in the presence of the respondent or a person who appears to the independent solicitor to be the respondent's director, officer, partner, employee, agent or other person acting on the respondent's behalf or instructions: PN 13 example form [17]. This requirement may be waived by the independent solicitor if he or she considers that full compliance with it is not reasonably practicable: PN 13 example form [18].
- If it is expected that a computer will be searched, the search party must include an independent computer expert who has prescribed responsibilities: PN 13 example form [20].
- Other safeguards appear in the various undertakings by the applicant, the applicant's solicitor, the instructing solicitor and any independent computer expert which are set out in Sch B to the example form.

[2-1060] Disclosure of customers and suppliers

It has become common for search orders to require respondents to provide information and documents as to their suppliers and customers. Such a provision appears in the PN 13 example form [23]:

[2-1070] Sample orders

Provision of information

Subject to paragraph 24 below, you must:

(a) at or before the further hearing on the return day (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing as to:

  (i) the location of the listed things;

  (ii) the name and address of everyone who has supplied you, or offered to supply you, with any listed thing;

  (iii) the name and address of every person to whom you have supplied, or offered to supply, any listed thing; and

  (iv) details of the dates and quantities of every such supply and offer.

(b) within [ ] working days after being served with this order, make and serve on the applicant an affidavit setting out the above information.

[2-1080] Gagging order

Except for the sole purpose of obtaining legal advice, the respondent is usually prohibited until 4.30 pm on the return date from informing anyone of the proceedings or of the contents of the order or from telling anyone that a proceeding has been or may be brought by the applicant: PN 13

example form [25]. A similar obligation is cast on the applicant by undertaking (3) in Sch B to the example form. Such a gagging order has been rationalised on the basis that it gives the applicant an opportunity to use information obtained from the search so as to locate and preserve evidence and assets in the possession or control of others.

[2-1090] Cross-examination

As in freezing order cases, the court may grant leave to cross-examine a respondent on disclosures.

[2-1095] Setting aside a search order

An applicant seeking to set aside an ex parte order bears the onus of showing why it should be set aside: *Brags Electrics Ltd v Gregory* [2010] NSWSC 1205 at [10], [17]. It may be a sufficient reason to set aside the order that the grounds for such an order were not satisfied. Where search orders have already been executed, the court may set aside the orders ab initio if there has been bad faith or material non-disclosure. Otherwise a discharge will operate in futuro only: *Brags Electrics Ltd* at [17] per Brereton J. The court may take into account on the hearing of the application the "fruits of the order" — that is to say, any evidence or admission procured as a result of the order — and any further evidence adduced in the meantime. The test for determining whether a non-disclosure is "material" was explained by Ball J in *Principal Financial Group Pty Ltd v Vella* [2011] NSWSC 327 at [17].

See further r 36.16(2)(b) and *Showcase Realty Pty Ltd v Nathan Circosta* [2021] NSWSC 355.

[2-1100] Risks for applicants and their solicitors

Applicants or their solicitors, who do not comply with requirements imposed on them by a search order or who act scandalously on its execution, are in contempt of court, and may be liable in damages to the respondent, and run the risk that the search order may be set aside or not continued. In *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 in which the New South Wales Court of Appeal dismissed an appeal from a finding of contempt of court for breaches of undertakings to the court given by a solicitor for the applicant when he obtained a search order for his client.

Another risk eventuated in *Canadian Bearings Ltd v Celanese Canada Inc* (2006) SCC 36. There privileged documents obtained pursuant to a search order came into the possession of the applicant's lawyers. The Supreme Court of Canada ordered that those lawyers no longer act for the applicant. This risk should be minimised under points 12 and 13 of the Example Form of Search Order in PN 13, which permit the respondent to give the independent solicitor any documents for which privilege is claimed in a sealed container, and require the independent solicitor not to inspect or permit anyone to inspect them, and to deliver them to the court on the return date.

[2-1110] Costs

The court has a wide discretion as to costs orders under r 25.24:

(1) The court may make any order as to costs that it considers appropriate in relation to an order made under this Division.

(2) Without limiting the generality of subrule (1), an order as to costs includes an order as to the costs of any person affected by a search order.

Practice Note

- SC Gen 13 (PN 13)

Rules

- UCPR rr 25.18–25.24

[The next page is 821]

Change of venue and transfer between New South Wales courts

[2-1200] Change of venue

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

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

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

Of particular relevance are:

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

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

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

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

Change of venue between Local Courts

A Local Court may make an order changing the venue of proceedings if it thinks it appropriate in the circumstances in accordance with s 55 *Local Court Act 2007*; UCPR Pt 8 and Local Court Practice Note Civ 1 (especially 10.1–10.7).

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

[2-1210] Transfer of proceedings between courts

Last reviewed: September 2024

Transfer to a higher court

The power to transfer proceedings to a higher court pursuant to CPA s 140 should be exercised in such a way as to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (CPA s 56) whilst at the same time recognising jurisdictional limitations in some courts.

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

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

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

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

Proceedings in the Local Court may only be transferred to a higher court where the higher court is satisfied that there is "sufficient reason" for hearing the proceedings in the court: CPA s 140(4); see *Riaz v Technical and Further Education Commission* [2024] NSWSC 474 at [44] for a list of the well-established principles concerning the transfer of matters from the Local Court to the Supreme Court. See also *Brown v IJM Group Pty Ltd t/a Cove Agency* [2024] NSWSC 578 at [21]–[25], in which orders were made to transfer proceedings pending in the Local Court to the Equity Division of the Supreme Court. It was held there was a significant possibility the parties might appeal the conclusions reached by a magistrate as to the proper construction of a Deed, due to the fact the Deed was the product of a mediation of proceedings in the Equity Division and the Deed would benefit from consideration by an experienced commercial law judge because of its "unusual features". A claim should be determined expeditiously in accordance with CPA Pt 6, including if there is at least a significant possibility that either party if unsuccessful might appeal.

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

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

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

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

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

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

Transfer to a lower court

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

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

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

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

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

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

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

Transfer between Supreme Court and Land and Environment Court

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

Transfer between Small Claims Division and General Division of Local Court

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

[2-1220] Sample orders

I order:

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

Legislation

- CPA ss 139–149E
- *District Court Act 1973*, ss 44(1)(e), 133–135
- UCPR r 8

- *Local Court Act 2007*, s 55
- Local Court Rules 2009, Pt 2, Div 2

Practice Notes

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

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Cross-vesting legislation

[2-1400] Cross-vesting

Last reviewed: December 2024

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

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

Transfer of proceedings

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

The conditions to be satisfied before proceedings are transferred in relation to applications under s 5(1) and (2), are set out in the relevant subsections. Note that following *Re Wakim, Ex parte McNally*, above, s 5(1) and (4) were amended and s 5(9) inserted to limit the proceedings which can be transferred so as to give effect to that decision. See also *Hopkins v Governor-General of Australia* (2013) NSWCA 365.

Section 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) provides that, if it appears that a matter for determination in an appeal from a "decision of a single judge of the Supreme Court of a State or Territory" is a "matter arising under" one of the 13 Commonwealth Acts specified in the Schedule to the *Cross-vesting Act*, that appeal is required to be instituted in, and determined by, one of the three courts identified in s 7(5), including the Full Federal Court. The High Court held in *HBSY Pty Ltd v Lewis* [2024] HCA 35 that s 7(5) should not be "read down" to mean only

decisions in federal jurisdiction that have come before the relevant Supreme Court as a result of the operation of s 4(1) of the *Cross-vesting Act*. Rather, s 7(5) relevantly directs appeals from a Supreme Court decision to the Full Federal Court, irrespective of the source of the Supreme Court's original jurisdiction, where a matter arising for determination in the appeal is a matter arising under one of the Acts listed in the Schedule to the Cth *Cross-vesting Act*: at [75]–[76]. See also *Papoutsakis v Dunn* [2024] NSWCA 246 at [14] which considered the equivalent s 7(4) of the NSW Act.

See also *Eberstaller v Poulos* (2014) 87 NSWLR 394; *Boensch v Pascoe* [2016] NSWCA 191; *Guan v Li* [2022] NSWCA 173.

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

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

- the place or places where the parties and/or witnesses reside or carry on business;
- the location of the subject matter of the dispute;
- the importance of local knowledge to the resolution of the issues;
- the law governing the relevant transaction, especially if the matter involves the construction of State legislation: *Australian Consolidated Investments Ltd v Westpac Banking Corporation* (1991) 5 ACSR 233;
- the procedures available in the different courts;
- the likely hearing dates in the different courts;
- whether it is sought to transfer the proceedings to a specialised court, for example, the Family Court: *Lambert v Dean* (1989) 13 Fam LR 285;
- an exclusive jurisdiction clause nominating the courts of a particular State for the resolution of disputes: *West's Process Engineering Pty Ltd (Administrator Appointed) v Westralian Sands Ltd* (unrep, 6/8/97, NSWSC);
- whether the matter is a "special federal matter" (defined in s 3(1) of the Commonwealth legislation): such matters must be transferred to the Federal Court unless "special reasons" are established for the proceeding to be determined by the Supreme Court: s 6(3). For guidance as to what constitutes "special reasons" in this context see *Huynh v Attorney General (NSW)* [2023] NSWCA 190 at [39]–[53].

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

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

[2-1410] Sample order

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

Legislation

- *Jurisdiction of Courts (Cross-Vesting) Act 1987* ss 3, 4, 5(1), 5(2), 5(3), 5(4), 5(5), 5(9), 6(3), 7(5), 8
- UCPR rr 44.2–44.5

[The next page is 925]

Service of process outside New South Wales

[2-1600] Service within the Commonwealth of Australia

In the Supreme Court, service of originating process may be effected in accordance with either UCPR r 10.3 or the *Service and Execution of Process Act 1992* (Cth), ss 13–16. In other courts, service can only be effected in accordance with the *Service and Execution of Process Act 1992*. For an exception see **[2-1620]**.

In the case of Supreme Court proceedings, if a person joined as a party wishes to have the proceedings transferred to the Federal Court, Family Court or the Supreme Court of another State or Territory, application may be made under the *Jurisdiction of Courts (Cross Vesting) Act 1987* to have the proceedings transferred.

In respect of proceedings in other courts, the *Service and Execution of Process Act 1992*, s 20 (which does not apply to proceedings in a Supreme Court: s 20(1)) provides that a person served with an originating process under the Act may apply to the court which issued the process for an order staying the proceedings (s 20(2)) on the ground that a court of another State has jurisdiction to determine all the matters in issue between the parties and is the appropriate court to determine those matters: s 20(3). The applicant bears the onus on the balance of probabilities of demonstrating that the alternative court is the appropriate court. Language such as a "clear and compelling basis" operate as an unwarranted gloss on the statute and impose a higher hurdle on applicants seeking a stay of proceedings: *Joshan v Pan Pizza Group Pty Ltd* (2021) 106 NSWLR 104 at [72]–[77].

In determining such an application, the court is to take into account the matters set out in s 20(4), namely:

- the places of residence of the parties and of the witnesses likely to be called in the proceedings,
- the place where the subject matter of the proceedings is situated,
- the financial circumstances of the parties so far as the court is aware of them,
- any agreement between the parties about the court or place in which the proceedings should be instituted,
- the law that would be most appropriate to apply in the proceedings, and
- whether a related or similar proceeding has been commenced against the person served or another person,

but the court is not to take into account the fact that the proceedings were commenced in the place of issue.

See also the observations of Bell P in *Joshan v Pizza Pan Group Pty Ltd* at [50]–[68] regarding s 20 of the Act.

The application may be determined without a hearing unless the applicant or a party objects (s 20(6)), or the court may hold a hearing by video link or telephone: s 20(7). An order may be made subject to such conditions as the court considers just and appropriate in order to facilitate determination of the matter in dispute without delay or undue expense: s 20(5).

A court of a State or Territory other than the place of issue must not restrain a party to the proceedings from taking a step in such proceedings on the ground that the place of issue is not the appropriate forum for the proceedings: s 21.

[2-1620] Service pursuant to UCPR r 10.6

In any proceedings, any document (including originating process) may be served by one party or another (whether in New South Wales or elsewhere) in accordance with any agreement, acknowledgement or undertaking by which the party to be served is bound: r 10.6(1).

In relation to the service of an originating process in proceedings on a claim for possession of land, the agreement, acknowledgment or undertaking must be made after the originating process is filed but before it is served: r 10.6(1A).

Such service is taken for all purposes (including for the purposes of any rule requiring personal service) to constitute sufficient service: r 10.6(2).

[2-1630] Service outside Australia pursuant to UCPR Pts 11 and 11A

General

Service of originating process outside Australia is permitted by UCPR Pt 11 and assisted by Pt 11A. Part 11 only applies to the Supreme Court: r 11.1. In the circumstances referred to in Sch 6, leave is not required: r 11.4(1). This rule extends to an originating process to be served outside Australia in accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention): r 11.4(2). In any proceedings when service is not allowed under Sch 6, such service may be effected with the leave of the court: r 11.5(1).

Part 11A deals with the operation of the Hague Convention, which is a set of uniform rules concerning the service of Australian judicial documents in civil and commercial matters to countries (other than Australia) that are parties to the Convention.

The Convention, which came into force in Australia on 1 November 2010, offers an alternative method of service of judicial documents outside Australia but it is not mandatory.

As to special provisions for service in New Zealand, see r 11.3 and "Trans-Tasman proceedings" at [5-3500]–[5-3510].

Part 11 does not require the leave of the court for any service or other thing that may be effected or done under any law of the Commonwealth or Pt 11A: r 11.2. Division 2 of Pt 11 does not apply to any documents that are intended to be served on a person outside Australia in accordance with the Convention: r 11.8A.

Application for leave to serve

The application must be on notice to every party other than the person intended to be served: r 11.5(2). A sealed copy of the relevant order must be served with the document to which it relates: r 11.5(3). The application must be supported by an affidavit stating the facts and matters referred to in r 11.5(4).

The court may grant an application for leave if satisfied that the claim has real and substantial connection with Australia (r 11.5(5)(a)), that Australia is an appropriate forum for the trial (r 11.5(5)(b)) and that in all circumstances the court should assume jurisdiction: r 11.5(5)(c). See *Michael Wilson & Partners Ltd v Emmott* [2019] NSWSC 218 where it was held Australia (NSW) was not the appropriate forum to determine the dispute as, inter alia, the citizenship of the parties was not regarded as a connecting factor at common law and no reason was advanced to justify an exception in this case. Further the fact one of the parties had given evidence in Australia did not mean of itself that there was a connection between the current claim and Australia: at [63].

On application by a person relevantly served, the court may dismiss or stay the proceeding or set aside service of the originating process: r 11.6(1).

Without limiting that provision, the court may make such an order if satisfied that service of the originating process is not authorised by the rules (r 11.6(2)(a)), or that the court is an inappropriate

forum for the trial of the proceeding (r 11.6(2)(b)) or that the claim has insufficient prospects of success to warrant putting the person served to the time, expense and trouble of defending the claim: r 11.6(2)(c).

Rule 11.7 provides that the person so served must also be served with a notice setting out the matters referred to in that rule.

Rule 11.8 provides that unless the court otherwise orders, an appearance must be filed within 42 days of the date of service.

Application by person served

Although not specifically referred to in r 11.6, it seems that the appropriate course is for a defendant served with an originating process outside the jurisdiction to apply for an order setting aside the originating process or service thereof, declaring the court has no jurisdiction in the matter or declining to exercise jurisdiction under r 12.11 on the ground that the service of the originating process is not authorised by the rules, on the ground that the court is an inappropriate forum for the trial of the proceedings, or that the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending the claim: r 11.6. For an example of an application of this general kind, see *In the matter of Mustang Marine Australia Services Pty Ltd (In Liq)* [2013] NSWSC 360.

Such an application must be made by notice of motion filed within the time limited for entering an appearance, stating the applicant's address for service, but may be made without entering an appearance and does not constitute submission to the jurisdiction of the court: r 12.11(2), (3), (4).

See further *Michael Wilson & Partners Ltd v Emmott* [2020] NSWCA 139.

Leave to proceed

Where no appearance is entered, the party serving the originating process may not proceed except by leave of the court: r 11.8AA(1). An application for such leave may be made without serving notice on the person served with the originating process: r 11.8AA(2).

In an application for leave to proceed under r 11.8AA, the plaintiff must prove proper service on the defendant (*Castagna v Conceria Pell Mec SpA* (unrep, 15/3/1996, NSWCA)). Leave by the court for service outside of Australia or that proceedings come within Sch 6 and therefore r 11.4.

In deciding whether r 11.4 applies, attention is to be directed to the way in which the claims are framed. The focus is upon the nature of the claim which is made, that is the claim in which the plaintiff alleges a cause of action which, according to the allegations, falls within the schedule: *Agar v Hyde* (2000) 201 CLR 552 at [50].

The inquiry is not concerned with an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim. The application of the schedule depends on the nature of the allegations which the plaintiff makes, not on whether these allegations will be made good at trial. "Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph … service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed": *Agar v Hyde*, above, at [51].

Similarly, it would seem that where leave to serve has been granted by the court and there is no opposition to a grant of leave to proceed, prima facie, the plaintiff should have such leave.

Other matters

Any documents other than an originating process may be served outside Australia with the leave of the court: r 11.8AB.

A document to be served outside Australia need not be personally served so long as it is served in accordance with the law of the country in which service is effected: r 11.8AC. This is so even though personal service would be required if the document was served in Australia: *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 501–502.

For a consideration of issues arising under r 11 and as to service generally, see *Hiralal v Hiralal* [2013] NSWSC 984 and *Agar v Hyde*.

Service pursuant to Pt 11A: the Hague Convention

Part 11A deals with the service of documents in Convention countries and with default judgements after such service. The majority of countries are party to the Hague Convention, including United Kingdom and Northern Ireland, United States, China and India. Some of the non-Convention countries include Kuwait and Pakistan. The Commonwealth Attorney-General's department maintains a list of Convention and non-Convention countries, and other relevant information.

The provisions in Pt 11A prevail to the extent of any inconsistency between those provisions and any other UCPR provisions: r 11A.2.

A person may apply to the Registrar for a request for service of an Australian judicial document in a Convention country. The documentation that must accompany the application is set out in r 11A.4 and includes:

- the signed request for service abroad
- the document to be served
- a summary of the document to be served, and
- where applicable, a translation (including a certificate from the translator) of the documentation.

The draft request for service may request a certificate of service: r 11A.4(4)(d). A certificate of service is sufficient proof that service of the document was effected by the method specified in the certificate on that date: r 11A.8. Concerning default judgment following service abroad of the initiating process, r 11A.10 applies if a certificate of service has been filed in the proceedings and the defendant has not appeared or filed a notice of address for service: r 11A.10(1).

A default judgment may not be given against the defendant, pursuant to r 11A.10(2), unless the court is satisfied that the initiating process was served in:

- accordance with the law of the Convention country
- sufficient time to enable the defendant to enter an appearance in the proceedings.

As to submission to the jurisdiction, see *Bagg v Angus Carnegie Gordon as liquidator of Salfa Pty Limited (in liq)* [2014] NSWCA 420.

Rule 11A.10(3) provides that "sufficient time" is 42 days from the date on which service of the process was effected or a lesser time that is thought to be appropriate by the court.

Where no certificate of service has been filed or if no service could be effected and the defendant has not appeared or filed a notice of address for service, the court may give a default judgment, pursuant to r 11A.11, if it is satisfied that:

- the initiating process was forwarded to the Convention country
- a period of not less than 6 months has elapsed since the date on which the initiating process was forwarded
- every reasonable effort was made to obtain a certificate of service or to effect service.

An application to have a judgment set aside may be made within a 12 month period after the date on which the judgment was given or within such time after the defendant acquires knowledge of the judgment as the court considers reasonable. An order to set aside a judgment on this basis may be made if the court is satisfied that the defendant did not have knowledge of the initiating process in sufficient time to defend the proceedings and a prima facie defence can be made to the proceedings on the merits: r 11A.12.

Legislation

- CPA s 67.
- *Service and Execution of Process Act 1992* (Cth), ss 13–16, 20–21.
- UCPR rr 10.3, 10.6, Pts 11; 11A; 12; rr 11.1–12.11; Sch 6.

Further reading

- A Bell, "Private international law in practice across the divisions: some recent developments and caselaw" (2020) 14 *TJR* 1.

International Convention

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention).

(The Convention and a list of parties to the Convention can be found at http://www.hcch.net.)

[The next page is 975]

Consolidation and/or joinder of proceedings

[2-1800] Consolidation of proceedings

Last reviewed: August 2023

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

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

the court may order:

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

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

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

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

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

Note that if the effect of the order for consolidation is the joinder of a number of parties as plaintiffs, they must all act by the one solicitor, in accordance with the general rule that plaintiffs must always be represented by the same solicitor: *Herbert v Badgery* (1893) 14 LR (NSW) Eq 321; *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601.

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

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

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

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

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

[2-1810] Sample orders

For consolidation

I order:

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

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

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

[2-1820] For proceedings to be heard together

I order that:

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

Legislation

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

Rules

- UCPR r 28.5

[The next page is 1031]

Set off and cross-claims

[2-2000] Set off

If there are mutual debts between a plaintiff and a defendant, the defendant may, by way of defence, set off any debt that was owed by the plaintiff to the defendant and was due and payable at the time the defence of set off was filed. It does not matter whether the mutual debts are of a different nature: CPA s 21(1).

The defence is available where one or more of the mutual debts is owed by or to a deceased person who is represented by a legal personal representative: s 21(2). It is not available to the extent that the plaintiff and the defendant have agreed that debts may not be set off against each other: s 21(3).

Section 21 does not affect any other rights or obligations of a debtor or creditor in respect of mutual debts, whether arising in equity or otherwise (s 21(4)), and is subject to s 120 of the *Industrial Relations Act 1996*: s 21(5).

Section 120 of the *Industrial Relations Act 1996* prohibits a defence of set off to a claim for remuneration in respect of goods or services supplied by the employer or at its direction.

In s 21, "debt" means any liquidated claim: s 21(6).

[2-2010] Transitional provisions

Section 21 extends to any debt arising under an agreement entered into before 15 August 2005 and to any other debt arising before that date except that, in respect of the former, the court may order that the section does not apply "if it is satisfied that it would be in the interests of justice to make such an order": CPA Sch 6 cl 6.

[2-2020] Mutuality

Historically, the requirement of mutual debts required that the demands must be between the same parties and that the debts not be due to the parties in different rights See New South Wales Law Reform Commission, *Set Off*, 2000, NSWLRC Report No 94 at 40.

However, the latter requirement has been altered by s 21(4) as set out above.

[2-2030] Applicability

For the history of set off and the reasons for the re-introduction of statutory set off in the CPA see the NSWLRC Report, above.

The provisions of the CPA do not affect the availability of equitable set off which remains applicable in appropriate circumstances. It is not excluded by the absence of mutuality or the circumstance that one of the claims is not liquidated. What is required is that the contrary liabilities are sufficiently closely connected that it would be inequitable for the plaintiff to be permitted to proceed with its claim without making allowance for the defendant's claim against it: *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd Receivers and Managers appointed* (1997) 42 NSWLR 462 at 481–482, 488–489.

As to the relevant tests and examples of cases in which the defence of equitable set off has been relied upon, see *Ritchie's* [s 21.10].

Further, the provisions of the CPA do not affect the availability of the defence of contractual set off or set off by agreement. Such a defence can arise — as in the case of any other contractual term — expressly, by implication, from a course of conduct, or by custom. See NSWLRC Report, above, at 4; *Re Application of Keith Bray Pty Ltd* (1991) 23 NSWLR 430 per McLelland J at 431.

[2-2040] Set off of judgments

Quite apart from the Act and Rules, the Supreme Court has inherent power to order that one judgment be set off against another whether there be one or more proceedings: *Ryan v South Sydney Junior Rugby League Club* [1975] 2 NSWLR 660 per Bowen CJ in Eq at 664; *Wentworth v Wentworth* (unrep, 12/12/94, NSWSC) at 3–4, *Wentworth v Wentworth* (unrep, 21/2/96, NSWCA) at 2–3. These cases deal with set off as to costs. However the principle is not so limited.

In courts other than the Supreme Court (CPA s 96(5)), a judgment debtor may apply for an order that the judgment be set off against another judgment of the same court in respect of which the judgment debtor is the judgment creditor: s 96(2). If an order is made, set off is effected in the manner provided by s 96(3). Judgments of different Local Courts are taken to be judgments of the same court and the application can be made to either court: s 96(4).

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

[2-2050] Cross-claims generally

Section 22 of the CPA permits a defendant to bring a cross-claim against a plaintiff and a cross-claim involving third parties provided that, as to third parties, the relief sought relates to, or is connected with, the subject of the proceedings brought by the plaintiff: s 22(1)–(2).

Section 22 is procedural only and does not negate the need for a cross-claimant to establish a right to relief independently of the section: *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 per Barwick CJ at 328, Gibbs J at 330.

The cross-claim must be one seeking such relief as the court might grant against a cross-defendant in separate proceedings commenced by the defendant: s 22(1).

The cross-defendant has the same rights in respect of his or her defence against the claim as he or she would have in separate proceedings commenced against the person by the defendant: s 22(3)(a).

If not already a party, a cross-defendant becomes a party and, unless the court otherwise orders, is bound by any judgment or decision on any claim for relief in the proceedings including in any cross-claim: s 22(3)(b). See *Insurance Exchange of Australasia v Dooley* (2000) 50 NSWLR 289 per Handley JA at [12]–[19] and *Bowcliff v QBE Insurance* [2011] NSWCA 18 per Handley AJA at [27] and [36].

If a substantive right to relief is established, the court may make appropriate orders even in the absence of a formal claim: *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 per Handley JA at 84–85.

A cross-claim may be contingent on the success of the plaintiff's claim (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 595–596) and may have been acquired after the commencement of the proceedings: *Baldry v Jackson* [1976] 2 NSWLR 415; *Crothers v Hire Finance Ltd* (1959) 76 WN (NSW) 469.

[2-2060] Discretion

While s 22 leaves the court with a discretion not to entertain a cross-claim, the overriding purpose and object of the CPA suggests that such a course would be rare. Although, see *Wood v Cross Television Centre Pty Ltd* [1962] NSWR 528; (1961) 79 WN (NSW) 596, in which a cross-claim in defamation was involved. The same reasoning would still apply especially in relation to defamation.

The court may, at any stage of the proceedings, order that a cross-claim or a question arising in the cross-claim may be tried separately: r 9.8(a). It may direct generally the extent to which the usual procedures are to be modified because of the joinder of the cross-defendant: r 9.8(b).

[2-2070] Hearings

Usually the original claim and all cross-claims are heard together. However, there may be circumstances that make it appropriate to hear a cross-claim or claims separately. An example is where a third party cross-defendant is an insurer and the issues go to the entitlement to indemnity: *Martin v Cassidy* (1969) 90 WN Pt 1 (NSW) 433.

Subject to a contrary direction, which would be unusual, a cross-defendant is entitled to participate in the trial between the plaintiff and the defendant, at least in so far as relevant to the defendant's claim against the cross-defendant. Participation includes cross-examination of witnesses, the calling of evidence and making submissions: *Insurance Exchange v Dooley*, above, per Handley JA at [19].

[2-2080] Savings

A cross-claim may proceed even if the original proceedings have ended in judgment or been stayed, dismissed, withdrawn or discontinued: r 9.10(1).

The original proceedings may proceed even if the cross-claim has ended in judgment or been stayed, dismissed, withdrawn or discontinued: r 9.10(2).

A summary judgment may be stayed until determination of a cross-claim: r 13.2.

[2-2090] Judgment

The court may give judgment for the balance of the sum awarded on the claim and cross-claim or may give judgment in respect of each claim: s 90.

[2-2100] Costs

As to costs, see ch 8 "Costs" at [8-0000].

Legislation

- CPA ss 21(3), 22, 90, 96
- *Industrial Relations Act 1996* s 120

Rules

- UCPR Pt 9, rr 9.8, 9.10, 13.2

[The next page is 1085]

Discovery

[2-2200] Discovery generally

Discovery is a process which originated in the Court of Chancery and involved both disclosure of documents and the answering of interrogatories: see generally *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 643–646.

Now, discovery (and inspection) of documents, interrogatories, preliminary discovery and discovery by non-parties are dealt with separately by the UCPR, although the former chancery remedy (separate proceedings for discovery) is expressly preserved in the Supreme Court: r 1.4.

[2-2210] Discovery and inspection during proceedings

Last reviewed: March 2025

For "Preliminary discovery generally" see below at [2-2280].

Discovery and inspection of documents during proceedings are governed by Pt 21 of the UCPR which is applicable in all courts other than the Dust Diseases Tribunal and the Small Claims Division of the Local Court: r 1.5, Sch 1. The process is available in the General Division of the Local Court.

In contrast to the previous practice (in proceedings commenced prior to 1 October 1996 in the Supreme Court, or 1 November 1996 in the District Court), a party can no longer require another party to give discovery merely by service of a notice and, in the absence of agreement, discovery can only be required pursuant to an order of the court.

In general, discovery (also known as disclosure) is ordered after the close of pleadings, so that the issues have been defined, but before the parties have exchanged evidence. However, in the Equity Division (including the Commercial List but excluding the Commercial Arbitration List), Practice Note SC Eq 11 now provides:

> **Disclosure**
>
> 4 The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
>
> 5 There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.
>
> 6 Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out:
>
> - the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;
> - the classes of documents in respect of which disclosure is sought;
> - and the likely cost of such disclosure.
>
> **Costs**
>
> 7 The Court may impose a limit on the amount of recoverable costs in respect of disclosure.

The practice note guides but does not govern the discovery process. While it lists conditions that must be satisfied before the court will order disclosure, it does not list conditions which are sufficient to obtain disclosure. The court still retains a discretion to require or limit discovery under UCPR r 21. That discretion must be exercised having regard to ss 56 and 57 of the CPA.

The intention of the practice note is to reduce the burden of discovery by ordering it only after the issues have been defined by pleadings (where relevant) and refined by the affidavit evidence. It is also intended to prevent the parties constructing their evidence in light of the discovered documents.

Disclosure will be "necessary" for the purposes of paragraph 5 of the practice note when it is reasonably required for the fair disposition of the proceedings.

While the bar should not be set too high, "exceptional circumstances" in paragraph 4 of the practice note means not normal or usual, something out of the ordinary but not necessarily unique or unprecedented. While each case must be considered on its own facts and the categories of exceptional circumstances are not closed, one case in which the circumstances may be exceptional for the purposes of the practice note is where the relevant facts are solely in the knowledge of the party from whom discovery is sought.

For a convenient summary of the principles governing the application of the practice note (and on which the preceding paragraphs are based) see *Bauen Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 684; *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326. See also *Neil Street Co Pty Ltd v Ibrahim* [2024] NSWSC 1382, in which the Court found that the issuing of nine subpoenas to third parties obtaining access to documents within the time prescribed for the defendant to file an appearance or defence and before the defendant had done so, and also without the defendant's knowledge, constituted an abuse of process: [34]. One of the three bases for this finding was that the subpoenas had the effect of subverting the operation of Practice Note SC Eq 11 concerning disclosure: at [4], [44]; *Re Mempoll Pty Ltd* [2012] NSWSC 1057 at [11]–[13] citing *The Owners Strata Plan 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]–[24]. The subpoenas to the third parties spanned a five-year period and the documents the subject of the subpoenas represented substantial categories all of which would have been discoverable from the defendant at the appropriate time. The Court held that it is sufficient to constitute an abuse of process if the conduct has the relevant delinquent effect, even if that effect was not the subjective intent of the person or party responsible for it: at [44]–[48].

[2-2220] Discovery limited

When making an order for discovery, there is no power to make an order for general discovery (that is, all documents which may relate directly or indirectly to the matters in issue), but the court's order must specify the class or classes of documents of which discovery is to be given: r 21.2(1)(a). The UCPR envisage that discovery be limited to documents relating to particular issues or subject matters, or limited to a particular period. Any such class of documents must not be specified in more general terms than the court considers to be justified in the circumstances: r 21.2(2).

A class of documents may be specified by relevance to one or more facts in issue, by description of the nature of the documents, the period within which they were brought into existence, or in such other manner as the court considers appropriate in the circumstances: r 21.2(3).

Where there is a large number of documents within a class, the court may order that discovery be given of one or more samples (selected in such manner as the court may specify): r 21.2(1)(b).

"Document" includes any part or copy of a document or part thereof (Dictionary to UCPR) and means any record of information including anything on which there is writing, or on which there are marks, figures, symbols or perforations that have a meaning for persons qualified to interpret them or anything from which sounds, images or writings can be reproduced with or without the aid of anything else: *Interpretation Act 1987*, s 21(1). It includes a tape recording (*Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 594); a video cassette recording (*Radio Ten Pty Ltd v Brisbane TV Ltd* [1984] 1 Qd R 113); and a computer database containing information which can be converted into a readable form: *Derby & Co Ltd v Weldon (No 9)* [1991] 2 All ER 901.

[2-2230] Relevant documents

Rule 21.1(2) of the UCPR defines a document as being "relevant to a fact in issue" if:

> it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

There is a suggestion in some of the older cases that only documents which may advance a party's own case or damage that of the other party are discoverable, but not those which are merely detrimental to a party's own case, but r 21.1(2) makes it clear that such documents must be discovered. Any order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue: r 21.2(4). Thus documents which are not directly relevant but may merely lead to a line of inquiry are excluded.

[2-2240] Procedure

The party subject to the order must serve on the other party a list of documents in its "possession" (other than excluded documents, the meaning of which see r 21.1(1)) which complies with r 21.3(2). The time allowed for serving such a list is normally 28 days, but this time may be varied by the order: r 21.3(3). Note that "possession" is defined in s 3 of the CPA to include "custody and power". The list of documents must be verified in accordance with r 21.4.

[2-2250] Personal injury cases

In proceedings on a common law claim for damages for personal injury or death, the court may not make an order unless special reasons are shown: r 21.8. Such "special reasons" may include such considerations as a young or badly injured plaintiff in a case where there were no eyewitnesses: *Boyle v Downs* [1979] 1 NSWLR 192 (a case on interrogatories, but similar considerations apply: r 22.1(3)), or where documents in the possession of the other party are necessary to enable an expert to prepare a report: *Binks v North Sydney Council* [2001] NSWSC 27. The applicant must show by affidavit or otherwise that "special reasons" exist: *Goulthorpe v State of New South Wales* [2000] NSWSC 329.

[2-2260] Privileged documents

Not only are documents which might expose a party to a civil penalty privileged from production (*Evidence Act 1995* s 128(1)(b)); but it would appear that a party sued for a civil penalty (or for forfeiture) cannot be ordered to give discovery at all, although the party seeking the penalty (or forfeiture) can be the subject of such an order: *Naismith v McGovern* (1953) 90 CLR 336, and see also CPA s 87.

The list of documents must identify any document which is claimed to be a privileged document and specify the circumstances under which such privilege is alleged to arise: r 21.3(2)(d). As to the importance of compliance with this rule see *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333 at [35]–[45].

Whether a document is privileged depends on the definitions of the "privileged document" and "privileged information" in the Dictionary to the UCPR, the effect of which is to apply the relevant provisions of the *Evidence Act 1995* to the pre-trial inspection of documents, see also r 1.9. As to inadvertent failure to claim privilege and a detailed consideration of related privilege issues, see [4-1562] and see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

Sub-rules 1.9(4A)–(4B) clarify that when an objection is made to the production of a document on the ground of privilege, access to the document must not be granted unless and until the objection is overruled, and that the production of a document to the court under a claim for privilege does not constitute a waiver of privilege.

[2-2270] Inspection

Within 21 days after service of the list of documents or such other time as the court may specify, the other party must make the documents in its possession or control, other than privileged documents, available for inspection and copying: r 21.5.

The UCPR also make provision for further discovery in respect of documents of which the discovering party subsequently becomes aware (r 21.6), and for prohibiting the use of any copy of, or information from, a discovered document for any purpose other than the subject proceedings without leave of the court: r 21.7.

Without an order for discovery, a party to proceedings may serve on any other party a notice to produce for inspection any document or thing referred to in any originating process, pleading, affidavit or witness statement filed or served by the other party or any other specific document or thing that is clearly identified in the notice and is "relevant to a fact in issue": r 21.10, as to which, see [2-2230]. The obligations of the party served with such a notice are set out in r 21.11. Once again, these rules do not apply to common law proceedings for damages for personal injuries and death unless the court, for special reasons, orders otherwise: r 21.12.

The court may order the party seeking production to pay the producing parties' costs and expenses of compliance: r 21.13(1). If such an order is made the court must fix the amount or direct that it be fixed in accordance with the court's usual procedure in relation to costs: r 21.13(2). As to a mandatory attempt to agree on these costs, see r 42.33.

Sample order

I order that on or before [*date*] the defendant serve on the plaintiff, in accordance with UCPR r 21.3, a verified list of all documents in its possession, custody or control relating to the following issues, namely [*set out the class or classes of documents subject of the order*] and further order that the defendant [*or as the case may be*] make such documents, other than privileged documents available for inspection on or before [*date*]. Costs of the application to be costs in the cause [*or otherwise as appropriate*].

Costs of the application to be costs in the cause (or otherwise as appropriate).

[2-2280] Preliminary discovery generally

This process, which is available in the General Division of the Local Court (though not in the Small Claims Division of the Local Court), is wider than that formerly available in the Supreme and District Courts. Discovery is now available from a prospective defendant, not only as to the identity of the defendant, but also as to the person's whereabouts and as to whether a cause of action exists: rr 5.2–5.3. Provision is also made for discovery of documents against third parties: see [2-2310]. A challenge to the validity of r 5.2 on Constitutional grounds was rejected in *The Age Company Ltd v Liu* (2013) 82 NSWLR 268.

[2-2290] Preliminary discovery to ascertain identity or whereabouts of prospective defendants

If an applicant satisfies the court that, having made reasonable enquiries, he or she is unable to ascertain sufficiently the identity or whereabouts of a proposed defendant (or cross-defendants as the case may be), and that someone may have information, or may have or have had possession of a document or thing that tends to assist in ascertaining such identity or whereabouts, the court

may order that such person attend the court for examination or give discovery of such documents: r 5.2. See *Roads and Traffic Authority of NSW v Care Park Pty Ltd* [2012] NSWCA 35 and *The Age Company Ltd v Liu*, above.

An order for examination may include an order to produce any relevant documents or thing and/or an order that the examination be before a registrar: r 5.2(3). Such an order may be limited or conditional: *Roads and Traffic Authority of NSW v Care Park Pty Ltd*, above.

If the application relates to proceedings in which the applicant is a party it is to be made by motion in the proceedings, or otherwise by summons: r 5.2(8). It must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of information, documents or things in respect of which the order is sought: r 5.2(7)(a). The application, together with a copy of the affidavit, must be served personally on the other person: r 5.2(7)(b).

In *Stewart v Miller* [1979] 2 NSWLR 128 at 140, it was held that under the former Supreme Court Rules, it was generally necessary for an applicant for preliminary discovery to show a prima facie case against the person whose name he wished to ascertain; but that there might be cases where the evidence, although falling short of establishing all the ingredients of a prima facie case, pointed sufficiently to the existence of a case for relief so as to justify the making of an order so that proceedings for such relief could be brought. The former Supreme Court rule was amended in 1974 to eliminate the requirement that the applicant establish a prima facie case against the intended defendant, but the issue is relevant to the exercise of discretion. The existence of such a case remains relevant to the exercise of the discretion under r 5.2: *The Age Company Ltd v Liu* at [89].

Applications for preliminary discovery are interlocutory applications in which it is inappropriate for contested issues of fact between the parties to be litigated or decided upon. Such applications should be conducted with due regard to the objectives in s 56 of the CPA and to the obligation on litigants and their advisors to conduct litigation in accordance with the overriding objective in that section: *The Age Company Ltd v Liu*, Bathurst CJ at [102]–[105].

[2-2300] Preliminary discovery to assess prospects

Rule 5.3 of the UCPR enables an applicant who believes he or she may have a cause of action against another person to require that other person to give discovery and produce for inspection relevant documents to assist in assessing whether or not to commence proceedings against that other person. See, *RinRim Pty Limited v Deutsche Australia Ltd* [2013] NSWSC 1762 at [34]–[49]. The documents of which discovery may be ordered are not limited to those relating to the entitlement to make a claim, but extend to documents going only to the quantum of a potential claim: *O'Connor v O'Connor* [2018] NSWCA 214 at [90].

To obtain such an order, it must appear to the court, pursuant to r 5.3(1), that:

(a) the applicant may be entitled to make a claim for relief (as defined in CPA s 3) against another person but, having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against such person, and

(b) such person may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make such a claim for relief, and

(c) inspection of such a document would assist the applicant to make the decision concerned.

Unless the court otherwise orders, the application must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought. The application, together with the affidavit, must be served personally on the person to whom it is addressed: r 5.3(3). In the case of a corporation, that person may be any officer or former officer of the corporation: r 5.3(2).

For a discussion of relevant principles generally, see *O'Connor v O'Connor* and in relation to defamation, see *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506 (CA).

Cases decided under FCR O 15A r 6, although not in identical terms, would appear to be relevant to applications under this rule, however, in *O'Connor v O'Connor* the court noted at [79] that the test to be applied under UCPR 5.3 is the "appears to the court" test, which is wider than the test to be applied under the corresponding Federal Court "there is reasonable cause to believe" rule.

Note in particular that an applicant does not need to establish a prima facie case amongst the prospective defendant. The determination of an application for preliminary discovery under UCPR 5.3 does not involve a determination of the merits of the claim, but rather whether it "appears to the court" that a cause of action "may" exist: *O'Connor v O'Connor* at [77].

[2-2310] Discovery of documents from non-parties

Rule 5.4 of the UCPR provides for discovery against persons who are not parties to the proceedings. As worded, it is not limited to preliminary discovery and relates to proceedings already commenced, but is included in Pt 5 of the UCPR with the provisions relating to preliminary discovery.

Rule 5.4(1) provides that where it appears to the court that a person who is not a party to proceedings may have or have had possession of a document that relates to any question in the proceedings, the court may order such person to give discovery to the applicant of all documents that are, or have been, in the person's possession and which relate to that question. As to the meaning of "document" and "possession", see [2-2220] and [2-2240].

The application and the supporting affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought must be served personally on the person to whom it is addressed: r 5.4(2).

The purpose of the rule is to enable a party to ascertain whether a person, who is not a party to the proceedings, is or has been in possession of a document which might usefully be the subject of a subpoena in the proceedings, and the content of such document. It may be noted that whereas rr 5.2 and 5.3 refer to "documents and things", r 5.4 only refers to "documents".

[2-2320] General provisions

The effect of an order for discovery under Pt 5 is the same as that of an order under Div 1 of Pt 21 relating to general discovery: r 5.5, as to which see above. The person ordered to give discovery must furnish a list of documents in his or her possession (other than excluded documents) and make the documents in their control (other than privileged documents) available for inspection and copying: rr 21.3, 21.5.

An order under Pt 5 may be made subject to the applicant giving security for the costs of the person the subject of the order (r 5.6); orders for costs and expenses may be made (r 5.8); and non-parties' rights to privilege are preserved: r 5.7.

[2-2330] Sample orders

For discovery as to identity or whereabouts of prospective defendant: r 5.2

1. I order that [*name*] attend the court at [*am*/*pm*] on [*date*] to be examined in relation to any matter relating to the identity/whereabouts of a person for the purpose of commencing proceedings against that person.
2. I further add that such examination be held before a Registrar.
3. (Costs, as appropriate).

or

1. I order that within 28 days of today [*name*] serve on the applicant in accordance with UCPR r 21.3 a verified list of all documents or things in his or her possession, custody or control relating to the identity/whereabouts of [*description*].
2. I further order that [*name*] make such documents or things [*other than privileged documents*] available for inspection on or before [*date*].
3. (Costs, as appropriate).

For discovery to assess prospects: r 5.3

1. I order that within 28 days of today [*name*] serve on the applicant in accordance with UCPR r 21.3 a verified list of all documents and things which are or have been in his or her possession, custody or control relating to the question whether the applicant has the right to obtain relief against him or her and further order that the said [*name*] make such documents and things, other than privileged documents available for inspection on or before [*date*].
2. (Cost as appropriate).

For discovery against non-parties: r 5.4

1. I order that within 28 days of today [*name*] serve on the applicant in accordance with UCPR r 21.3 a verified list of all documents relating to any question in these proceedings which are or have been in his or her possession and further order that the said [*name*] make such documents, other than privileged documents, available for inspection on or before [*date*].
2. (Cost as appropriate).

Legislation

- CPA ss 3, 87
- *Evidence Act 1995*, s 128(1)(b)
- *Interpretation Act 1987* s 21(1)

Rules

- UCPR rr 1.4, 1.5, 1.9, 5.1–5.8, 21.1–21.8, 21.10–21.13, 42.33, Sch 1, Dictionary

Further references

- Justice D Hammerschlag, "Practice Note SC Eq 11 – Disclosure in the Equity Division: how is it working two years on", paper presented at the 8th Information Governance & eDiscovery Summit, 17 June 2014, Sydney
- Practice Note No SC Eq 11

[The next page is 1141]

Dismissal for lack of progress

[2-2400] Power under the rules

If a plaintiff does not prosecute the proceedings with due despatch, the court may order that the proceedings be dismissed or make such other order as the court thinks fit: r 12.7(1).

If the defendant does not conduct the defence with due despatch, the court may strike out the defence, either in whole or in part, or make such other order as the court thinks fit: r 12.7(2).

Rule 12.7 relates to the prosecution of proceedings with due despatch not to the commencement of proceedings with due despatch: *Reimers v Health Care Complaints Commission* [2012] NSWCA 317 at [19], [24]–[27].

What follows deals predominantly with r 12.7(1).

[2-2410] Applicable principles

It has been held that CPA s 56 (just, quick and cheap resolution of real issues), s 57 (objects of case management), s 58 (dictates of justice), s 59 (elimination of delay) and s 60 (costs to be proportionate) apply: *A & N Holdings NSW Pty Ltd v Andell Pty Ltd* [2006] NSWSC 55; *Phornpisutikul v Mileto* [2006] NSWSC 57. It has been said, in this connection, that these provisions give rise to a "new regime" and that some previous decisions may not be relevant: *A & N Holdings*, above at [27], citing *Price v Price* [2003] 3 All ER 911 at 920–21.

There are no rigid rules. In particular, there is no rule that the plaintiff's default must be intentional or contumelious or amount to inordinate and inexcusable delay: *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274, per Heydon JA at [51]. Nor that the fault of the plaintiff's solicitor in causing delay should, as a matter of course, be attributed vicariously to the plaintiff (*Stollznow v Calvert* [1980] 2 NSWLR 749, per Moffitt P at 751–2); nor that a defendant is entitled to contribute to delay by "letting sleeping dogs lie" (ibid).

The interests of justice is the primary consideration. In *Stollznow,* above at 751, Moffitt P adopted the following passage from the judgment of Walsh J in *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt 1) (NSW) 405 at 412:

> [A] balance must be struck as between the plaintiff and the defendant and, in the end, "the court must decide whether or not on balance justice demands that the action should be dismissed".

This approach was affirmed in *Micallef v ICI Australia Operations,* above, per Heydon JA at [62], applying *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 (which maintains the primacy of the interests of justice).

Any explanation or excuse offered for the delay is a relevant consideration: *Witten v Lombard*, above, at 412.

Whether or not there is particular prejudice to the opposing party by reason of the delay is a relevant consideration: *Witten v Lombard*, above, at 412.

That inappropriate delay or behaviour by a plaintiff may be a function of the plaintiff's mental state, which may itself be in part a function of the alleged tortious conduct, is a relevant consideration: *State of New South Wales v Plaintiff A* [2012] NSWCA 248 at [18], [82].

For more particular considerations, see *State of New South Wales v Plaintiff A*, above, and *Ritchie's* at [12.7.5]; *Thomson Reuters* at [r 12.7.40]. Of the cases there cited, see particularly *Hoser v Hartcher* [1999] NSWSC 527, per Simpson J at [19]–[30].

Section 91 of the CPA provides that dismissal of proceedings does not, subject to the terms on which the order is made, prevent the plaintiff from bringing fresh proceedings. This is a relevant consideration (unless fresh proceedings would be statute barred): *A & N Holdings*, above.

Similarly, unless the court otherwise orders, a defendant may seek leave to file an amended defence following an order striking out a defence.

[2-2420] Cognate power

Where there has been a failure to comply with a direction, CPA s 61 provides a cognate power to dismiss proceedings or strike out a defence: *Phornpisutikul v Mileto*, above.

The same considerations as are mentioned above in relation to r 12.7 would appear to apply to the operation of s 61 in this respect.

Sample orders

I order that the proceedings be dismissed.

I order that the defence filed by the defendant be struck out.

As mentioned above, s 91 provides that dismissal of proceedings does not prevent the plaintiff from bringing fresh proceedings, subject to the terms on which the order is made. It is open to the court, in an appropriate case, to prevent the plaintiff from bringing fresh proceedings by an order for the entry of judgment.

I direct that judgment be entered for the defendant.

Similarly, striking out a defence does not automatically result in judgment for the plaintiff but, pursuant to r 12.7(2), the court may, in an appropriate case, make an order to that effect:

I direct that judgment be entered for the plaintiff for damages to be assessed. [*or as is appropriate having regard to the nature of the case.*]

[2-2430] Costs

Rule 42.20 of the UCPR provides that, where any order of the kind reviewed above is made, the losing party must pay the successful party's costs of the proceedings to the extent specified in the rule, unless the court otherwise orders. There is accordingly no need to make an order in relation to the costs of the proceedings, unless the court is of the opinion that there should be a result in that regard which is different from the result provided for in the rule.

The costs of the application are not the subject of r 42.20 and should be dealt with by order in the ordinary way.

Legislation

- CPA ss 56, 57, 58, 59, 60, 61, 91

Rules

- UCPR rr 12.7, 12.7(1), 12.7(2), 42.20

[The next page is 1201]

Stay of pending proceedings

[2-2600] The power

Last reviewed: March 2025

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 *Willmot v Queensland* [2024] HCA 42 at [15]; *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 (through *Limitation Act 1969*, s 6A): *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* at [43]–[45]. However it was confirmed in *Willmot v Queensland* that while the impoverishment of evidence is now to be encountered and expected in cases which would have been statute barred, and the court will need to deal with that impoverishment, that does not change the content or application of the well-established principles of abuse of process or the deeply rooted common law right of the right to a fair trial: at [22]–[24], [91]ff.

[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 2025

- Pending the determination of proceedings in another forum: see *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287; *L & W Developments Pty Ltd v Della* [2003] NSWCA 140 and *Michael Wilson & Partners Ltd v Emmott* [2024] NSWSC 1258 at [40]–[41]; 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 stay of the civil proceeding will be ordered where "the interests of justice require such an order": *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46 at [36]. 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. It is not necessary for the applicant for a stay to state the "specific matters of prejudice" before a stay could be contemplated: *Commissioner of Australian Federal Police v Zhao* at [35], [43]. The risk of prejudice must be real and must be weighed against the prejudice that a stay of the civil proceeding would occasion: *Commissioner of Australian Federal Police v Zhao* at [47], [50], applied in *CFMEU v ACCC* [2016] FCAFC 97 at [22]; *Telstra Ltd v Sulaiman* [2024] NSWSC 971 at [30], [37]. 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".
- To preserve the subject matter of litigation pending an application for special leave to appeal: this is an extraordinary jurisdiction and exceptional circumstances must be shown before its exercise is warranted. The court will consider first whether there is a substantial prospect that special leave to appeal will be granted; secondly, whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending; thirdly, whether the grant of a stay will cause loss to the respondent; and fourthly, where the balance of convenience lies: *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681 at 684–685, considered in *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2023] NSWCA 89 at [2]–[4]; *Piety Developments Pty Ltd v Cumberland City Council (No 2)* [2024] NSWCA 196 at [26]–[33].
- Pending the High Court decision in a different case: see *TT v The Diocese of Saint Maron, Sydney & SS (No 4)* [2024] NSWSC 1102, in which Elkaim AJ stayed his orders pending the decision of the High Court appeal in *Bird v DP* (2023) 69 VR 408. *Bird* was a case on which Elkaim AJ relied, and was bound by, in finding the vicarious liability of the first defendant — if the High Court restricted vicarious liability to circumstances of employment only (which it did, see *Bird v DP* [2024] HCA 41), the Supreme Court's decision would be inconsistent with the result.
- 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 allegations are so vague that they are incapable of meaningful response, defence or contradiction, or if the defendant does not have an ability to investigate the foundational facts of an allegation with the result the allegations could not be fairly tried: *Willmot v Queensland* [2024] HCA 42 at [61], [84].
- 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]; *Willmot v Queensland* at [16]. 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]; see also *RC v The Salvation Army (Western Australia) Property Trust* [2024] HCA 43 at [27]–[28]. 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)

- *Limitation Act 1969*, s 6A
- *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]

Interim preservation orders including interlocutory injunctions

[2-2800] Jurisdiction

Part 25 of the UCPR contains a number of procedures to preserve rights and property pending the resolution of proceedings so that a successful plaintiff is not deprived of the fruits of his/her victory as a result of the destruction or disposal of the subject matter of the proceedings or by other conduct by, or on behalf of, the defendant or third parties.

Division 1 (rr 25.1–25.9) applies to the Supreme and District Courts, whilst Divs 2 and 3 (rr 25.10–25.24), relating to Freezing (Mareva) and Search (Anton Piller) orders, apply to the Supreme and District Courts and also to the Dust Diseases Tribunal: r 25.1. None of the provisions of Pt 25 apply to the Local Court.

The Supreme Court's power to grant injunctions, including interlocutory injunctions, is now expressed in SCA s 66.

There is express power for the District Court to grant injunctions (including interlocutory injunctions) in any "action" as defined in s 44 of the DCA: DCA s 46. It has the same powers as the Supreme Court, which would include the power to grant injunctions or to make interim preservation orders, in respect of the matters set out in Pt 3 Div 8 of the DCA (ss 133–142): s 141. It also has a limited power to grant "temporary injunctions" in limited cases (s 140), but in view of the more general jurisdiction conferred by DCA s 46 it would seem unlikely that this power will be exercised in the future. Having regard to the terms of r 25.1, it would appear that the District Court now has power to make other interim preservation orders, as well as injunctions in relation to any proceedings otherwise within its jurisdiction.

Although Pt 25 is expressed in general terms to be applicable to the District Court, the powers can only be exercised in relation to proceedings in respect of which the District Court otherwise has jurisdiction: *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435.

In that case, it was held that the power to grant injunctions in s 46 was ancillary to the exercise of jurisdiction to hear and dispose of the actions specified in s 44, but the majority further held that the injunction granted in that case after judgment was in the nature of an asset preservation order, and was neither an injunction nor an injunction "in an action" for the purposes of s 46, and was accordingly beyond the powers of the District Court. It may be that in view of the terms of Pt 25 rr 25.1, 25.2 and 25.11 the District Court's power may now not be so limited, provided that the order relates to "an action" within s 44.

Certain Australian courts have jurisdiction to grant interim relief in respect of New Zealand proceedings, as to which see "Trans-Tasman proceedings" at [5-3550].

[2-2810] Generally

The various interim preservation orders, apart from injunctions, which may be made are:

- orders for the preservation of property: r 25.3
- orders for disposal of perishable or similar property: r 25.4
- orders for interim distribution of property or income surplus to the subject matter of the proceedings: rr 25.5–25.6
- orders for payment of shares in a fund before the ascertainment of all persons interested: r 25.7
- freezing (Mareva) orders: r 25.11. See commentary at [2-4100], or
- search (Anton Piller) orders: r 25.19. See commentary at [2-1000].

The Supreme Court also has power to make interim orders for writs of habeas corpus ad subjiciendum, for the custody of a minor, extending the operation of a caveat under the *Real Property Act 1900*, the *Offshore Minerals Act 1999* or the *Offshore Minerals Act 1994* (Cth), appointing a receiver (SCA s 67), and under the *Fair Trading Act 1987* ss 66–67 (as to which see [2-2840]).

As to an order for payment into court pursuant to r 25.3(3), see *Newcastle City Council v Caverstock Group Pty Ltd* [2008] NSWCA 249.

[2-2820] Applications generally

In order to obtain an interlocutory injunction (or an order for the preservation of property), the applicant must identify the legal (which may be statutory) or equitable rights which are to be determined at trial and in respect of which final relief is sought: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [8]–[16], [60], [91].

Next the applicant must make out a prima facie case: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622. Reference is often made to the test propounded by Lord Diplock in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 at 406, namely whether there is a "serious question to be tried". In practice, there is generally no significant difference between the two formulations of the test, but, so far as there is any difference, the *Beecham* test is applicable in Australia: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [19], [70]–[71].

Accordingly, in applications for interim relief, the court will not normally attempt to resolve disputed questions of fact or difficult questions of law: *American Cynamid Ltd,* above, at 407, *Beecham Group Ltd,* above, at 622.

The applicant for interim relief must also show that the balance of convenience is in favour of granting the relief. Relevant matters on this issue will depend on the nature of the case or the property in dispute, but may include such considerations as whether irreparable harm will be suffered by the plaintiff if the relief is not granted; whether damages will be a sufficient remedy and whether the defendant will be in a position to pay such damages if ordered; whether delay in making the application has or may prejudice the defendant in some way, eg if it would prevent him carrying on a successful established business; whether the interlocutory relief sought would overturn or merely maintain the status quo; and the sufficiency of the plaintiff's undertaking as to damages.

[2-2830] Undertaking as to damages

Finally an applicant for interim relief will usually be required to give the usual undertaking as to damages, the terms of which are set out in UCPR r 25.8; and if the applicant will not be in a position to honour such an undertaking, the application will generally be refused. The Crown is generally required to give the usual undertaking, at least when it seeks to protect a proprietary or private right (*Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39), but not necessarily when it seeks an interim injunction in "law enforcement" actions: *F Hoffman-La Roche & Co AG v Secretary for Trade & Industry* [1975] AC 295. See also *ACCC v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512.

Often, rather than submit to any interlocutory injunction, a defendant will give an undertaking to the court without admissions not to engage in the conduct sought to be restrained. Such an undertaking has the same force as a injunction and can be enforced in the same way. In return for such an undertaking, an undertaking as to damages will still be required from the applicant.

[2-2840] *Fair Trading Act 1987* and the *Australian Consumer Law (NSW)*

As from 1 January 2011, following the amendment of the *Fair Trading Act 1987* by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*, the *Australian Consumer Law* (ACL), which is contained in Sch 2 of the *Competition and Consumer Act 2010* (Cth), applies as a law of New South Wales: FTA s 28(1)(a). It is referred to as the *Australian Consumer Law (NSW)*: FTA s 28(1)(b).

Under FTA s 78, the Supreme Court may upon the application of the Minister or Director-General make orders, among other things, for the preservation of money or property in the circumstances set out in the section.

Under FTA s 79, the Supreme Court may grant an injunction in such terms as it determines to be appropriate in the circumstances set out in the section. However, an injunction under this section may be granted only on the application of the Director-General with the consent of the Minister: s 79(2). The injunction may be granted as an interim injunction without an undertaking being required as to damages or costs or may be granted as a permanent injunction: s 79(3).

A broader injunctive power is available to the Supreme Court (see FTA s 30(3)) in the circumstances set out in s 232 of the ACL (NSW). Such an injunction may be granted on application by the regulator (the Director-General) or any other person: s 232(2). A consent injunction may be granted (s 233) and an interim injunction may be made (s 234). As to undertakings as to damages see s 234(2) and (3). The court may vary or discharge an injunction under s 235.

[2-2850] Defamation

Interlocutory injunctions are rarely granted in defamation cases because of the interference they impose on the right of free speech. They will only be granted in a "very clear case" and usually will not be granted if the defendant intends to rely on the defence of justification (substantial truth relating to a matter of public interest, now substantial truth simpliciter: *Defamation Act 2005* s 25): *Chappell v TCN Channel Nine Pty Ltd* [1988] 14 NSWLR 153, and see *Australian Broadcasting Corporation v O'Neill*, above, at [18]–[19], [73]–[83].

[2-2860] Receivers

The Supreme Court may on terms appoint a receiver at any stage of the proceedings: SCA s 67. The procedure is regulated by UCPR Pt 26, and is only available in the Supreme Court: r 26.1.

[2-2870] Injunctions to restrain the commencement of winding-up proceedings

Freezing (Mareva) orders and Search (Anton Piller) orders — see separate sections at [2-1000] and [2-4100].

[2-2880] Procedure

Applications are often made at the commencement of or during the course of the proceedings, in which case they are made by notice of motion in the proceedings duly served on the party against whom the order is sought (as to leave to serve short notice, see [2-2890] below). Alternatively in cases commenced by summons, the claim for interim relief may be included as a separate prayer in the summons.

Often it is necessary or appropriate to obtain such interim preservation orders or injunctions as a matter or urgency before the other side is notified, or becomes aware of the proceedings, so as to prevent the subject property or right being lost or damaged before the order is obtained. In such cases the application is made ex parte (as to which see [2-2890]).

[2-2890] Ex parte applications

Where it is necessary or appropriate to obtain an injunction or other interim preservation order before the other party becomes aware of the application, or in other cases of extreme urgency, the application may be made ex parte. Such applications should be made to the duty judge of the Division or court and are normally dealt with at 10 am, 12.45 am, 2 pm and 3.45 pm if the relevant judge

is sitting; otherwise they are dealt with in chambers by appointment after contacting the judge's associate. At night and at weekends they may, if the judge is agreeable, be dealt with at the judge's home or elsewhere, and if the relevant duty judge is unavailable, any judge may deal with the application; but normally will not do so unless extreme urgency is shown.

As a matter of practice, and as a protection against false accusations, applications by litigants in person should not be dealt with in chambers or elsewhere, but only in open court with a court reporter present recording everything said.

Rule 25.2 provides that in an urgent case, on the application of a person who intends to commence proceedings, the court may:

- make any order which it might make in proceedings on an application for a writ of habeas corpus ad subjuiciendum
- make any order for the custody of a minor
- grant any injunctive relief including relief in the nature of a freezing (Mareva) order or a search (Anton Piller) order
- extending the operation of a caveat under the *Real Property Act 1900*, the *Offshore Minerals Act 1999* or the *Offshore Minerals Act 1994* (Cth)
- appoint a receiver, or
- make an order for the detention, custody or preservation of property under r 25.3,

but in such cases the applicant must give an undertaking to the court that he/she will file originating process within such time as the court may order, or if the court makes no such order, within 48 hours after the application is granted.

Applicants for ex parte relief should provide the judge with a draft statement of claim and notice of motion or summons, and affidavit evidence of the facts relied on, which may be on information and belief, provided the deponent identifies his/her source: *Evidence Act 1995* s 75. Although where time does not permit, the judge may act without draft originating process and may receive oral evidence, or even (rarely) act on instructions conveyed by counsel or solicitor.

An applicant must disclose all matters which may affect his or her right to the interlocutory order. In *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681–2, Isaacs J said:

> [I]t is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. *Uberrima fides* is required …

See also *Garrard t/as Arthur Anderson & Co v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 676–677. The failure to make full disclosure will result in the injunction being dissolved, but does not prevent the making of a fresh application with full disclosure.

An ex parte order should only be made for a short interim period, for example two days or less, and the time for service of the originating process shortened, so that on the return day the defendant has notice of the proceedings and the right to be heard. On that day the plaintiff bears the onus of establishing a right to continuation of the injunction or other interim relief.

If the judge is not satisfied of the applicant's right to ex parte relief, or the applicant does not seek ex parte relief but merely wishes to bring the other party before the court as a matter or urgency so that the application can be made on notice, the judge will normally grant the applicant leave to serve short notice of application.

When considering an application late in the day, the judge should make arrangements with his or her associate to advise the Registry to remain open to deal with any orders which may be made.

At times application is made to the Supreme Court for an injunction to restrain execution by the Sheriff of a writ of possession. Such an application is not strictly an application for an injunction but for a stay of execution and should be dealt with on such basis.

Sample order

Ex parte injunction:

1. On the plaintiff by his/her counsel/solicitor giving the usual undertaking as to damages and undertaking to file originating process by 5 pm on [*date*] [*about two days forward*] the defendant be restrained until 5 pm on [*the return day — or as appropriate*]) from [*conduct prohibited*] OR in accordance with paragraphs 1, 2, etc, [*as appropriate*] of the draft summons initialled by me.
2. Order the said summons [*or Notice of Motion as appropriate*] be returnable before me on [*date*] at [*am*].
3. Abridge time for service of the Summons/Notice of Motion and plaintiff's affidavits to [*am/pm*] on [*date*].
4. These orders may be entered forthwith.
5. Direct that notice of these orders may be given to the defendant by personal service of a sealed copy of the orders and in the meantime by facsimile from the Registrar addressed to the defendant and transmitted to [(02) .....] [*or as appropriate*].
6. Costs reserved.

Legislation

- *Supreme Court Act 1970* ss 66, 67
- *District Court Act 1973* ss 44, 46, 133–142
- *Defamation Act 2005* s 25
- *Real Property Act 1990* s 74K
- *Offshore Minerals Act 1999*
- *Offshore Minerals Act 1994* (Cth)
- *Fair Trading Act 1987*, Pt 6, s 79
- *Competition and Consumer Act 2010* (Cth) Sch 2; Australian Consumer Law (NSW) Ch 5, ss 232-235

Rules

- UCPR rr 25.1–25.19, 26

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Interpleader proceedings

[2-3000] Introduction

Interpleader is a procedure by which a person, faced with competing claims in respect of personal property (which he does not claim as his own), can protect himself from the uncertainty and expense of separate legal proceedings with each claimant by applying to the court to compel the claimants to settle, between themselves, their entitlements to the property: *Ritchie's* at [r 43.1] ff and see *Australian Customer Target Information Co Pty Ltd v Cabool Holdings Pty Ltd* [2003] NSWSC 753 at [9]–[10].

Part 43 of the UCPR, which applies in all courts, provides for the discretionary grant of relief by way of interpleader in two situations relating to disputed property.

Disputed property means any debt or other personal property in respect of which a stakeholder or the Sheriff is being sued, or expects to be sued, by two or more persons in proceedings before a court: r 43.1.

[2-3010] Stakeholder's interpleader

The first situation, referred to as stakeholder's interpleader, is where a stakeholder, that is a person who is under a liability in respect of a debt or other personal property (r 43.1), is sued or expects to be sued by two or more claimants in relation to disputed property: r 43.2(1).

It is a prerequisite to the grant of such relief that the stakeholder has filed an affidavit with the application for relief to the effect that the applicant claims no interest in the subject matter in dispute other than for charges or costs (r 43.2(3)(a)), is not in collusion with any claimant (r 43.2(3)(b)), and is willing to transfer the subject matter in dispute into court or, if the court so requires, to give security to the value of the subject matter to the satisfaction of the court: r 43.2(3), (4).

If the stakeholder has been sued in proceedings in the court in respect of the disputed property, the application is made by motion in the proceedings; otherwise, it is to be made by separate proceedings joining each claimant as a defendant: r 43.2(2)(a) and (b). As to service, see r 43.2(3)(c).

[2-3020] Sheriff's interpleader

The second situation, is where the Sheriff takes or intends to take possession of any disputed property under a writ of execution: r 43.3.

A claimant in respect of the property, or the proceeds of sale or value of the property, may give notice of his or her claim to the Sheriff: r 43.3(1). As to the mandatory contents of such a claim, see r 43.3(2).

On receiving a notice of claim, the Sheriff must serve the notice on the execution creditor: r 43.3(3).

If a claimant does not give a notice of claim within a reasonable time, the court, on application by the Sheriff, may restrain the claimant from commencing or continuing proceedings against the Sheriff in respect of anything done or omitted to be done in execution of any writ of execution after the time when the claimant might reasonably have given a notice of claim: r 43.4(2).

As to procedure and service, see r 43.4(3) and (4).

Should an execution creditor serve a notice of admission on the Sheriff in respect of any disputed property, the Sheriff must withdraw from possession of the disputed property: r 43.5(2).

However, the court may, on application by the Sheriff, restrain the claimant from commencing or continuing proceedings against the Sheriff in respect of anything done, or omitted to be done, by the Sheriff in execution of the writ of execution in relation to the disputed property: r 43.5(3).

As to procedure and service, see r 43.5(4) and (5).

If an execution creditor on whom a claim is served does not, within four days after service of the notice, serve a notice of admission on the Sheriff and the claim is not withdrawn the court may make an order granting relief by way of interpleader: r 43.6.

As to procedure and service, see r 43.6(3) and (4).

[2-3030] Interpleader proceedings generally

In respect of applications for either stakeholder's interpleader or sheriff's interpleader, the court may make such orders and directions as it thinks fit for the hearing and determination of all matters in dispute: r 43.7(1). Rule 43.7(2) sets out a number of specific powers but does not limit r 43.7(1). Rule 43.7(2)(b) confers a power to stay proceedings in any other court in which the applicant is sued in respect of the disputed property.

A stay of proceedings in another court may be lifted by the court by which it was granted or by the court in which the stayed proceedings are pending: r 43.7(3).

If a claimant after due notice does not appear at the hearing or comply with an order made in the proceedings, the court may order that the claimant and those claiming under the claimant, be barred from prosecuting the claim against the applicant: r 43.8.

If multiple proceedings are pending in the court in respect of any or all of the disputed property, the court may make an order in any two or more of those proceedings: r 43.10.

Subject to any order or direction of the court, Pt 6 of the CPA and Pt 43 of the UCPR, with any necessary modifications, extend to the trial of any question that the court directs to be tried in any proceedings for relief by way of interpleader: r 43.11(1).

The court before which a question is tried may make such order, or give such judgment, as the case requires, including an order or judgment finally disposing of all questions arising in the proceedings: r 43.11(2).

[2-3040] Disputed property

Interpleader is not available in respect of a claim for unliquidated damages: *Ingham v Walker* (1887) 3 TLR 448. It is available in respect of a contingent debt that is due but not immediately payable: *Reading v School Board for London* (1886) 16 QBD 686 at 688.

[2-3050] Entitlement to apply

The applicant for an interpleader order must establish an expectation that, if not already sued, a claim will be made. It must appear that there is a real foundation for the expectation: *Watson v Park Royal (Caterers) Ltd* [1961] 2 All ER 346 at 352.

[2-3060] Discretion

The remedy is discretionary (r 43.7) and may be defeated by delay: *Watson*, above, at 352.

[2-3070] Fees and charges

A claim for charges and costs will not defeat the entitlement of an applicant to an interpleader order (r 43.9) and see *Wilson v Grace Bros Pty Ltd* (1948) 66 WN (NSW) 21.

[2-3080] Neutrality of applicant

The court may dismiss an application by a stakeholder or give judgment against the stakeholder, unless it is satisfied that the stakeholder claims no interest in the disputed property, except for charges or costs, and is not in collusion with any claimant: r 43.9(1).

The court may require the Sheriff to satisfy the court that the Sheriff claims no such interest and has not so colluded. If not satisfied as to these matters, the court may dismiss the interpleader application: r 43.9(2).

For interpleader to be granted, the competing claims must be adverse: *LJ Hooker Ltd v Dominion Factors Pty Ltd* [1963] SR (NSW) 146; *Olsson v Dyson* (1969) 120 CLR 365 at 369. A separate claim against the applicant may defeat the application: *Australian Customer Target Information Co Pty Ltd v Cabool Holdings Pty Ltd*, above, at [11]. So, too, the identification of the applicant with the interests of either party or otherwise intermeddling in the proceedings: *Smith v Nixon* (1885) 7 ALT 74. The granting of indemnity does not necessarily defeat the application: *Crothers v Grant* [1934] VLR 120.

[2-3090] Costs

Generally a stakeholder who comes to the court promptly when faced with conflicting claims and has been guilty of no conduct which has increased costs will be entitled to costs, so far as the fund will permit: In *re McPherson* [1929] VLR 295 at 301; *Cook v ANZ Bank* (unrep, 16/6/95, NSWSC). Generally all participants in the interpleader proceedings will be entitled from the fund to the costs of presenting reasonable evidence and submissions concerning how the fund should be distributed: *Westpac Banking Corporation v Morris* (unrep, 2/12/98, NSWSC) at 5. However this entitlement is lost if issues are raised that increase costs and fail: *Morris*, above, at 5.

Sample orders

Stakeholder where application made in existing proceedings

I order:

1. Interpleader granted.
2. The defendant to pay the sum of $[*disputed sum*] into court within 14 days.
3. [*The claimant*] be added as a defendant in these proceedings in substitution for the applicant.
4. The plaintiff to file points of claim within 14 days. The added defendant to file points of defence within 14 days after service of the points of claim [*or other directions as appropriate*].
5. Matter listed for further directions on [*date*].
6. Costs reserved [*or as appropriate*].

Note: It may be appropriate to stay these or other proceedings.

If there are no existing proceedings in the court in which the application is made, there should be an order as to which of the claiming parties is to be the plaintiff and which the defendant. Such an order should also be made if it is not appropriate, in the particular case, to add the claimant as a defendant.

Where the disputed property is physical property, there should be an order as to how it is to be held or disposed of in the meantime.

Sheriff's application under r 43.4(2), (3)

I order:

1. That [*the claimant*] be restrained from commencing [*or instituting*] proceedings against the Sheriff in respect of anything done, or omitted to be done, by the Sheriff in execution of the writ of execution [*identify*].
2. [*the claimant*] to pay the Sheriff's costs [*or as appropriate*].

Sheriff's application under r 43.6(1), (2)

I order:

1. Interpleader granted.
2. Execution creditor to file points of claim within 14 days [*or other directions as may be appropriate*].
3. [*the claimant*] to be added as a defendant in the proceedings and to file points of defence within 14 days after service of the points of claim [*or other directions as may be appropriate*].
4. Costs reserved [*or as appropriate*].

Legislation

- CPA Pt 6

Rules

- UCPR rr 43.1–43.11

[The next page is 1371]

Interrogatories

[2-3200] Introduction

Discovery by interrogatories is a procedure whereby a party or its representative is required to answer in writing, and usually on oath, specific questions prior to the trial, which answers may be tendered against the answering party as evidence in the trial. Like Discovery, of which interrogatories form part, the procedure originated in the High Court of Chancery and only became available in New South Wales at Common Law under the *Supreme Court Act 1970* and in the District Court under the *District Court Act 1973*. It was not previously available in the Local Court.

Interrogatories are dealt with in UCPR Pt 22 which applies to the Supreme and District Courts and to the General Division of the Local Court. Interrogatories are not available in the Small Claims Division of the Local Court or in the Dust Diseases Tribunal: r 1.5 and Sch 1.

[2-3210] Application

Unlike the previous procedure in the Supreme and District Courts, a party can no longer require another party to answer interrogatories by service of a notice setting out the interrogatories, but must obtain an order from the court requiring answers to specified interrogatories: r 22.1.

The application for an order for interrogatories may be made at any time and must be accompanied by a copy of the proposed interrogatories: r 22.2.

Such an order is not to be made unless the court is satisfied that the order is necessary at the time it is made: r 22.4. In proceedings on a claim for damages arising out of the death of or bodily injury to any person or a claim for contribution in relation to damages so arising, such an order is not to be made unless the court is satisfied that special reasons exist to justify the making of the order: r 22.3. As to what constitutes "special reasons" in this context, see "Discovery" at [2-2200].

[2-3220] Order necessary

"Necessary" in this context has been held to mean "necessary for the disposing fairly of the case or matter", "necessary in the interests of a fair trial": *Boyle v Downs* [1979] 1 NSWLR 192 at 204–5; *Chong v Nguyen* [2005] NSWSC 588.

The proposed interrogatories must therefore relate to the issues in the trial (*Seidler v John Fairfax and Sons Ltd* [1983] 2 NSWLR 390), and it is relevant to consider whether the proposed interrogatories relate to matters which can be proved by other evidence, but interrogatories have been held to be "necessary and allowed" where they related to matters, proof of which would be difficult or expensive: *Lang v Australian Coastal Shipping Commission* [1974] 2 NSWLR 70.

In *Venacom Pty Ltd v Morgan Brooks Pty Ltd* [2006] NSWSC 46, Campbell J held that, as the plaintiff's evidence-in-chief had not been filed at the time of the application, it was not shown that the order for interrogatories was "necessary" *at that time*.

The following classes of interrogatories will not be allowed:

- those which seek admissions on matters of law
- those which seek admissions depending on the application of a legal standard
- those which assume that the same answer would be given irrespective of the factual context in which the question arises, or
- those which relate only to the credibility of a witness.

See generally *Coal Cliff Collieries Pty Ltd v C E Heath Insurance Broking (Aust) Pty Ltd* (1986) 5 NSWLR 703; *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44 at 57–58.

[2-3230] Objections to specific interrogatories

Rule 22.2 provides that the only grounds on which a party may object to answering an interrogatory are:

(a) that the interrogatory does not relate to any matter in issue between that party and the party seeking the order,

(b) that the interrogatory is oppressive or vexatious,

(c) that the answer to the interrogatory could disclose privileged information.

It would appear that there is little difference, if any, between (a) and (b) and the requirement under r 22.1 that the interrogatory be "necessary" at the relevant time.

As to (c) privileged information, see Discovery, above, at [2-2200] and CPA s 87.

[2-3240] The order

The order must specify the interrogatories to be answered (r 22.1(1)) may require the answers to be given within a specified time, may require the answers, or any of them, to be verified by affidavit and, in cases where r 35.3 authorises someone other than the party to make the affidavit (eg in cases of infants, corporations, etc), may specify the person to make the affidavit or class from whom such person is to be chosen: r 35.5.

[2-3250] The answers

Rule 22.3 requires that a statement of answers to interrogatories must deal with each interrogatory specifically, setting out each interrogatory and the answer to it, answering the substance of each interrogatory without evasion, and, in so far as required by the order, must be verified by affidavit.

Unless the terms of the interrogatory indicate otherwise, the party interrogated must make enquiries of their servants and agents, including former servants and agents, and answer in accordance with the information supplied by them as well as their own knowledge, information and belief: see *Derham v AMEV Life Insurance Co Ltd* (1978) 20 ACTR 23, noted (1978) 52 ALJ 464, and see generally *Ritchie's* at [22.3.20]–[22.3.40] and *Thomson Reuters* at [22.2.80].

As to insufficient answers or default in answering, see rr 22.4 and 22.5 respectively.

[2-3260] Answers as evidence

Answers to interrogatories do not become evidence in the proceedings unless tendered at the trial. A party may tender one or more answers or part of an answer without tendering the other answers or the whole of the answer. If the court, however, considers that any other answer or any part of an answer is so connected with the matter tendered that such matter should not be used without the other answer or part, it may reject the tender unless that other answer or part is also tendered: r 22.6.

Sample Order

I order the [*plaintiff/defendant/name of person to answer on behalf of corporation/etc as the case may be*] to answer within [*days of today*], the interrogatories attached to the notice of motion filed on [.....] and numbered [.....] and verify such answers by affidavit. Costs of this application to be costs in the cause [*or as the case may be*].

Legislation

- CPA 2005 s 87

Rules

- UCPR 2005 Sch 1, rr 1.5, 22.1–22.6, 35.3, 35.5

[The next page is 1425]

Joinder of causes of action and parties

[2-3400] Causes of action

A plaintiff may join more than one cause of action when:

- he or she sues in the same capacity and claims the defendant to be liable in the same capacity in respect of each cause of action: UCPR r 6.18(1)(a),
- he or she sues as an executor or administrator in respect of one or more causes of action and in his or her own capacity with reference to the estate of the same deceased person in respect of the remaining causes of action: r 6.18(1)(b),
- he or she claims the defendant to be liable as executor or administrator in respect of one or more causes of action and in his or her own personal capacity in relation to the estate of the same deceased person in respect of the remaining causes of action: r 6.18(1)(c), or
- the court grants leave for all the causes of action to be dealt with in the same proceedings: r 6.18(1)(d). Leave may be granted before or after the originating process is filed: r 6.18(2).

[2-3410] Common question

Two or more persons may be joined as plaintiffs or defendants if separate proceedings by or against each of them would give rise to a common question of fact or law (r 6.19(1)(a)), and all rights of relief claimed are in respect of, or arise out of, the same transaction or series of transactions: r 6.19(1)(b). They may also be joined if the court gives leave for them to be joined: r 6.19(1). That leave may be granted before or after the originating process is filed: r 6.19(2). The power to grant leave is not limited by the conditions stated in r 6.19(1)(a) or (b): *CGU Insurance v Bazem Pty Ltd* [2011] NSWCA 81.

Rule 6.19 applies only to joinder by the plaintiff and, when some relief is sought by the plaintiff, against the proposed new defendant: *Walker v Commonwealth Trading Bank of Australia* (1985) 3 NSWLR 496 at 503.

[2-3420] Joint entitlement

Unless a court orders otherwise, all persons jointly entitled to the same relief must be joined as parties in any claim for relief that is made by any one or more of them: r 6.20(1).

Unless a court orders otherwise, such a person is to be joined as a plaintiff if he or she consents to be a plaintiff, otherwise as a defendant: r 6.20(2).

A person may not be joined as a party to proceedings in contravention of any other Act or law: r 6.20(3).

A person is not to be joined as a plaintiff except with his or her consent: r 6.25.

[2-3430] Joint or several liability

UCPR, r 6.21(1), provides that "[a] person who is jointly and severally liable with some other person in relation to any act matter or thing need not be [joined] as a defendant in proceedings with respect to that act, matter or thing merely because the other person is a defendant in those proceedings." Although a court may require the joinder of other parties who are jointly but not severally liable, that does not encompass cases of joint and several liability: *Burton v Babb* [2020] NSWCA 331 at [76].

In any proceedings in which a defendant is one of a number of persons who are jointly, but not severally, liable in contract or tort or under an Act or statutory instrument, the court may order that the other persons be joined as defendants and that the proceedings are stayed until the other persons have been so joined: r 6.21(2).

[2-3440] Separate trials

If the court considers that the joinder of parties or causes of action may embarrass, inconvenience or delay the conduct of the proceedings, it may order separate trials (r 6.22(a)) or make such other order as it thinks fit: r 6.22(b).

[2-3450] Generally

Proceedings are not defeated merely because of misjoinder or non-joinder of parties: r 6.23.

The court may order that a person be joined as a party if it considers that the person ought to have been joined or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings: r 6.24(1). In proceedings for the possession of land, the court may order that a person in possession of any part of the land, whether in person or by a tenant, be added as a defendant: r 6.24(2). Determination of who "ought to be joined" or who "is a necessary party" is not always uncontroversial and not necessarily simple: *Burton v Babb* at [23]; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 524–526.

A relevant occupier of land, whose occupation the plaintiff seeks to disturb, must be served with the originating process: rr 6.8(1)(b), 36.8. With the originating process must be served a notice that the occupier may apply to the court for an order that the occupier be added as a defendant and that, if the occupier does not so apply within ten days after service, the occupier may be evicted under a judgment entered in the occupier's absence: r 6.8(1)(b)(i)–(ii), Form 5.

Except to the extent to which the rules expressly provide, a party may not join another person as a party for the purpose of making an application for costs against that person: r 6.26(1). The rule does not apply if the other person would otherwise be a proper party or if the party joins that person by means of cross-claim in respect for a claim for costs against the party.

A person who is not a party may apply to the court to be joined as a party either as a plaintiff or defendant: r 6.27.

If the court orders that a person be joined as a party, the date of commencement of the proceedings in relation to that person is the date on which the order is made or such later date as the court may specify in the order: r 6.28.

[2-3460] Removal of parties

The court may order that a person be removed as a party if that person has been improperly or unnecessarily joined or has ceased to be a proper or necessary party: r 6.29: see *Burton v Babb* [2020] NSWCA 331 at [49]. A defendant is likely to be regarded as a "proper party" if a party relies upon its conduct to establish the cause of action: *Burton v Babb* at [51].

Proceedings do not abate as a result of a person's death or bankruptcy if a cause of action in the proceedings survives: r 6.30(1). If a cause of action survives, and the interest or liability of a party passes to some other person, the court may make orders as it thinks fit for the joinder, removal or rearrangement of the parties: r 6.30(2).

Where a party dies but the cause of action survives and an order for the joinder of a party to replace the deceased person is not made within three months after the death, the court may order that the proceedings be dismissed unless an application to join a party to replace the deceased party is made within a specified time: r 6.31(1) and (4).

Application may be made by any person to whom the deceased party's liability in relation to the cause of action concerned has passed: r 6.31(3).

[2-3470] Future conduct of proceedings

Where a court has made an order for the joinder of causes of action or parties or for the removal of parties, it may make such orders as it thinks fit for the future conduct of the proceedings: r 6.32.

If the court orders the substitution of one party for another, all things previously done in the proceedings have the same effect in relation to the new party as they had in relation to the old, subject to any order of the court: r 6.32(2).

[2-3480] General principles

As to the many issues that may arise in individual cases on the question of joinder, see the discussion and the cases cited in *Ritchie's* [6.18.5]–[6.32.10] and *Thomson Reuters* [r 6.18.20]–[r 6.32.1000]. What follows is a consideration of some selected problems.

[2-3490] Leave

Where a discretion to grant leave is available, the court "should take whatever course is most conducive to a just resolution of the dispute between the parties, but having regard to the desirability of limiting so far as practicable, the costs and delay of the litigation": *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1991) ASC ¶56-033 per Rogers CJ in Comm Div.

[2-3500] Joint entitlement

A person, jointly entitled, who has declined to consent to being joined as a co-plaintiff and has been joined as a defendant, is entitled to indemnity from costs and may be entitled to security for costs: *Rajski v Computer Manufacture and Design Pty Ltd* [1981] 2 NSWLR 798.

[2-3510] Inconvenient joinder

The court has a wide discretion to make a suitable order, including one for separate trials. Although the applications may be made as late as at the trial (*Thomas v Moore* [1918] 1 KB 555 at 569), delay in making the application can be a relevant factor, especially under the present procedures. The ultimate onus is on the plaintiff to justify the joinder: *Saccharin Corp Ltd v Wild* [1903] 1 Ch 410 at 424. The interests of all parties are to be considered in the exercise of the discretion.

[2-3520] Misjoinder

While misjoinder or non-joinder do not defeat proceedings the court may, in appropriate circumstances, determine issues in proceedings notwithstanding the non-joinder or misjoinder of parties: *Finance Corp of Australia v Bentley* (1991) 5 BPR 11,883. However a person who has not been joined as a party and is affected by orders made in the proceedings will generally be entitled to have them set aside: *Taylor v Taylor* (1979) 143 CLR 1 at 4.

[2-3530] Misnomer

An amendment will usually be granted to rectify an error in the name of a party as opposed to the situation where what is proposed is the substitution of one defendant for another. Limitation issues do not arise in the case of mere misnomer: *J Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441.

[2-3540] Parties that ought to be joined or are "necessary for the determination of all matters in dispute"

"All matters in dispute" includes ancillary or preliminary questions: *Qantas Airways Ltd v A F Little Pty Ltd* [1981] 2 NSWLR 34 at 38. Matters are not "effectually and completely 'adjudicated upon' unless … all those who would be liable to satisfy the judgment are given an opportunity to be heard": *Gurtner v Circuit* [1968] 2 QB 587 per Diplock LJ at 602–603.

The test of what is a sufficient ground to entitle a person to be added as a party was expressed by the Privy Council in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 at 56 as follows:

> Will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

The breadth of the discretion under the rule is demonstrated by the cases cited in *Ritchie's* at [6.24.25] and *Thomson Reuters* [r 6.24.40]. These cases make it clear that the test in *Pegang Mining*, above, is not exhaustive.

Where no order is sought against a defendant, it will generally be held that the joinder is not necessary and should not be made: *Vandervell Trustees Ltd v White* [1971] AC 912 at 944. However, for an unusual case and a discussion of the phrase "matters in dispute", see *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278.

Unless a proposed defendant is a person who ought to have been joined according to the rules, a plaintiff will generally succeed in opposing an application that that person be added as a defendant, however, see *Ritchie's* at [6.24.35] and see also *Burton v Babb* [2020] NSWCA 331 where the Court of Appeal overturned a decision to remove two named defendants from the proceedings as the conduct of the defendants, inter alia, was in issue and would be relied upon to establish the pleaded torts: at [51].

[2-3550] Sample orders

Joinder of a defendant

I order:

1. That X be joined as a defendant.
2. The plaintiff to file an amended statement of claim within 14 days.
3. The added defendant to file any appearance or defence upon which it is intended to rely within 28 days after service of the amended statement of claim.

Death of a plaintiff and no replacement

I order:

1. That unless an application to join a party to replace the plaintiff is made within [*days*], these proceedings are dismissed.
2. This order be served upon [*name*] by [*date*].
3. Costs [*as appropriate*].

Separate trials

1. That the causes of action against the [*first*] defendant and the [*second*] defendant be heard separately.
2. Costs [*as appropriate*].

Note: Depending upon the circumstances a range of directions may also need to be given.

Rules

- UCPR rr 6.8–6.32, r 36.8

[The next page is 1531]

Joinder of insurers and attachment of insurance moneys

[2-3700] Generally

While specific statutory provisions, which are dealt with below, may affect the issue, the joinder of an insurer is governed by the rules and principles discussed above at [2-2050] "Cross-claims generally" and [2-3400] "Joinder of causes of action and parties".

The joinder of an insurer as a cross-defendant is commonplace, however, it is less usual for an insurer to be validly joined as a defendant on the basis of these rules and principles alone.

Generally, at least, there must be an issue between the insured and the insurer as to liability to indemnify, and the denial of liability must be on grounds that substantially duplicate the factual and legal issues between the plaintiff and the defendant.

Such joinder was allowed in *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432, a decision of the South Australian Full Court. However, joinder, or entitlement to join, was subsequently denied by the South Australian Full Court, differently constituted, in *Beneficial Finance Co Ltd v Price Waterhouse* (1996) 68 SASR 19. The Court of Appeal of Victoria (*CE Heath Casualty and General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256) and the Court of Appeal of Queensland (*Interchase Corporation (in liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301) also disallowed joinder.

[2-3710] Civil Liability (Third Party Claims Against Insurers) Act 2017

Pt 4 of the *Law Reform (Miscellaneous Provisions) Act 1946* provided a mechanism enabling a plaintiff to access proceeds of insurance by means of a statutory charge where proceedings against an insured defendant were not possible or would be pointless because, for example, the defendant was missing or insolvent. The 70-year old legislation caused conceptual problems and has been criticised for its obscure drafting. Further its effect was unclear following changes to the insurance market since it was enacted.

Following recommendations of the NSW Law Reform Commission contained in *Third party claims on insurance money*, Report 143, 2016, the *Civil Liability (Third Party Claims against Insurers) Act 2017* (the "CL Act") replaced Pt 4 of the *Law Reform Miscellaneous Provisions) Act 1946* and the statutory charge mechanism. The CL Act provides a process whereby if an insured person has an insured liability to a claimant, the claimant may, subject to the CL Act, recover the amount of the insured liability from the insurer in proceedings before a court.

[2-3720] Leave applications

Proceedings may not be bought under s 4 of the Act except by leave of the court in which the proceedings are to be commenced: s 5(1). An application for leave may be made before or after the commencement of proceedings under s 4: s 5(2). The court's power to refuse or grant leave is discretionary (s 5(3)). However leave must be refused under s 5(4) if the insurer can establish that it is entitled to disclaim liability under the contract of insurance: see *Chubb Insurance Australia Ltd v Giabal Pty Ltd; Catlin Australia Pty Ltd v Giabal Pty Ltd* [2020] NSWCA 309 at [11] where the insurers had failed to establish "beyond argument" an entitlement to disclaim**.**

The requirement for leave under s 5(4) is imposed "to insulate insurers from exposure to untenable claims: *Count Financial Limited v Pillay* [2021] NSWSC 99 at [7]–[8]. The discretion to give leave to bring such a claim is to be exercised with this in mind": *Murphy, McCarthy & Associates Pty Ltd v Zurich Australian Insurance Ltd* [2018] NSWSC 627 at [16]; *Wigge v Allianz Australia Insurance Ltd* [2020] NSWSC 150 at [18].

An entitlement to disclaim liability may also relate to a limitations point. Section 6(1) of the CL Act does not alter the general law and the onus lies upon the insurer to prove that a claimant's claim against an insured person is out of time under the *Limitation Act* 1969: *Zaki v Better Building Constructions Pty Ltd* [2017] NSWSC 1522.

Sample order

Civil Liability (Third Party Claims against Insurers) Act 2017, s 5

1. Grant leave to the plaintiff to commence proceedings against [*the insurer*].
2. [*the insurer*] to pay the plaintiff's costs [*or as appropriate*].

[2-3730] Limitation period and matters on which an insurer may rely

Under s 6(1), proceedings to recover an amount from an insurer under s 4 must be commenced within the same limitation period that applies under the *Limitation Act 1969* or other Act to the claimant's cause of action against the insured period in respect of the insured liability: see also *Kinzett v McCourt* (1999) 46 NSWLR 32 at [107]–[110] which held that the *Limitation Act* applied to proceedings under Pt 4 of the *Law Reform Miscellaneous Provisions) Act* (rep).

Section 7 provides that in proceedings brought under s 4, an insurer is entitled to rely on any defence or any other matter in answer to the claim or in reduction of its liability to the claimant:

(a) that the insurer would have been entitled to rely on in a claim made by the insured person under the contract of insurance, or

(b) that the insured person would have been entitled to rely on in proceedings brought by the claimant against the insured person in respect of the insured liability.

The NSWLRC stated in Report 143 at p ix that this should ensure that the insurer can rely on the same defences that the insured defendant could have relied on in an action brought by the plaintiff.

[2-3735] Judgment against insured no bar to claim against insurer

Section 8 allows a plaintiff to proceed against an insurer even after a successful judgment or order for damages, compensation or costs has been obtained if the defendant is unable to pay all or part of the liability, except to the extent that the judgment or order has been satisfied. This is to avoid double recovery.

[2-3737] Effect of payments made by insurer to insured person

Section 10 of the CL Act provides:

An insurer's liability to a claimant under this Act is not reduced, discharged or otherwise affected by:

(a) any compromise or settlement between the insurer and the insured person in respect of the insured liability, or

(b) any payment by the insurer to the insured person in respect of the insured liability unless and to the extent that the amount of the payment is or has been paid by the insured person to the claimant in respect of the insured liability.

The NSWLRC in Report 143 said this is directed to preventing collusion between the insurer and the defendant due to the abolition of the statutory charge (p 40). It provides that any payment the

insurer makes to the defendant, or any compromise agreed between them in respect of the insured liability, does not discharge the insurer's liability to the plaintiff unless and to the extent that the defendant pays the money to the plaintiff.

[2-3740] Other statutes

Section 11 of the CL Act provides that "the rights conferred on claimants under this Act do not affect, and are in addition to, the rights conferred under the *Workers Compensation Act 1987* or any other law on a person who is not a party to a contract of insurance to make a claim against an insurer in respect of an insured liability".

Section 51 of the *Insurance Contracts Act 1984* (Cth) provides that where an insured under a contract of liability which provides relevant cover is liable in damages to a third party and the insured has died or cannot, after reasonable enquiry, be found, the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages. See *Morris v Betcke* [2005] NSWCA 308; *Tatterson v Wirtanen* [1998] VSC 88 and C McCarthy, "Third Party Access to Insurance Policies and Joinder of Insurers" (1999) 11 *Insurance Law Journal* 46.

Section 117 of the *Bankruptcy Act 1966* (Cth) provides that where a bankrupt is or was insured against liabilities to third parties and a liability against which he or she was so insured has been incurred (whether before or after he or she became a bankrupt), the "right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer under the policy in respect of the liability shall, if the liability has not been satisfied, be paid in full forthwith to the third party to whom it was incurred".

Section 562 of the *Corporations Act 2001* (Cth) provides that, where a company is insured against liability to third parties, under a contract of insurance, entered into before it is wound up, then, if such a liability is incurred by the company (whether before or after the winding up) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount shall, after deducting any expenses of and incidental to getting that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred in priority to all payments in respect of debts mentioned in s 556. Expenses are to be deducted. Payment is to made to the extent necessary to discharge the liability.

Separate provision is made for contracts of reinsurance (s 562A), in relation to injury compensation: s 563 and claims against insurers of deregistered companies (s 601AG).

Legislation

- *Civil Liability (Third Party Claims against Insurers) Act 2017*
- *Insurance Contracts Act 1984* (Cth), s 51
- *Bankruptcy Act 1966* (Cth), s 117
- *Corporations Act 2001* (Cth), ss 562, 562A, 563, 601AG

[The next page is 1585]

Limitations

[2-3900] Introduction

Last reviewed: May 2023

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

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

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

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

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

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

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

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

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

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

[2-3920] Provisions applicable to all three categories

Last reviewed: August 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For special provisions relating to minors injured by close relatives and relating to the effect of disability on the limitation period, see ss 50E and 50F. For a detailed analysis of the provisions relating to this category, see *Baker-Morrison v State of NSW* (2009) 74 NSWLR 454 and *State of NSW v Gillett* [2012] NSWCA 83. Where a minor is involved, the relevant focus is on facts that are known or ought to be known by a "Capable Person" (which are then taken to be facts that are known or ought to be known by the minor): see *Anderson v State of NSW* [2023] NSWCA 160 at [44].

[2-3930] Motor Accidents Compensation Act 1999

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

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

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

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

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

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

[2-3935] Motor Accident Injuries Act 2017

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

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

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

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

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

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

[2-3940] Workers Compensation Act 1987

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

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

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

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

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

1. The onus is on the applicant to satisfy the court that the limitation period should be extended.
2. The test is whether the justice of the case requires that the application be granted.
3. A material consideration is whether a fair trial is possible by reason of the time that has elapsed since the events giving rise to the cause of action. That is to be judged at the time of the application. It is not a question of comparing the situation at the time of the application with the situation when the limitation period expired and confining attention to any additional prejudice.

4. The length of delay and any explanation for it are relevant considerations.
5. A respondent is prima facie prejudiced by being deprived of the protection of the limitation period.
6. It is open to the respondent to adduce evidence of any further particular prejudice claimed.
7. The application should be refused if the effect of granting an extension would result in significant prejudice to the respondent.
8. The application should not be granted if the applicant, having made a deliberate decision not to commence proceedings within the limitation period, fails to give a satisfactory explanation for that conduct, notwithstanding that the respondent would suffer no prejudice from the delay.

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

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

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

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

[2-3960] Pleading the defence

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

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

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

Whether to decide a limitation defence separately

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

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

Whether to decide an application to extend the limitation period separately

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

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

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

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

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

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

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

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

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

[2-3965] Cross references to related topics

Last reviewed: December 2023

- Amendment, see "Limitation periods" at [2-0780] for amendment raising a cause of action which is statute barred; and "Grounds for refusal of amendment" at [2-0720] for a late application to add a limitation defence.
- Cross-vesting legislation, see "Cross-vesting" at [2-1400] for cases where different limitation periods are applicable.
- Consolidation of proceedings, see [2-1800] regarding the court's power to order consolidation to preserve a party's rights under the *Limitation Act 1969*.
- Stay of pending proceedings, see "Legitimate personal or juridical advantage" at [2-2610] where a more generous limitation period in the domestic forum may be a relevant consideration in deciding to order a stay.
- Summary disposal and strike out applications, see "Limitation defence" at [2-6920]: limitation questions should be decided in interlocutory proceedings only in the clearest of cases.
- As to limitation issues in defamation proceedings, see [5-4050].
- No limitation period in child abuse actions, s 6A *Limitation Act*: Legislative amendments which inserted s 6A into the *Limitation Act 1969* so as to disapply the statute of limitations in respect of such claims manifest an intention that the passage of time is not of itself to be treated as unacceptably prejudicing a fair trial. Section 6A(6) "does not limit" the inherent, implied, or statutory jurisdiction of courts, including to prevent abuses of process however the jurisdiction is now to be exercised in the "radically new context" created by s 6A(1). Section 6A removes any requirement or even expectation of an explanation for the passing of time between the accrual

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

- See also [2-2690] Other grounds on which proceedings may be stayed. For s 6A to apply, the conduct complained of must constitute child abuse defined as (a) sexual abuse, (b) serious physical abuse, or abuse connected with (a) or (b). There is no definition in the *Limitation Act* of sexual abuse but on a proper construction, the reference to "sexual abuse" as part of the definition of "child abuse" in s 6A(2) means conduct which has a sexual connotation: *Anderson v State of NSW* [2023] NSWCA 160 at [24]–[25] (in which strip searches of two minors by police was held not to constitute child abuse for the purposes of s 6A).

[2-3970] Table of limitation provisions in NSW

Last reviewed: May 2023

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

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

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

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

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
CONTRACT AND QUASI-CONTRACT		
Contract (except actions founded on a deed)	6 years: s 14(1)(a) See [5.10.580]	
Actions for seamen's wages	6 years: s 22(1), s 14(1)(a) See [5.10.660]	
Actions on a specialty or deed	12 years: s 16 See [5.10.670]	
Quasi-contract	6 years: s 14(1)(a) See [5.10.680]	
Action arising by virtue of frustration of contract	6 years from date of frustration: s 14A See [5.10.680]	
Actions for an account	6 years: s 15 See [5.10.2070]	
TORT		
Tort (other than specific cases set out below)	6 years: s 14(1)(b) See [5.10.700]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Trespass	6 years: s 14(1)(b) (general tort limitation period) See [5.10.700], [5.10.720]	
Second or subsequent conversion	6 years from accrual of original cause of action: s 21 See [5.10.730]	
Actions for breach of statutory duty	6 years: s 14(1)(b) See [5.10.700]	
Defamation: Causes of action accruing before 1 January 2006	1 year from publication: s 14B(3) (now repealed) See [5.10.830]	3 years from publication, if unreasonable for P to have commenced action within 1 year from publication: s 56A (as in force prior to amendment) See [5.10.830]
Defamation: Causes of action accruing on or after 1 January 2006	1 year from publication: s 14B (subject to transitional provisions in Sch 5 Pt 2 cl 7(2)). See [5.10.841]–[5.10.842]	3 years from publication, if unreasonable for P to have commenced action within limitation period: s 56A(2) See [5.10.841]–[5.10.842]
Contribution and indemnity between joint tortfeasors	2 years from date action accrues to tortfeasor, or 4 years from expiry of limitation period for principal cause of action, whichever period expires first: s 26(1) See [5.10.2120]	
PERSONAL INJURY		
Personal injury: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1050]	1 year after material facts of decisive character within P's means of knowledge: s 58(2) See [5.10.1050] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, Schedule 5 Pt 1 cl 4 See [5.10.1080]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Personal injury: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A See [5.10.1060]	An additional 5 years, if just and reasonable: s 60C See [5.10.1070] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, Schedule 5 Pt 1 cl 4 See [5.10.1080]
Personal injury: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.1090]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A See [5.10.1100] There is a special provision for minors: s 62D See [5.10.2430]
Dust-related conditions	No limitation period: *Dust Diseases Tribunal Act 1989* s 12A See [5.10.1110]	
Child abuse	No limitation period where death or personal injury results from abuse of a child: s 6A (has retrospective effect)	
Road accidents	See [5.10.1050]–[5.10.1060]	
Work accidents	See [5.10.1050]–[5.10.1060]	
Wrongful death actions: Causes of action accruing before 1 September 1990	6 years from death: s 19(1)(a) See [5.10.1370]	Where material facts of decisive character not within deceased's means of knowledge more than 1 year prior to death, court can disregard limitation period: s 60(2) See [5.10.1400] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4
Wrongful death actions: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years from death: s 19(1)(b) See [5.10.1370]	5 years, if just and reasonable: s 60D(2) See [5.10.1400] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60H(2) See [5.10.1400]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Wrongful death actions: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C(1) See [5.10.1370] But no limitation period for child abuse actions: s 6A(5)(a) See [5.10.1370]	12-year period can be extended for maximum of 3 years from date of discoverability, but 3-year period cannot be extended: s 62A(2) See [5.10.1400]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.2210]	1 year after material facts of decisive character within P's means of knowledge: s 59(2) See [5.10.2220]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A(2) See [5.10.2210]	Up to 5 years if just and reasonable: s 60C(2) See [5.10.2220]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.2210]	12-year period can be extended for maximum of 3 years from date of discoverability, but 3-year period cannot be extended: s 62A(2) See [5.10.2220]
Cause of action in tort surviving against estate of deceased person	Period same as if deceased had survived See [5.10.2210]	
PROPERTY DAMAGE AND ECONOMIC LOSS		
Action for negligence for property damage or economic loss	6 years: s 14(1)(b) (general tort limitation period) See [5.10.700] See also [5.10.790]	
Action in respect of defective building work	10 years from completion: *Environmental Planning and Assessment Act 1979* s 6.20(1) See [5.10.790]	
RELATED ACTIONS		
Actions on a judgment	12 years from date judgment became enforceable: s 17(1) See [5.10.2170]	
Actions to enforce an arbitral award (where agreement to arbitrate not under seal)	6 years: s 20(2)(b) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.2180]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions to enforce an arbitral award (where agreement to arbitrate made under seal)	12 years: s 20(2)(a) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.2180]	
Actions to enforce a recognisance	6 years: s 14(1)(c) See [5.10.2190]	
Actions to recover a penalty or forfeiture or other sum recoverable by virtue of an enactment	2 years: s 18(1) See [5.10.2200]	
Actions to recover sum recoverable by virtue of an enactment (other than penalty or forfeiture or sum by way of penalty or forfeiture)	6 years: s 14(1)(d) See [5.10.2200]	
Actions to recover arrears of income	6 years: s 24(1) See [5.10.2150]	
LAND		
Actions to recover land	12 years: s 27(2) See [5.10.1560]	
Action to recover land by holder of future interest to recover land	12 years: s 27(2) Action accrues when P becomes entitled to immediate possession, if no person in possession under interest claimed: s 31 See [5.10.1640]	
Actions by tenant entail	Entailed interests abolished See [5.10.1650]	
Actions by the Crown to recover land	30 years: s 27(1) See [5.10.1680]	
Action to recover land brought by person other than Crown where right first accrued to Crown	At any time before expiration of Crown limitation period, or 12 years from date when right of action accrued to person other than Crown, whichever period first expires: s 27(4) See [5.10.1680]	
Actions to recover arrears of rent, or damages in respect of arrears	6 years: s 24(1) See [5.10.1720]	
MORTGAGES		
Actions by mortgagor to redeem (land and personalty)	12 years from date mortgagee last went into possession, or last received payment of principal or interest: s 41 See [5.10.1740]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions by mortgagee to recover possession (land and personalty)	12 years: s 42(1)(b) See [5.10.1750]	
Actions by mortgagee to foreclose (land and personalty)	12 years: s 42(1)(c) See [5.10.1760]	
Actions by mortgagee to recover principal money (land and personalty)	12 years: s 42(1)(a) See [5.10.1770]	
Actions by mortgagee to recover interest	6 years from accrual (or date prior mortgagee discontinues possession) or when limitation period for action to recover principal expires, whichever period first expires: s 43(1) See [5.10.1780]	
TRUSTS		
Actions by a beneficiary against a trustee to recover trust property, or for breach of trust	6 years: s 48(a) See [5.10.1790]	
Actions in respect of fraud or fraudulent breach of trust, and actions to recover trust property converted by a trustee	12 years from date of discoverability, or expiration of any other applicable limitation period under *Limitation Act*, whichever is later: s 47(1) See [5.10.1810]	
DECEASED ESTATES		
Actions claiming the personal estate of the deceased, under will or on intestacy	6 years: s 48 (breach of trust limitation period) See [5.10.1820]	
Actions to recover arrears of interest in respect of legacy, or damages in respect of arrears	6 years: s 24(1) See [5.10.1820]	
ADMIRALTY ACTIONS		
Maritime claims generally	Limitation period that would have been applicable if proceeding brought otherwise than under *Admiralty Act 1988* (Cth), or 3 years from when cause of action arose: *Admiralty Act 1988* (Cth) s 37(1) See [5.10.2080]	May be extended where court otherwise has no power to extend limitation period in respect of maritime claim, but has power to extend limitation period in respect of claim of same kind: *Admiralty Act 1988* (Cth) s 37(3) See [5.10.2080]

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions to enforce claim or lien against ship or shipowner in respect of damage to another ship, its cargo or freight, any property on board, or loss of life or personal injury suffered by anyone on board	2 years from date of damage: s 22(2) See [5.10.2090]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.2090]
Actions to enforce claim or lien in respect of salvage services	2 years from date services rendered: s 22(3) See [5.10.2090]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.2090]
MISCELLANEOUS		
Arbitrations	After expiration of limitation period fixed by *Limitation Act* for cause of action in respect of same matter: s 70(2) See [5.10.2110]	In stated circumstances, court can order that time between commencement of arbitration and making of order should not count in reckoning of limitation period: s 73 [5.10.2110]
Actions to recover tax	12 months after tax paid: *Recovery of Imposts Act 1963* s 2(1)(b) See [5.10.2240]	
ULTIMATE BAR		
Ultimate bar	30 years from date limitation period runs (in all cases except wrongful death or personal injury where the court has extended the limitation period): s 51(1) See [5.10.2350]	

Legislation

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

Rules

- UCPR r 14.14(2), (3)

Further References

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

[The next page is 1651]

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 2025

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); *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 at [4],
- 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); *Care A2 Plus Pty Ltd v Pichardo* [2023] NSWCA 156 at [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].

For a summary of the well-established legal principles applicable as to whether a freezing order should be made see *KR Properties Global Pty Ltd t/as AK Properties Group v Kazzi* [2024] NSWCA 141 at [13]–[16], [46]–[50]; *Atlanta Building Pty Ltd v Abela* [2024] NSWSC 1193 at [74]–[86].

[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".
>
> …
>
> [46] … Even where a court makes a freezing order in circumstances in which a substantive proceeding in that court has commenced or is imminent, the process which the order is designed to protect is "a prospective enforcement process". That description is drawn from the explanation of the nature of a freezing order given by Lord Nicholls of Birkenhead in *Mercedes Benz AG v Leiduck*. That passage was cited with approval by five members of this Court in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* in a passage which (subject to presently immaterial qualifications) was itself adopted as a correct statement of principle by four members of this Court in *Cardile v LED Builders Pty Ltd*. Lord Nicholls explained:
>
> > Although normally granted in the proceedings in which the judgment is being sought, [a freezing order] is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained.

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

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

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

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

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

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

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

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

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

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

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

Rules

- UCPR rr 25.10–25.17

Further references

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

Practice Note

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

[The next page is 1765]

Persons under legal incapacity

[2-4600] Definition

Last reviewed: December 2023

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

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

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

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

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

For an application under s 4 of the Felons Act, see *Potier v Director-General, Department of Justice and Attorney General* [2011] NSWCA 105 and *Potier v Arnott* [2012] NSWCA 5, where the prisoner failed to establish before the Court of Appeal that there were prima facie grounds for the proceedings. Such grounds must be arguable and not hopeless: *Application of Malcolm Huntley Potier* [2012] NSWCA 222 at [17], nor constitute an abuse of process: *Stoeski v State of NSW* [2023] NSWSC 926 at [9]. Leave may be sought nunc pro tunc under s 4 Felons Act if proceedings have been commenced without a grant of leave: *Stoeski v State of NSW* at [5].

[2-4610] Commencing proceedings

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

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

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

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

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

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

[2-4620] Defending proceedings

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

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

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

[2-4630] Tutors/Guardians ad litem

Last reviewed: December 2024

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

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

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

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

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

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

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

The court may appoint a tutor or remove a tutor and appoint another: r 7.18(1). For examples, see *South v Northern Sydney Area Health Service* [2003] NSWSC 479 and *Wang v State of NSW* [2014] NSWSC 909. In dismissing an application for the removal of a tutor on the basis of insufficient medical evidence (due to the lack of a capacity assessment), the Court in *Walton by his tutor Mann v Hartmann* [2020] NSWSC 1628 at [19] observed the mere fact that a person may have some stable episodes may be "a long way from a proper assessment" of whether they are capable of giving instructions, taking advice, or making decisions in their own interest.

A tutor cannot unilaterally "cease to act" as tutor. Rather, once appointed, it is for the court under UCPR, r 7.18(1)(b) to remove a tutor. A purported notice did not itself have the effect of removing the tutor in *Pudarich v Pudarich* [2024] NSWSC 1123 at [29]–[33].

The court may appoint a tutor for a person under legal incapacity who is not a party and join that person as a party: r 7.18(2). If the court removes a party's tutor, it may stay the proceedings until the appointment of a new tutor: r 7.18(3).

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

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

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

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

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

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

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

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

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

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

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

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

[2-4660] The end of legal incapacity

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

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

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

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

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

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

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

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

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

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

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

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

[2-4700] Compromise

Last reviewed: August 2023

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

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

Compromise of claims enforceable by proceedings in the court made on behalf of or against a person under legal incapacity may be approved by the court before proceedings are commenced:

s 75(2). If not approved the agreement is not binding on the person under legal incapacity: s 75(3). If approved, the agreement is binding on the person under legal incapacity and his or her agents: s 75(4). Applications for such approval should be made by summons: r 6.4(1)(e).

In proceedings commenced by, on behalf of, or against a person under legal incapacity, a person who, during the course of the proceedings, becomes a person under legal incapacity or a person who the court finds to be incapable of managing his or her own affairs, there cannot be a compromise or settlement of the proceedings or an acceptance of money paid into court without the approval of the court: s 76(3). The test is whether the court is satisfied that the compromise or settlement is in the best interests of the plaintiff: *Nolan v Western Sydney Local Health District* [2023] NSWSC 671 at [3]; *Karvelas (an Infant) v Chikirow* (1976) 26 FLR 381 at 382; *Robinson v Riverina Equestrian Association* [2022] NSWSC 1613 at [5]. However approval is not required where the person under legal incapacity has attained the age of 18 years on the day the agreement for the compromise or settlement is made unless that person is otherwise under legal incapacity or found by the court to be incapable of managing his or her own affairs: s 76(3A).

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

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

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

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

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

[2-4710] NSW Trustee and Guardian Act 2009

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

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

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

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

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

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

[2-4720] Directions to tutor

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

[2-4730] Money recovered

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

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

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

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

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

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

[2-4740] Sample orders

Removal of tutor

I order:

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

Appointment of tutor and addition of party

I order:

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

Approval of settlement

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

By consent, I make the following orders:

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

   OR

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

Notes

1. The order will refer to the term numbering of the applicable terms of settlement.
2. Appropriate orders should be made in respect of any additional plaintiffs, however, expression of approval is not required unless one or more of them is also under a legal incapacity.

3. Commonly, term 4 [or as to case may be] will be all embracing, however, should it not cover all deductions, including those provided for by Statute, the order 4 [or as the case may be] may require qualification. It may be appropriate in a given case to identify the sum or a maximum sum to be so deducted.
4. The first form of order 4 will be appropriate where an application under the *NSW Trustee and Guardian Act* is contemplated, the second where infancy is the sole ground of legal incapacity. Should the estate of the plaintiff be already under relevant management, an order for direct payment to the appointed manager could be made.

Further reading

- P Brereton, "Acting for the incapable — a delicate balance", address to the Law Society of NSW & Carers NSW, CLE Breakfast: How to Care in 2011, Sydney 30/6/2011
- R Stein, "Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary" (2024) 36 *JOB* 91
- Guardian ad Litem team, Department of Communities and Justice, "The protective role of Guardians ad Litem and vulnerable people" (2024) 36 *JOB* 94.

Legislation

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

Rules

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

[The next page is 1825]

Pleadings and particulars

[2-4900] The relationship between pleadings and particulars

Rule 15.1 of the UCPR provides that a pleading must give such particulars as are necessary to enable the opposite party to identify the case to be met. Rule 15.9 provides that the particulars must be set out in the pleading or, if that is inconvenient, be set out in a separate document referred to in the pleading and filed with the pleading. So, in concept, particulars are part of the pleading, either physically so or by reference.

What, then, is the distinction between pleaded facts and particulars?

The basic distinction is that particulars give specificity to assertions of a more general kind made in the body of the pleading. (For example, it may be asserted that the defendant was negligent, in which case the particulars will specify the respects in which it is said that the defendant was negligent.)

In two respects, a material distinction may arise between facts asserted in the body of the pleading, on the one hand, and particulars, on the other. First, the facts asserted in the body of the pleading must be sufficient, standing alone, to make out the party's case (whether for a remedy sought or as a factual answer in law to the previous pleading). Gaps in the pleading party's case cannot be filled in by providing particulars: *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at [13]–[23].

Secondly, it is said that a party need not, and should not, plead to particulars: *Pinson v Lloyds & National Foreign Bank Ltd* [1941] 2 KB 72 at 75. (There should, however, be no occasion to do so because, where particulars are properly limited to making the pleaded facts more specific, an answer to the facts as pleaded will be an answer to the facts as particularised.)

In another and more important respect, there is no material distinction to be made between the facts asserted in the body of the pleading and such particulars as are provided. Together, the allegations of fact must be sufficient to apprise the opposite party of the case to be met: see "The purpose of pleadings and particulars" at [2-4930].

[2-4910] Application of the rules

Part 14, Div 2, rr 14.4 and 14.5 (reply and subsequent pleadings) do not apply to the Small Claims Division of the Local Court, and Div 6 (defamation) does not apply to the Local Court.

Part 15, Div 1, rr 15.7 (exemplary damages), 15.8 (aggravated damages) and 15.12–17 (personal injury cases) do not apply to the Small Claims Division of the Local Court. Rule 15.8 (aggravated damages) does not apply to the Dust Diseases Tribunal. Division 4 (defamation) does not apply to the Small Claims Division of the Local Court or to the Dust Diseases Tribunal.

[2-4920] Definition of "pleading"

The word "pleading" is defined in the Dictionary to the UCPR as including a statement of claim, defence, reply and any subsequent pleading, and as not including a summons or notice of motion.

Conformably, r 14.1 provides that Pt 14 (Pleadings) applies to proceedings commenced by statement of claim and to proceedings in which a statement of claim has (later) been filed.

[2-4930] The purpose of pleadings and particulars

The issues purpose

It is the function of pleadings to identify the issues, the resolution of which will determine the outcome of the proceedings.

The notice purpose

It is the function of pleadings, including particulars, to apprise the opposite party of the case to be met.

The second of these principles is enshrined in r 15.1, which provides that a pleading must give such particulars of any claim, defence or other matter pleaded as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

Authorities supporting these purposes

Not surprisingly, the following judicial statements make no distinction between the function of pleadings and function of particulars.

> Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it … they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial … and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court.: *Dare v Pulham* (1982) 148 CLR 658 at 664.

> The function of pleadings is to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.: *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

> Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds.: *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214 at 219.

It is no argument that the opposite party knows the facts.

> [I]t is a misapprehension to think that the only function of particulars is to reveal to a party facts of whose existence he is unaware. As I have indicated, particulars have the important function of informing a party of the nature of the case he has to meet and of limiting the issues of fact to be investigated by the court.: *Bailey v Federal Commissioner of Taxation*, above, at 219.

[2-4940] How pleadings establish the issues to be tried: admission, denial, non-admission and joinder of issue

The relevant rules are UCPR r 14.26 (Admission and traverse from pleadings) and r 14.27 (Joinder of issue).

Where there is a joinder of issue, that is the end of that aspect of the pleadings and an issue or issues for trial are thereby identified.

How is a joinder of issue achieved?

- A traverse, in the meaning of the rules, is a denial (explicit or implied) or a statement of non-admission; it may be made generally and thus relate to every allegation made in the previous pleading, or it may be made in relation to any particular allegation or allegations: r 14.26(2).
- Rule 14.20 provides that a pleading may not plead the general issue. (Under the pre-Judicature Act system of pleading, all of the facts pleaded in support of the plaintiff's claim could be denied by pleading one of a set of formulae, compendiously referred to as "the general issue", for example, "The defendant says it is not guilty as alleged" in the case of negligence, "The defendant says it did not promise as alleged" in the case of contract, etc.)
- Allegations of fact are taken to be admitted unless traversed or unless a joinder of issue under r 14.27 operates as a denial (see below): r 14.26(1).

- A joinder of issue, may be express or implied.
- An express joinder of issue (for example, "The plaintiff joins issue on the defendant's defence" or "The plaintiff joins issue on the defendant's defence except for paras 1 to 5 inclusive which are admitted") operates as a denial as to every allegation of fact in the previous pleading other than those expressly admitted: r 14.27(1) and (6).
- There is an implied joinder of issue if there is no reply to a defence or no answer to a subsequent pleading: r 14.27(2) and (3). An implied joinder of issue operates as a denial of every allegation of fact made in the pleading to which it relates: r 14.27(5).
- Where allegations are not admitted or are denied (whether explicitly or impliedly denied, or are taken to be denied by operation of the rules) and where any such non-admission or denial is the subject of joinder of issue (including any joinder of issue implied under the rules), allegations not admitted or denied are in issue and fall to be determined by the court.

[2-4950] Implied traverse as to damage and damages

Where a pleading alleges damage or the amount of damages, a pleading in response to that pleading is taken to traverse the allegation unless it specifically admits the allegation: r 14.26(3).

[2-4960] No joinder of issue on a statement of claim

There can be no joinder of issue, express or implied, on a statement of claim: r 14.27(4). (Accordingly, if no defence is filed, the plaintiff must prove, ex parte, the facts relied upon for the remedy that is sought.)

[2-4970] Pleader under legal disability

Subrule 14.26(4) provides that r 14.26 does not apply to a pleading by or on behalf of a party under legal incapacity. Read literally, r 14.26(4) applies to the whole of r 14.26 (which is referred to above and which includes a number of pleading rules). However, a more limited effect might have been intended, namely, to prevent an admission arising by implication by operation of subrule 14.26(1) against a person under legal incapacity.

[2-4980] Pleading of facts in short form in certain money claims

Rule 14.12(1) of the UCPR preserves the old style common money counts such as "for goods sold and delivered by the plaintiff to the defendant" and "for money lent by the plaintiff to the defendant".

Rule 14.12(3) and (4) provides that notice to plead may be given in such cases and for what then follows.

[2-4990] Trial without further pleadings

Rule 14.2(1) of the UCPR provides that the court may order that the proceedings be tried without further pleadings if the issues between the parties can be defined without further pleadings or for any other reason. Rule 14.2(2) provides that, in such case, the court may direct the parties to prepare a statement of the issues or, failing agreement in that regard, may settle a statement itself.

A typically suitable case for the application of this rule is a proceeding involving only questions of law.

[2-5000] Pleadings for which leave is required or not required

No leave is required to commence proceedings by statement of claim or to file a defence.

In the Supreme Court and District Court, no leave is required to file a reply, but leave is required to do so in the Local Court: r 14.4(1) and (2).

In all courts, leave is required to file any pleading subsequent to a reply: r 14.5.

[2-5010] The form of pleadings, paragraphs

Pleadings must be divided into numbered paragraphs, with each matter in a separate paragraph: r 14.6.

[2-5020] Verification of pleadings

See UCPR, Pt 14, Div 4 (Verification of pleadings), rr 14.22–14.24.

[2-5030] Facts, not evidence

Rule 14.7 of the UCPR provides that a pleading must contain only a summary of the material facts relied upon, and not the evidence by which those facts are to be proved.

This means that a pleading should not specify the way the asserted facts are to be proved (such as that certain persons saw or heard certain things, unless the seeing or hearing are themselves material facts).

[2-5040] Brevity

Rule 14.8 of the UCPR provides that a pleading must be as brief as the nature of the case allows.

[2-5050] References to documents and spoken words

Rule 14.9 provides that the effect of any document or spoken words should be pleaded, not the terms of the document or spoken words unless material.

[2-5060] Matters presumed or implied and which, accordingly, need not be pleaded

Presumed facts

A fact presumed by law need not be pleaded, except as necessary to answer a specific denial: r 14.10.

Burden on opposite party

Similarly, a fact which the opposite party has the burden of disproving need not be pleaded, except as necessary to answer a specific denial: r 14.10.

Condition precedent

Rule 14.11 relates to certain conditions precedent specified in the rule. These include that something in particular has been done or has happened or exists or that the party is ready and willing to perform an obligation. The rule provides that a statement to the effect that such a specified condition has been satisfied is implied in the pleading.

[2-5070] Unliquidated damages

A pleading must not claim an amount for unliquidated damages except in relation to certain specified motor vehicle and other specified property damage claims: r 14.13.

[2-5080] Matters arising after commencement of the proceedings

Such matters may be pleaded: r 14.17.

[2-5090] Opposite party not to be taken by surprise

Rule 14.14(1) of the UCPR provides that a plaintiff must plead specifically in a statement of claim any matter that may otherwise take the defendant by surprise.

Rule 14.14(2) provides that, in a defence or subsequent pleading, a party must plead specifically any matter that might otherwise take the opposite party by surprise (r 14.14(2)(a)), or that allegedly makes any claim, defence or other case of the opposite party not maintainable (r 14.14(2)(b)), or that raises matters of fact not arising out of the original pleading (r 14.14(2)(b)).

Material facts which if established would support a statutory defence such as ss 42 or 5O of the *Civil Liability Act 2002* should be pleaded: *Port Stephens Council v Theodorakakis* [2006] NSWCA 70 at [15]; *Sydney South West Area Health Service v MD* (2009) 260 ALR 702 at [20]–[23], [65].

Rules like r 14.14(2)(a) are not confined in their operation to requiring the pleading of facts that are in a strict sense material to the cause of action or defence in question: *Davis v Veigel* [2011] NSWCA 170 at [95]. In some circumstances, in order to avoid surprise, it may be necessary for a party in his or her pleading to "explicitly relate the facts it pleads to specified causes of action": *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135 at [21].

For statements condemning trial by ambush, see *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116 at [28]–[32], [40]–[46], *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80 at [59]–[60], and *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34 at [28]–[33].

For an example of relief in respect of the requirements of rr 14.14 and 15.1 on the grounds of privilege against self-exposure to penalties, see *MacDonald v ASIC* (2007) 73 NSWLR 612.

[2-5100] The Anshun principle

For a discussion of the related Anshun principle, see *Ritchie's* at [14.28.20]; *Thomson Reuters* at [r 14.14.220]. And see *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245, *Conference & Exhibition Organisers Pty Ltd v Johnson* [2016] NSWCA 118, *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; *J & E Vella Pty Ltd v Hobson* [2020] NSWCA 188 at [29]–[30] and *Clayton v Bant* [2020] HCA 44.

[2-5110] Special rules providing that particular matters must be pleaded specifically

- Possession of land: r 14.15
- Contributory negligence: r 14.16
- Claims under *Property (Relationships) Act 1984*: r 14.21
- Rule 14.14(3) provides that certain particular matters must be pleaded pursuant to r 14.14(2) without limiting the general effect of the subrule. These include fraud, performance, release and statute of limitations
- For discussion of the topics specified in r 14.14(3) and other topics within the general terms of r 14.14(2), see *Ritchie's* at [14.14.5]–[14.14.10]; *Thomson Reuters* at [r 14.14.100]–[r 14.14.200].

[2-5120] Special rules providing that particulars of certain matters be provided

- Behaviour in the nature of fraud: r 15.3
- Condition of mind: r 15.4
- Negligence and breach of statutory duty in common law claims in tort: r 15.5

- Out of pocket expenses: r 15.6
- Exemplary damages: r 15.7
- Aggravated damages: r 15.8,
- *Property (Relationships) Act 1984*: r 15.11

[2-5130] A point of law may be raised

Rule 14.19 of the UCPR provides that a party may raise any point of law.

The rule enables a party, in its pleading, to raise for decision whether the facts pleaded in the preceding pleading have the asserted legal effect; for example, whether the facts pleaded in a statement of claim establish a cause of action or entitle the plaintiff to the relief sought, or whether the facts asserted in a defence provide an answer in law to the plaintiff's claim.

See "Separate determination of questions" at [2-6100].

[2-5140] "Scott schedule" in building, technical and other cases

See r 15.2.

[2-5150] The defence of tender, special rule

See r 14.25.

[2-5160] Defamation, special rules

See Pt 14, Div 6, rr 14.30–14.40; Pt 15, Div 4, rr 15.19–15.32.

[2-5170] Personal injury cases, special rules

See Pt 15, Div 2, rr 15.12–15.17.

Claims for indemnity under s 151Z(1)(a) of the *Workers Compensation Act 1987* are not claims for personal injuries, however, the plaintiff insurer should provide particulars whereby the defendant would know the case it had to meet in relation to, amongst other things, the damages the worker would have obtained in the appropriate proceedings: *Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd* [2007] NSWCA 144. The insurer is only obliged to provide the best particulars that it can: *Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd*, above. See also *State of New South Wales (Ambulance Service of NSW) v McKittrick* [2009] NSWCA 63.

[2-5180] Interim payments, special rule

See r 15.18.

[2-5190] Order for particulars

Generally

Rule 15.10(1) of the UCPR provides that the court may order a party to file particulars of any claim, defence or other matter stated in the party's pleading or in any affidavit, or a statement of the nature of the case on which the party relies, or particulars relating to general or special damages if the party claims damages.

Knowledge

Rule 15.10(2) provides specifically that, if a pleading alleges that a person had knowledge of some fact, matter or thing, the court may order the pleading party to file particulars of that knowledge.

Notice

Rule 15.10(2) also provides specifically that, if a pleading alleges that a person had notice of some fact, matter or thing, the court may order the pleading party to file particulars of the notice.

[2-5200] Application for further and better particulars

The most common ground on which such applications are made is that a pleading, including such particulars as it may contain, fails to serve the notice function of pleading, that is, the need to inform the opposite party of the case to be met.

The order may provide that the specified particulars be supplied by filing an amended pleading containing the required particulars or that the particulars be supplied by letter. The former course is in strict accord with r 15.1. The alternative (by letter) is supported by the court's power to give directions generally: CPA s 61; and for the conduct of proceedings: CPA s 58. Which course to adopt will depend on the circumstances. Where the particulars in question are extensive or fundamental to the case, it may be preferable to require an amended pleading to be filed.

The following sample orders are provided. (These can be varied to require the particulars to be supplied by letter).

Sample orders

I order that, by [..... *time*] on [..... *date*], the plaintiff file an amended statement of claim including particulars of the facts relied on in support of paragraph [number] of the statement of claim.

I order that, by [..... *time*] on [..... *date*], the plaintiff file an amended statement of claim including particulars of the facts relied on in support of the allegation made in paragraph [..... *number*] of the statement of claim that [specifying the allegation, such as that the defendant was negligent].

I order that, by [..... *time*] on [..... *date*], the plaintiff file an amended statement of claim including the particulars sought in the defendant's notice of motion filed on [..... *date*].

I order that, by [..... *time*] on [..... *date*], the plaintiff file an amended statement of claim including the particulars sought in the letter from the defendant's solicitor to the plaintiff's solicitor dated [..... *date*].

I order that, by [..... *time*] on [..... *date*], the plaintiff file an amended statement of claim including the following particulars of the agreement alleged in paragraph [..... *number*] of the statement of claim:

(a) Whether the alleged agreement was express or implied or partly express and partly implied

(b) Insofar as the alleged agreement was express, whether the agreement was in writing or oral or partly in writing and partly oral

(c) Insofar as the alleged agreement was in writing, identifying the documents relied on

(d) Insofar as the alleged agreement was oral, when, where and by whom on behalf of the parties respectively the relevant utterances were made and, in substance, the oral terms of the agreement

(e) Insofar as the alleged agreement was implied, the facts and any statute law relied on as giving rise to the implication and, in substance, the implied terms of the agreement.

[2-5210] Striking out a pleading

See "Summary disposal and strike out applications" at [2-6900].

[2-5220] Leave to amend a pleading

See "Amendment" at [2-0700].

[2-5230] Where evidence is led or sought to be led outside the case pleaded and particularised

The appropriate response depends on the circumstances.

- The court may refuse to allow evidence to be lead outside the case pleaded and particularised, if an amendment should, in justice, not be allowed.
- The pleadings may be amended (if appropriate, on terms as to adjournment or as to costs or otherwise), if an amendment should, in justice, be allowed.
- Where the case has been conducted on a basis outside the pleadings and particulars, the court should decide the case as litigated.

The following judicial statements may be noted.

> Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings … But where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed … though a failure to amend particulars to accord precisely with the facts which have emerged in the course of evidence does not necessarily preclude a plaintiff from seeking a verdict on the cause of action alleged in reliance upon the facts actually established by the evidence.: *Dare v Pulham* (1982) 148 CLR 658 at 664.

> The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.: *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287.

Legislation

- *Civil Liability Act 2002* ss 5O, 42
- CPA ss 58, 61
- *Property (Relationships) Act 1984*
- *Workers Compensation Act 1987* s 151Z(1)(a)

Rules

- UCPR Pt 14, Div 2, Div 4, Div 6, 14.4–14.15, 14.17, 14.19, 14.21–14.27, 14.30–14.40, Pt 15, Div 2, Div 4, 15.1–15.32

[The next page is 1885]

Parties to proceedings and representation

[2-5400] Application

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

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

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

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

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

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

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

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

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

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

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

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

[2-5430] Issue of subpoena

A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is issued is represented by a solicitor in the proceedings: r 7.3(1). Leave may be given

generally or in relation to a particular subpoena or subpoenas: r 7.3(2). A subpoena may not be issued in relation to proceedings in the Small Claims Division of the Local Court except by the leave of the court: r 7.3(3).

[2-5500] Representative proceedings in the Supreme Court

Last reviewed: December 2024

General

Following amendments to the CPA in 2011, a new regime which echoed the provisions of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) was enacted. (See Supreme Court Practice Note, SC Gen 17, concerning representative proceedings, commenced 1/8/2024). Part 58 of the UCPR was inserted to make provision for opt out notice requirements together with Form 115, which may be downloaded from the Supreme Court website.

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

Claims under industrial awards

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

Commencement of representative proceedings

Proceedings can be commenced in the Supreme Court by seven or more people who have claims against the same person or persons. The claims must arise out of the same, similar or related circumstances and the claims must give rise to " ... *a substantial common question of law or fact* ...": s 157(1). There is no basis to construe this phrase narrowly. A question can be common even if different evidence is adduced in respect of each aspect of the claim: *Nguyen v Rickhuss* [2023] NSWCA 249 at [27].

The person who commences the proceedings, known as the representative party, must have standing to commence representative proceedings on behalf of other persons. It is sufficient if the representative party has standing to commence proceedings on his or her own behalf: s 158(1).

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

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

The originating process must describe or otherwise identify the group members, specify the nature of the claims and the relief claimed, and the question of law or facts common to the claims. It is not necessary to name or specify the number of the group members: s 161. At the same time as the originating process is filed and served, the plaintiff's solicitor must file and serve a Class Action Summary Statement providing basic information about the proceedings: see Supreme Court Practice Note, SC Gen 17 at [12].

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

Specification of one or more substantial common questions of fact or law in the originating process is important. These common questions provide the backbone of the proceedings and "careful compliance" is "of the greatest importance", per Lindgren J in *Bright v Femcare Ltd* [2002] FCAFC 243 at [14].

Group members are given the option to opt out of representative proceedings in the Court: s 162. The opt-out nature of the regime has long been recognised to be an important aspect of the legislative regime: *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1 at [39]–[40] (on the equivalent federal legislation); approved in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [73] and noted in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 at [77]–[79].

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

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

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

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

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

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

Case management of representative proceedings

The representative proceedings are case managed by a judge of the Division in which they are commenced. (See [2-0000]ff as to case management.)

The management of representative proceedings is discussed in *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26 at [4]–[10] and in *Bright v Femcare Ltd* [2002] FCAFC 243 at [160].

In circumstances where an initial hearing will not determine all claims of all group members, it is appropriate to identify, in advance of the hearing, for reasons, at least, of procedural fairness, the questions which appear to be common from a consideration of the pleadings, and, where relevant,

evidence which it is intended to adduce. This procedure involves making what are known as "Merck Orders": *Merck* at [4]–[10]; *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 at [66] and *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383.

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

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

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

See also *Giles v Commonwealth of Australia* [2014] NSWSC 83 and *Wigmans v AMP Ltd* (2021) 270 CLR 623 at [116].

Settlement/discontinuation of proceedings

Representative proceedings may not be settled or discontinued without leave of the court: s 173(1). Unless otherwise ordered, an application for approval by the Court of a settlement or discontinuance of proceedings must be made by notice of motion in the proceedings: Supreme Court Practice Note, SC Gen 17 at [32]. The court may make orders as to the distribution of settlement moneys: s 173(2). The court's approval under s 173 is a discretionary decision, and therefore can only be disturbed if a *House v The King* error[1] is established: *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378 at [2], [9]–[10], [76]. As to settlement offers to group members, see *Courtney v Medtel Pty Ltd* [2002] FCA 957, per Sackville J at [64]. For a detailed discussion concerning the fairness and reasonableness of an overall settlement sum, see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche (No 2)* [2006] FCA 1388 at [42]–[64]. The central question for the court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole. The court's role in relation to group members is supervisory and protective, analogous to that which it assumes when approving settlements on behalf of persons with a disability: *Findlay v DSHE Holdings Ltd* [2021] NSWSC 249 at [12]–[14]. See also *Ellis v Commonwealth* [2023] NSWSC 550 at [7], [17]–[18]. Cases decided under the equivalent s 33V *Federal Court of Australia Act 1976* (Cth) include: *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 at [62]; *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 at [8].

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

Competing representative proceedings in relation to the same controversy

There is no provision in Pt 10, CPA that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. Where seven or more persons have claims against the same person, and the conditions in s 157(1)(b) and (c) are met, s 157

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

permits "one or more" of those persons to commence proceedings representing some or all of them. However as per Supreme Court Practice Note, SC Gen 17 at [25] "Competing class actions", the lawyers for the parties are to inform the Court upon becoming aware that a competing class action has been filed in the Supreme Court, the Federal Court or in another Court. Lawyers should familiarise themselves with any relevant protocol: for example, Federal Court, *Protocol for communication and cooperation between Supreme Court of New South Wales and Federal Court of Australia in class action proceedings*, November 2018.

Provisions in Pt 10, such as ss 171 and 162, do not detract from the Supreme Court's power under s 67 to stay competing representative proceedings or impose any limitations: *Wigmans v AMP Ltd* (2021) 270 CLR 623 at [78].

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

Notices

Part 10, Div 3 concerns notices. Section 175 provides for notices that must be given in representative proceedings. Generally, the court has a wide power to order that notice of any matter be given to the group or individual members: s 175(5). Section 175(5) is informed by s 175(6) in at least two respects. First, it must be related to an "event" and that "event" is one that must have occurred prior to the giving of the notice. The point of notification is to advise group members of *events* in the litigation so that they may exercise their rights in an informed way: *Pallas v Lendlease Corp Ltd* (2024) 114 NSWLR 81 at [32], [112], [119] per Bell CJ (Gleeson, Leeming and Stern JJA agreeing; cf Ward P at [137]). In this case, the proposed notification was held not to be of any event but of a present intention on the part of the respondent to participate in settlement negotiations in a particular way and was therefore invalid: [32], [112], [118]–[119].

The court must specify who is to give the notice and the way in which the notice is to be given: s 176(2). Any conditions and compliance periods must also be clearly specified in the order. Pursuant to s 175(6), notices must be given as soon as practicable after the happening of the event to which it relates.

Specifically, notices must be given for the following:

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

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

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

Powers of the Court

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

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

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

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

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

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

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

In related litigation in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*, a five-judge bench of the Court of Appeal held that an order for "class closure" which in effect destroyed a person's cause of action within the limitation period, without a hearing and with no guarantee that the person would necessarily know of the outcome or consequence of their failure to register, was not an order that was "necessary to ensure that justice is done in the proceedings" or "appropriate … to ensure that justice is done in the proceedings": at [12] The court held that the scheme of Pt 10 of the CPA is inconsistent with an interpretation of s 183 which empowered the Supreme Court to make an order effecting "class closure". In so finding, the Court of Appeal analysed and followed the construction of Pt 10 of the *Civil Liability Act* preferred by the majority

of the High Court in *BMW Australia Ltd v Brewster*: at [99]. See also *Wigmans v AMP* (2020) 102 NSWLR 199 at [79], followed in *Pallas v Lendlease Corp Ltd* [2024] NSWCA 83 at [124]–[125] (Bell CJ, Ward P and Gleeson, Leeming and Stern JJA agreeing); *Parkin v Boral Ltd* [2022] FCAFC 47 (considering equivalent federal legislation) disapproved.

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

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

Appeals

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

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

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

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

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

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

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

[2-5540] Judgments and orders bind beneficiaries

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

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

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

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

[2-5550] Interests of deceased persons

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

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

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

Sample orders

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

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

[2-5560] Order to continue

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

[2-5570] Executors, administrators and trustees

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

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

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

[2-5580] Beneficiaries and claimants

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

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

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

[2-5590] Joinder and costs

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

[2-5600] Persons under legal incapacity

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

[2-5610] Business names

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

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

[2-5620] Defendant's duty

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

[2-5630] Plaintiff's duty

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

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

[2-5640] Relators

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

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

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

[2-5650] Appointment and removal of solicitors

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

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

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

[2-5660] Adverse parties

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

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

[2-5670] Change of solicitor or agent

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

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

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

[2-5680] Removal of solicitor

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

[2-5690] Appointment of solicitor by unrepresented party

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

[2-5700] Withdrawal of solicitor

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

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

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

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

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

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

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

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

[2-5710] Effect of change

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

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

[2-5720] Actions by a solicitor corporation

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

Legislation

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

Rules

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

Practice Note

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

[The next page is 1951]

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]. As stated in UK case Pearson v Naydler [1977] 1 WLR 899 at 902: "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". 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

Last reviewed: December 2024

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).

(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]. In *Vintage Marine Art Pty Ltd v Henderson & Cremer (No 2)* [2019] NSWCA 252 at [17], Brereton JA held that "the principle that security for costs should not be allowed to stultify proceedings has to be given practical effect" and "[i]ts rationale is not that an impecunious litigant should be forced to conduct proceedings on a shoestring or without lawyers". This case was applied in *Suchand Pty Ltd v Colbran and Stone as Receivers and Managers of Suchand Pty Ltd* [2024] NSWCA 250 where Stern JA held at [64]–[73] that whilst an undertaking from an impecunious director of an impecunious company to pay any adverse costs order may be an answer to an application for security for costs, it will not necessarily be determinative. It is a factor, which can be assessed as a powerful one, to be considered together with the risk of stultification of the proceedings: *Jazabas Pty Ltd v Haddad* [2007] NSWCA 291 at [74]–[80]; *Prynew Pty Ltd v Nemeth* [2010] NSWCA 94 at [44]–[45].

(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: s 60 CPA; r 42.21(1A)(k)

Section 60 CPA provides that: "In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute." 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. See also *Interslice Pty Ltd v CCA Investments — Bass Hill Pty Ltd* [2024] NSWCA 247 at [12]ff, which considered the proportionality principle in s 60 CPA.

(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

Last reviewed: December 2024

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] NSWCA 291 (security ordered as shareholders were not prepared to provide formal undertaking to meet costs). However, although an undertaking from an impecunious director of an impecunious company is a powerful consideration for declining to make an order for further security (*Vintage Marine Art Pty Ltd v Henderson & Cremer (No 2)* [2019] NSWCA 252 at [28]), such an undertaking must be considered alongside other relevant discretionary considerations and will not be an answer to an application for security for costs in every case: *Suchand Pty Ltd v Colbran and Stone as Receivers and Managers of Suchand Pty Ltd* [2024] NSWCA 250 at [74]–[75]; *Aquatic Air Pty Ltd v Siewart* [2016] NSWCA 130 at [25]. As various cases show, one factor of relevance to the weight to be given to an undertaking by a person standing behind a corporate plaintiff is whether that undertaking will provide effective security to a "captive" defendant: *Suchland* at [74]; *Prynew Pty Ltd v Nemeth* [2010] NSWCA 94 at [45]–[46]. The impecuniosity of the person offering an undertaking to pay any costs order made against a corporate plaintiff may be a reason why such an undertaking would not be determinative: *Suchand* at [75]; *Elip Pty Ltd v Arch Finance Pty Ltd* [2020] NSWSC 752.

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*, 5th edn, LexisNexis Butterworths, Sydney, 2021
- NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, accessed 24/4/23
- P Blazey and P Gillies, "Recognition and Enforcement of Foreign Judgments in China", *International Journal of Private Law*, Macquarie University, 2008, (cited in *Chen v Keddie* [2009] NSWSC 762 at [18]).

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Separate determination of questions

[2-6100] Sources of power

The court may give directions as to the order in which issues of fact are to be tried: CPA s 61.

The court may make orders for the separate decision of any question of fact or law, or mixed fact and law, and whether such a separate decision is to be decided before, after, or at any trial or further trial in the proceedings: r 28.2.

The court may order separate trials where the joinder of parties or causes of action may embarrass, inconvenience or delay the conduct of the proceedings: r 6.22.

The court has an incidental power to control its own procedures.

Ordinarily, a judge will need to look no further than r 28 which is in comprehensive terms.

[2-6110] Relevant principles and illustrations

The "Guiding Principles" in CPA ss 56–60 apply.

Preliminary questions may be questions of law, questions of mixed law and fact, or questions of fact; where facts are involved they may be assumed for the purposes of the preliminary determination, or agreed as correct, or requiring determination: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [52]–[53].

A separate determination may result in a substantial saving in time and costs. However, the risk of unforeseen complications is well recognised and demands caution.

A separate determination should be ordered only if the utility, economy and fairness to the parties of a separate hearing is beyond question: *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at [170].

Cases where a separate hearing may be appropriate include the following.

(a) Where the determination will dispose of the proceedings completely if the decision goes a certain way: *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 607.

(b) Where the determination would not have this result, but where the parties would then be likely to settle the proceedings as a whole: *CBS Productions Pty Ltd v O'Neill*, above, at 607.

(c) Where the question is common to a number of pending cases and would otherwise have to be decided more than once: *Kosciusko Thredbo Pty Ltd v State of New South Wales* [2002] NSWSC 216.

(d) Where the nature or extent of damage is not yet clear, typically in personal injury cases involving infants, where it may also be that negligence is to be decided by reference to contemporary practices and standards: *Thomas v Oakley* [2003] NSWSC 1033.

A separate hearing will not be appropriate where the separate question requires, or may require, a decision concerning the credit of witnesses who are likely to be witnesses at a later hearing in the proceedings, if a later hearing is required: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411. Nor is it appropriate when the basis upon which the matter is put before the court does not allow the court to resolve either way the matter in a final and determinative way: *Tyrrell v The Owners Corporation Strata Scheme 40022* [2007] NSWCA 8 at [16]. In *Tyrrell* the distinction is made between "assumed facts" and "agreed facts". Where the separate issue to be determined involves a mixed question of fact and law, it is inappropriate to rely upon "assumed facts". The parties should agree on the facts so far as they can and, if necessary, present evidence to permit a fact-finding exercise on the part of the judge: *Tyrrell* at [12], [13].

As to the use of separate determinations relating to limitations issues, see *Guthrie v Spence* (2009) 78 NSWLR 225 at [16]–[19]. As to the use of separate determinations relating to issues of immunity from suit, see *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335 and *Young v Hones* [2014] NSWCA 337. However see also, *Nikolaidis v Satouris* (2014) 317 ALR 761 at [12], where Barrett JA said the position was "unsettled". As to the use of separate determinations in defamation matters, see *Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Co Ltd* [2018] NSWCA 95 at [1]; [3]; [131]–[132].

[2-6120] Procedural matters

The application for an order for a separate determination should be by motion which should specify the question for decision with precision: *Rajski v Carson* (1988) 15 NSWLR 84 at 88C–D. The question should be so framed that it can be answered "Yes" or "No".

See rr 28.3 and 28.4 as to the need to cause the decision to be recorded or to give such judgment or make such order as the nature of the case requires, particularly where the determination disposes of the whole or part of the proceedings or renders any further hearing unnecessary.

For separate determinations in defamation proceedings, see *Ritchie's* at [28.4.30].

For separate trial of a cross-claim, see r 9.8.

[2-6130] Suggested form of order for a separate determination

Sample order

I order that the question specified in the [*party*]'s notice of motion dated [.....] be determined separately from any other question in the proceedings and before any further trial of the proceedings.

[2-6140] Suggested form of determination and any consequential order

Sample order

I answer the separate question referred to in the order made on [.....] as follows. Yes/No.

I direct the entry of judgment for the [*party*] with costs (or as may be appropriate).

Legislation

- CPA ss 56–60, 61

Rules

- UCPR rr 6.22, 9.8, 28.2–28.4

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Issues arising under foreign law

[2-6200] Filing of notice

A party who contends that an issue in proceedings in the Supreme Court is governed by foreign law must file and serve a "foreign law notice" setting out the relevant principles of foreign law and their application within six weeks: r 6.43(1)–(2).

A party served who disputes the principles of foreign law or their application must file and serve a "dispute as to foreign law notice" within eight weeks of service: r 6.43(3)–(4).

[2-6210] Orders

The Supreme Court may, on the application of one or more of the parties and with the consent of all the parties, order that proceedings be commenced in a foreign court in order to answer a question as to the principles of foreign law or their application: r 6.44(1).

The Supreme Court may on the application of one or more of the parties or of its own motion, order that the questions of foreign law be answered by a referee appointed in accordance with UCPR, Pt 20 Div 3: r 6.44(2). See *Marshall v Fleming* [2014] NSWCA 64.

See r 6.44(3) and (4) as to the content of the order to be made of directions that may be given.

[2-6220] Determination of issues arising in foreign court proceedings

Proceedings for determination of an issue of Australian law in respect of which the Supreme Court may exercise its jurisdiction and which is relevant to proceedings in a foreign court may be commenced by summons seeking a declaration of the answer to a question in the form determined by the foreign court.

[2-6230] Evidence obtained on commission for proceedings in another court or tribunal

A foreign court of tribunal may apply for an order for evidence to be obtained in NSW pursuant to Pt 4 of the *Evidence on Commission Act 1995* (NSW) for the purposes of proceedings outside NSW. Conversely, the Act provides for the taking of evidence outside NSW for the purposes of proceedings in NSW. Part 4 enacts as a law of NSW the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 847 UNTS 231. Part 4 follows the terminology of the *Evidence (Proceedings in Other Jurisdictions) Act 1975* (UK) and has been adopted as uniform legislation in Australia.

If an application is made under s 32, the Supreme Court has power to make an order under s 33 for taking evidence on oath in the State as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made. The preconditions to the exercise of the court's power are specified in s 32 of the Act. The order is not of an interlocutory nature.

The court may, under s 33(3), make an order:

(a) for the examination of witnesses, either orally or in writing,

(b) for the production of documents,

(c) for the inspection, photographing, preservation, custody or detention of any property,

(d) for the taking of samples of any property and the carrying out of any experiments on or with any property,

(e) for the medical examination of any person,

(f) without limiting para (e), for the taking and testing of samples of blood from any person.

The evidence permitted to be obtained under the *Evidence on Commission Act* in compliance with a request by a foreign court or tribunal is restricted to evidence for use in a trial, thereby excluding the obtaining of evidence which might lead to the procurement of evidence: *British American Tobacco Australia Services Ltd v Eubanks for the United States of America* (2004) 60 NSWLR 483 at [22]; [45].

Section 33(6), in general terms, prohibits an order being made requiring a person to provide discovery of documents: see further *British American Tobacco Australia Services Ltd v Eubanks for the United States of America* at [24]–[26]; *Application by the Attorney General of NSW* [2020] NSWSC 1007 at [5].

Legislation

- *Evidence on Commission Act 1995* (NSW), ss 32, 33

Rules

- UCPR, rr 6.43(1)–(4), 6.44(1)–(4)

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Judgments and orders

[2-6300] Introduction

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

[2-6310] Duty of the court

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

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

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

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

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

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

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

[2-6320] Consent orders

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

[2-6330] All issues

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

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

[2-6340] Cross-claims

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

[2-6350] Effect of dismissal

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

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

[2-6360] Possession of land

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

[2-6370] Detention of goods

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

[2-6380] Set off of judgments

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

[2-6390] Joint liability

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

[2-6400] Delivery of judgment

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

[2-6410] Written reasons

Last reviewed: June 2025

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

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

Reasons may be delivered at some time after delivery of judgment rather than, as Samuels JA said in *Palmer v Clarke* (1989) 19 NSWLR 158, at that time. While the words in r 36.2 "After a judgment" combined with … "must then be delivered" suggests that it is necessary for the reasons to be delivered with a degree of contemporality, the rule does not specify the limit of any timeframe that might be permissible. In *Rock v Henderson (No 2)* [2025] NSWCA 47, the Court of Appeal stated that if the giving of reasons is postponed, then the obligation must be an obligation to give reasons as soon as reasonably practicable after judgment is delivered: at [60]. If a delay is de minimis and of no consequence, it would not be in breach of r 36.2. Each case depends on its particular circumstances: *Irlam v Byrnes* [2022] NSWCA 81 at [119]–[122]; *Rock v Henderson (No 2)* at [60].

In *Rock v Henderson (No 2)*, it was held that although the primary judge did not deliver the reasons for her decision as soon as practicable, no further orders were required to address the error arising from the primary judge's delay of three months and four days between the delivery of orders and provision of reasons. The Court deemed the only apparent reason for the delay, being that the judge was under some pressure to deliver a decision and chose to do so well in advance of finalising her written reasons, to be "not a satisfactory reason": at [63]. However, there was no reason to think that the delay in delivering reasons affected the contents of those reasons and although the delay meant the appellant was unable initially to formulate grounds of appeal, that problem was overcome by the filing of an amended notice of appeal once the reasons became available: at [65]. The Court agreed with the approach taken in *Mulvena v Government Insurance Office of NSW* (Court of Appeal (NSW), unrep, 16 June 1992) that a remedy should be confined to what is necessary to rectify the error; the parties should only be put to the cost and inconvenience of a retrial if that is the only way of rectifying the consequences of the error: *Rock v Henderson (No 2)* at [48], [64].

[2-6420] Deferred reasons

Last reviewed: June 2025

While the Supreme Court has an inherent power to make orders and give reasons later, whether oral or written (*King Investment Solutions Pty Ltd v Hussain* (2005) 64 NSWLR 441), the District Court and Local Court do not have that power and must comply with the relevant legislation: *Palmer v Clarke* (1989) 19 NSWLR 158 at 165; *Cumming v Tradebanc International Ltd* [2002] NSWSC 70 at [38]–[58]. However the Court of Appeal noted in *Rock v Henderson (No 2)* [2025] NSWCA 47 that the oral tradition of the common law has been modified substantially at least in civil cases in the Supreme Court, District Court and Local Court since *Palmer*: at [55]. The Court doubted why the law should impose different obligations on the Supreme Court and District Court in this regard. For example, there is nothing in the *District Court Act 1973* which imposes particular obligations on the District Court in relation to the timing or content of reasons — those obligations are left to the common law: at [58]–[59].

[2-6430] Reserved judgment

If a judicial officer reserves judgment or decision on any question, that judgment or decision may be given either in open court or in the absence of the public, or reduced to writing, signed and forwarded

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

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

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

[2-6440] Reasons for judgment

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

The obligation to give adequate reasons is well established. The need for transparency in decision-making and what is required in any particular case is discussed in numerous authorities, including: *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [56], citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 260 and *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444. Concision in judgments is desirable, but not if it comes at the expense of failing to give adequate reasons: *Cavanagh v Manning Valley Race Club Ltd* [2022] NSWCA 36 at [24]. See also *Rialto Sports Pty Ltd v Cancer Care Associates Pty Ltd* [2022] NSWCA 146 at [59]–[64] (judge failed to consider material arguments and relevant evidence on substantial issues and judge's reasons were patently insufficient in being "strikingly short" and failed to explain a preference for one expert's evidence over another); *The Nominal Defendant v Kostic* [2007] NSWCA 14 (failure to provide adequate reasons regarding medical evidence); *Whalan v Kogarah Municipal Council* [2007] NSWCA 5 (judge's reasons did not engage with the case presented by plaintiff). As to reasons for demeanour findings, see *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186. As to amendments or additions to ex tempore reasons, see *Spencer v Bamber* [2012] NSWCA 274.

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

Judges in NSW should not use Generative AI (Gen AI) in the formulation of reasons for judgment or the assessment or analysis of evidence preparatory to the delivery of reasons for judgment. Gen AI also should not be used for editing or proofing draft judgments, and no part of a draft judgment should be submitted to a Gen AI program: see Guidelines for NSW Judges in Respect of Use of Generative AI at [4] and [5] (issued by the Chief Justice of NSW on 21/11/2024).

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

See commentary at [2-6600].

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

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

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

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

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

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

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

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

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

[2-6480] Arrest warrants

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

[2-6490] Entry of judgments and orders

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

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

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

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

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

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

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

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

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

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

Legislation

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

Rules and guidelines

- UCPR rr 36, 40.7
- Supreme Court of NSW, Guidelines for NSW Judges in Respect of Use of Generative AI, issued by the Chief Justice of NSW on 21/11/2024.

Further references

- P Taylor (ed), *Ritchie's Uniform Civil Procedure*, LexisNexis Butterworths, Australia, 2023 [s 20.5]–[s 20.25], [36.1.10], [36.4.7], [s 93.5]–[s 93.15], [s 95.5]–[s 95.25]
- J Hamilton, G Lindsay and C Webster (eds), *NSW Civil Practice and Procedure*, Thomson Reuters, Australia, 2023 [s 20.20]–[s 20.40], [r 36.4.60], [r 36.11.61]–[r 36.11.80], [r 36.14.40], [s 93.40], [s 95.20]
- D Lloyd, "How to develop effective judgment writing", October 2021, *Handbook for Judicial Officers*, accessed 16/4/2025
- J Raymond, "Five ways to improve your judgment writing", October 2021, *Handbook for Judicial Officers*, accessed 16/4/2025
- M Weinberg, "Adequate, sufficient and excessive reasons", October 2021, *Handbook for Judicial Officers*, accessed 16/4/2025.

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Setting aside and variation of judgments and orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2-6625] Postponement of effect of entry

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

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

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

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

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

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

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

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

[2-6640] Default judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2-6670] Interlocutory order

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

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

[2-6680] The slip rule

Last reviewed: June 2025

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

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

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

The rule extends to matters overlooked, such as specifying a date for compliance with an order (*Re Walsh* (1983) 83 ATC 4147), or adding an amount for interest to the judgment (*L Shaddock and Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590), or varying orders to distinguish interest from capital and specify the dates from which the interest ran, along with specifying the individual amounts to be paid to separate appellants (*Care A2 Plus Pty Ltd v Pichardo (No 2)* [2024] NSWCA 210); or where the judge has misunderstood the evidence (*Hall v Harris* (1900) 25 VLR 455 at 457) or counsel's submissions (*Yore Contractors Pty Ltd v Holcon Pty Ltd* (unrep, 17/7/89, NSWSC)); or to correct errors which may be typographical (*Aurora Australasia Pty Ltd v Hunt Prosperity Pty Ltd (No 2)* [2025] NSWCA 62 at [33]).

The rule also extends to a correction made in order to carry into effect the actual intention of the judge and/or to ensure that the order does not have a consequence which the judge intended to avoid adjudicating upon: *Newmont Yandal*, above, at [114], [116], [185], [194]; *Aurora Australasia Pty Ltd v Hunt Prosperity Pty Ltd (No 2)* at [33]–[35].

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

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

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

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

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

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

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

Last reviewed: December 2023

Courts are empowered to correct obvious drafting errors in all legal documents, including primary and delegated legislation: *Coal & Allied Operations Pty Ltd v Crossley* (2023) 112 NSWLR 130 at [43]–[54]; *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627. In *Coal & Allied Operations Pty Ltd v Crossley*, the Court of Appeal was not required to quash the decision and remit the matter but was empowered to correct an obvious drafting error by reading $36 as $3 per scanned page in the scale of costs: at [69].

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

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

[2-6700] Denial of procedural fairness

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

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

Regarding denial of procedural fairness by failure to disclose judicial reasoning, see *Lichaa v Boutros* [2021] NSWCA 322 at [48]–[50]. See also *Williams v Harrison* [2021] NSWSC 1488,

where a self-represented plaintiff was denied procedural fairness because he was not heard when he had a right to be heard and, as well, the magistrate failed to give reasons when obliged to do so: at [28].

[2-6710] Fraud

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

[2-6720] Liberty to apply

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

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

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

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

[2-6730] Self-executing orders

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

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

[2-6735] Consent orders

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

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

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

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

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

Legislation

- CPA ss 56, 63, 73

Rules

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

[The next page is 2181]

Summary disposal and strike out applications

[2-6900] Summary disposal

The courts have power to terminate proceedings at an early stage where either the plaintiff or defendant has no prospect of success, without putting the other party to the expense and delay of a full trial of the proceedings or the preliminary steps involved in preparing for such a trial such as discovery, interrogatories and inspection of property.

These powers, which apply in all courts, may be summarised as follows:

- the power to enter judgment for a plaintiff pursuant to UCPR r 13.1
- the power to summarily dismiss proceedings pursuant to r 13.4
- the power to dismiss proceedings for non-appearance of the plaintiff at the hearing pursuant to r 13.6
- the power to strike out pleadings pursuant to r 14.28
- the court's inherent power to prevent abuse of its process.

The exception to this is the Small Claims Division of the Local Court. The only power which the Small Claims Division has is to strike out pleadings pursuant to r 14.28.

See generally *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 940–944.

Remedy discretionary

Summary judgment and summary dismissal are discretionary remedies and although detailed argument may be necessary to determine the hopelessness of the respondent's case, the more complex and arguable the legal point, or the more dependent it may be on debatable factual premises, the less likely that summary disposal will be appropriate, particularly if the relevant law is in a state of development: *NRMA Insurance Ltd v AW Edwards Pty Ltd* (1995) 11 BCL 200. Where there are multiple parties, the desirability of proceedings against all parties being heard before removing one party may constitute a reason for refusing summary judgment: *NRMA Insurance Ltd v AW Edwards Pty Ltd*, above.

As to applications for summary judgment in cases where a defendant seeks to rely on the *Contracts Review Act 1980*, see *Ritchie's* at [13.1.40].

Generally

Although its use is appropriate in a variety of circumstances provided they come within the principles set out above, the procedure of summary judgment or dismissal is particularly useful in cases where irrelevant and extravagant claims are made in pleadings by a party (often unrepresented), and the other party will be put to considerable expense in providing evidence to refute such irrelevant and extravagant allegations. On the other hand, where there can be no dispute on the facts, there is often little point in an application for summary disposal and the preferable course is to proceed expeditiously to a final hearing.

Further proceedings

If a party against whom summary judgment is given has made a cross-claim against the party obtaining the judgment, the court may stay enforcement of the judgment until determination of the cross-claim: r 13.2.

If on an application for summary judgment, the proceedings are not wholly disposed of by the judgment, the proceedings may be continued as regards any claim or part of a claim not disposed of by the judgment: r 13.3.

[2-6910] Summary judgment for plaintiff

Rule 13.1 provides that, if on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:

(a) there is evidence of the facts on which the claim or part of the claim is based, and

(b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

In order to succeed on such an application, the plaintiff must adduce evidence (on affidavit):

- to establish the facts justifying the claim to relief, and
- from the plaintiff or some responsible person that in his or her belief, the defendant has no defence to the claim or part thereof, or except as to the amount of damages, and
- if the claim for summary judgment is disputed, to show that there is no real issue to be tried.

The rules of the various courts formerly provided that applications for summary judgment were not available in respect of claims for fraud, defamation, malicious prosecution or false imprisonment. No such restriction exists under the UCPR.

Where the plaintiff's entitlement to judgment is clearly established, but the amount of damages or the value of the goods the subject of the proceedings remains to be determined, the court may give judgment for damages to be assessed: r 13.1(2).

When entering judgment for the plaintiff under r 13.1, it is desirable to deal not only with the costs of the motion for summary judgment, but also with the costs of the proceedings so far.

No issue to be tried

The plaintiff must show that any defence intended to be relied on is untenable and cannot possibly succeed. See generally *Spellson v George* (1992) 26 NSWLR 666 at 678–679 per Young AJA, with whom Handley JA and Hope AJA agreed. Summary judgment will not be granted where there is any serious conflict as to a matter of fact (*Sidebottom v Cureton* (1937) 54 WN (NSW) 88), or any question of credit involved: *Bank of New South Wales v Murray* [1963] NSWR 515. The power to order summary judgment should be exercised with great care, and not unless it is clear that there is no real question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

In practice, the test applied to summary judgment applications by plaintiffs is the same as that applied to summary dismissal applications by defendants. That test is that "the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion". The test has been variously expressed, including "so obviously untenable that it cannot possibly succeed", "manifestly groundless", etc: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–129 per Barwick CJ. See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 at 514; *Webster v Lampard* (1993) 177 CLR 598 at 602–603; *Cosmos E-C Commerce Pty Ltd v Sue Bidwell & Associates Pty Ltd* [2005] NSWCA 81 at [37]–[38].

Summary disposal is not limited to cases where argument is unnecessary to show the futility of the claim or defence, and argument, even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff (or of the defendant) is so clearly untenable that it cannot possibly succeed: *General Steel Industries v Commissioner for Railways (NSW)*, above, at 130. The court will determine questions of law on such applications if satisfied that the point is clear: *Silverton*

Ltd v Harvey [1975] 1 NSWLR 659 at 665. It follows that the court examines the evidence, not for the purpose of making findings of fact, but only to determine whether a triable issue is disclosed: *Wickstead v Browne* (1992) 30 NSWLR 1 at 9.

Belief that no defence

The requirement in r 13.1(1)(b) for evidence from the plaintiff or some responsible person of belief that the defendant has no defence, does not require any particular form of words. The requisite belief must be established, but that can be done by an inference properly drawn from evidence furnished by the plaintiff or other responsible person; opinion, as opposed to belief, is insufficient: *Cosmos E-C Commerce Pty Ltd v Bidwell & Associates Pty Ltd*, above, at [47].

[2-6920] Summary dismissal

Last reviewed: June 2025

Rule 13.4(1) provides that, if it appears to the court that in relation to the proceedings generally or to any claim for relief:

- the proceedings are frivolous or vexatious, or
- no reasonable cause of action is disclosed, or
- the proceedings are an abuse of process,

the court may order that the proceedings be dismissed generally or in relation to that claim. On such an application, the court may receive evidence: r 13.4(2).

For the impact of CPA s 56 on the test under r 13.4, in that it may limit the circumstances in which the court, satisfied that the power is available, might be inclined to refuse relief on discretionary grounds, see *Bott v Carter* [2012] NSWCA 89 at [13]–[14] (Basten JA), referred to with approval in relation to r 14.28 ("No reasonable cause of action", discussed below) in *Hitchcock v Pratt Group Holdings Pty Ltd* [2024] NSWSC 1292 at [215]–[224].

Frivolous proceedings

Neither the CPA nor the UCPR contain a definition of "frivolous". It is defined in the Shorter Oxford Dictionary as "of little or no value or importance, paltry; (of a claim, charge, etc) having no reasonable grounds; lacking seriousness or sense"; and in the Macquarie Dictionary as "of little or no weight, worth or importance; lacking seriousness or sense". In rules such as the present it is invariably used in conjunction with "vexatious".

Vexatious proceedings

In *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491, in the context of the *Supreme Court Act 1970*, s 84(1) (now repealed) (vexatious litigant), Roden J said:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

Vexatious proceedings have also been described as "proceedings intended to harass or annoy, cause delay or … taken for some other ulterior purpose or which lack reasonable grounds": B Cairns, *Australian Civil Procedure*, 11th edn, Thomson Reuters, Australia, 2016 at [3.30]. For an examination of relevant principles and the *Vexatious Proceedings Act 2008*, see *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [41], [67].

Section 84 of the *Supreme Court Act* was repealed by the *Vexatious Proceedings Act 2008* (the Act). Section 6 of the Act (as amended by the *Vexatious Proceedings Amendment (Statutory Review) Act 2018*), provides that vexatious proceedings include:

- proceedings that are an abuse of the process of a court or tribunal, and
- proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and
- proceedings instituted or pursued without reasonable ground, and
- proceedings that are conducted to achieve a wrongful purpose, or in a way that harasses, or causes unreasonable annoyance, delay or detriment, regardless of the subjective intention or motive of the person who instituted the proceedings.

Section 4 defines "proceedings" to include any civil and criminal proceedings or proceedings before a tribunal.

In practice, cases coming within para (a) of r 13.4(1) will generally also come within para (b) (no reasonable cause of action) and/or para (c) (abuse of process).

As to the power of NCAT to dismiss proceedings it considers to be vexatious under s 55(1)(b) of the *Civil and Administrative Tribunal Act* 2013 (NSW), see *Minister for Education and Early Childhood Learning v Zonnevylle* (2020) 103 NSWLR 91.

See [2-7600]ff for further information.

No reasonable cause of action

Unlike applications to strike out pleadings under UCPR r 14.28, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form, in applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the plaintiff's claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim). See generally *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 943–944.

The test for determining whether a reasonable cause of action is disclosed is that set forth in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–129 and the other cases referred to in **No issue to be tried** at [2-6910].

Where the facts are peculiarly within the defendant's knowledge, the plaintiff's claim should not be summarily dismissed because of gaps in the plaintiff's case if the necessary evidence might be obtained as a result of discovery or interrogatories: *Wickstead v Browne* (1992) 30 NSWLR 1 at 11.

Similarly, one of a number of defendants cannot be entitled to summary dismissal because of deficiencies in the plaintiff's case because, if the matter proceeds to trial, such deficiencies may be filled by evidence in the case of other defendants: *Wickstead v Browne*, above, at 11–12; *Ford v Nagle* [2004] NSWCA 33.

Abuse of process

Abuse of process can take many forms including:

- The institution of proceedings for an improper purpose, for example, to exert pressure on a former employer for reinstatement, to induce a favourable settlement of other proceedings or to extort money: *Williams v Spautz* (1992) 174 CLR 509;
- The bringing of concurrent proceedings in different courts relating to the same subject-matter: *Moore v Inglis* (1976) 50 ALJR 589; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [2003] NSWCA 192;

- An attempt to re-litigate issues which have already been determined in previous proceedings where the principles of res judicata or issue estoppel are applicable: *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198; *Stokes (by a tutor) v McCourt* [2013] NSWSC 1014, including where the applicants are claiming the same or similar loss to that previously and unsuccessfully claimed by entities under their control with the relationship between them such as to make them, in substance, privies: *Haigh v Haddad* [2025] NSWCA 28 at [61], [66]–[67], [71];
- An attempt to litigate issues which could and should have been litigated in previous proceedings: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589;
- Claims that cannot be justly determined, for example, on account of delay: *Herron v McGregor* (1986) 6 NSWLR 246 at 251; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256;
- Modest claims which will involve disproportionate costs and time to determine. Compare CPA s 60, and see *Jameel v Dow Jones & Co Inc* [2005] QB 946 at [67]–[76];
- Forum non conveniens: see "Stay of pending proceedings" at [2-2610];
- Destruction of evidence: *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523.

Whether proceedings amount to an abuse of process is a matter for the court and does not depend on any intention on the part of the alleged abusers to commit an abuse: *Haigh v Haddad* [2025] NSWCA 28 at [72]–[73]; *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 at [28].

Limitation defence

In *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 533, the majority described it as undesirable that limitation questions be decided in interlocutory proceedings, except in the clearest of cases. In *Hillebrand v Penrith Council* [2000] NSWSC 1058, Austin J relied on the former equivalent of r 13.5 to strike out a claim for relief which was clearly statute-barred.

[2-6930] Dismissal for non-appearance of plaintiff at hearing

Rule 13.6 provides that if there is no appearance by or on behalf of a plaintiff at a hearing of which he has due notice, the court may adjourn the hearing to another date and direct that not less than five days before that date, a notice of the adjournment be served on the plaintiff advising that in the event of further non-appearance the proceedings may be dismissed. If such notice has been given, and there is no appearance on the adjourned date, the court may dismiss the proceedings.

"Hearing" is defined in CPA s 3 and includes both trial and interlocutory hearing.

This rule has nothing to do with the strength or weakness of the plaintiff's case or pleadings, but only with the fact of non-appearance. It is included here only for completeness and because it occurs in Pt 13.

[2-6940] Striking out pleadings

Last reviewed: September 2024

Rule 14.28 provides that the court may strike out the whole or any part of a pleading if it discloses no reasonable cause of action or defence, etc, or has a tendency to cause prejudice, embarrassment or delay in the proceedings, or is otherwise an abuse of the process of the court.

Unlike UCPR Pt 13, applications under this rule are directed to the form of the pleading rather than to the merits, or lack thereof, of the respective parties, and if the application is successful the

order usually made is not that the proceedings be struck out or dismissed, but that the pleading or particular parts thereof be struck out, usually with leave given to file an amended document, in which case the proceedings remain on foot.

If on the other hand, the evidence establishes that, no matter how the plaintiff pleads his or her case, he or she has no arguable cause of action and cannot possibly succeed, the proceedings should be dismissed pursuant to r 13.4. See, for example, *Lin v State of NSW* [2024] NSWSC 653 at [48]–[54].

Although r 14.28(2) permits the court to receive evidence on applications under the rule, the focus of such an application is primarily on the form of the pleading and evidence will be of only limited use. It may, however, be relevant to explain the allegations or terms used in the pleading or to prove that the pleading is inconsistent with a previous judgment or admission.

Discloses no reasonable cause of action or defence

A pleading or part thereof will be struck out if the court is satisfied that even if all the allegations of fact set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action or constitute a defence. Often such applications are used in this way to determine whether the facts alleged (and for the purpose of the application assumed to be true) constitute a valid cause of action or defence.

Prejudice, embarrassment or delay

A pleading or part thereof may tend to prejudice, embarrass or delay the fair trial of the proceedings if it contains allegations which are vague or imprecise such that the other party cannot plead to such allegations specifically, or if it contains allegations that are irrelevant, unnecessary or scandalous.

See generally *Northam v Favelle Favco Holdings Pty Ltd* (unrep, 7/3/95, NSWSC) per Bryson J. See also *Lin v State of NSW* [2024] NSWSC 653 at [39]–[43], in which Chen J held at [42] it was proper to characterise the pleading (the plaintiff's ninth version) as "unintelligible, ambiguous, vague or too general" (quoting Bongiorno J in *Gunns Ltd v Meagher* [2005] VSC 251 at [57]), and that it would be inconsistent with the overriding purpose of the CPA and work considerable unfairness and injustice upon the defendant if leave were granted to the plaintiff to rely on it.

In some such cases it will be appropriate to merely strike out the offending passages, in others it will be more appropriate to strike out the whole pleading and grant leave to replead.

Before seeking on order under this rule, the solicitors for the moving party should write to the opposing solicitors pointing out the objection and inviting an amendment. Whether such a letter has been written and its response, if any, will often be relevant on the question of costs.

Abuse of process

See [2-6920] above.

[2-6950] Inherent power

Every court has an inherent power to stay or dismiss proceedings or strike out pleadings which are frivolous or vexatious or otherwise an abuse of process: *Brimson v Rocla Concrete Pipes*, above, at 944. As Cross J there pointed out in *Brimson* at 944, the equivalent power under r 13.4 (former SCR Pt 13 r 5) and the inherent power are now apparently co-extensive; and it is difficult to envisage any case where it would be necessary to rely on the inherent power rather than the rules. See also *Hillebrand v Penrith Council*, above, at [30].

[2-6960] Sample orders

Summary judgment for the plaintiff: r 13.1

I direct entry of judgment for the plaintiff for [.....] (or for damages to be assessed). I order the defendant to pay the plaintiff costs of the motion and of the proceedings to date.

Summary dismissal: r 13.4

I order that the proceedings be dismissed with costs.

Striking out of pleadings

I order that the statement of claim (or as the case may be) be struck out, grant leave to the plaintiff to file an amended statement of claim within (14) days (costs).

Striking out parts of a pleading

I order that paragraphs 7, 9 and 13 (or as the case may be) of the statement of claim and/or the words [.....] and [.....] wherever appearing be struck out. Direct the plaintiff to file an amended statement of claim in accordance with this order within 14 days (costs).

Legislation

- CPA ss 3, 60
- SCA s 84(1) (now repealed)
- *Vexatious Proceedings Act 2008*, s 6

Rules

- UCPR Pt 13, rr 13.1–13.6, 14.28

Further reference

- B Cairns, *Australian Civil Procedure*, 11th edn, Thomson Reuters, Australia, 2016

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Time

[2-7100] Reckoning of time

The calculation of time for the purposes of the Rules, or for the purpose of any judgment or order of the court, or any document in any proceedings, is governed by Pt 1, Div 2, rr 1.11–1.13, which are applicable in all courts.

If time of one day or longer is to be reckoned by reference to a given day or event, the given day or the given event is not to be counted: r 1.11(2). So that if something is ordered to be done within three days of Monday, the Monday is not counted and the thing must be done by midnight on Thursday.

If the period in question, being a period of five days or less, would include a day or a part of a day on which the registry is closed, that day is to be excluded: r 1.11(3). Part 18 r 18.4, which generally requires a notice of motion to be served at least three days before the date fixed for the motion, means that if the motion is fixed for hearing on Wednesday, the motion must be served by the previous Thursday, the three days being Friday, Monday and Tuesday, the registry being closed on the Saturday and Sunday. If the registry is closed on the Monday (for example, for a public holiday) the notice of motion must be served by the previous Wednesday.

If the last day for doing a thing is a day on which the registry is closed, the thing may be done on the next day on which the registry is open: r 1.11(4).

The rules override the reckoning of time provisions contained in the *Interpretation Act 1987*, s 36.

[2-7110] Extension and abridgment

Subject to the UCPR, the court may, by order, extend or abridge any time fixed by the rules or by any judgment or order of the court. The court may extend time either before or after the time expires, even if the application for extension is made after the time has expired: r 1.12. The discretion conferred by UCPR r 1.12 is not in terms fettered, but a plaintiff seeking an extension of time must establish a proper or adequate reason for this being granted. Proof is required of a satisfactory explanation for the delay: *Pell v Hodges* [2007] NSWCA 234 at [30]. For further discussion of r 1.12, see *Lachlan v HP Mercantile Pty Ltd* [2015] NSWCA 130 at [22].

As to the extension of time for service of a Statement of Claim see *Arthur Anderson Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)* [2009] NSWCA 104.

For a detailed discussion of the application of ss 56–60 of the CPA to an application for extension of time, see *Richards v Cornford (No 3)* [2010] NSWCA 134.

If no time is fixed by the rules or by judgment or order of the court for the doing of any thing in or in connection with any proceedings, the court may by order, fix the time within which the thing is to be done: r 1.13.

[2-7120] Time during summer vacation

The former SCR Pt 2 r 5(1), which provided that time did not run from Christmas Day until the following 9 January has not been continued under the UCPR. The equivalent former DCR Pt 3 r 4 was repealed in 1991.

Accordingly, time continues to run.

[2-7125] Time for filing appearance

The time limited for a defendant to enter an appearance is whichever is the later of 28 days after service where proceedings have been commenced by statement of claim or such other time as the

court directs for the filing of a defence, or if the defendant makes an unsuccessful application to have the statement of claim set aside, 7 days after the refusal of the application: r 6.10. A defendant who files a defence in proceedings is taken to have entered an appearance in the proceedings: r 6.9.

[2-7130] Time for service of initiating process

In the case of proceedings in the Supreme Court, the Land and Environment Court, the Dust Diseases Tribunal or the Local Court, originating process is valid for service for 6 months after the date on which it is filed: r 6.2(4)(a).

In the case of proceedings in the District Court, the originating process is valid for one month after the date on which it is filed, unless it is a statement of claim seeking relief in relation only to a debt or other liquidated claim, or if the defendant (or at least one of the defendants) is to be served outside NSW, in which case it is valid for 6 months after the date on which it is filed: r 6.2(4).

Failure to serve originating process within the time limited by these rules does not prevent the plaintiff from commencing fresh proceedings by filing another originating process: r 6.2(5).

Legislation

- CPA, ss 56–60
- *Interpretation Act 1987*, s 36

Rules

- UCPR rr 1.11–1.13, 6.2, 6.9-6.10, 18.4

Further reading

B Cairns, *Australian civil procedure*, 12th edn, Lawbook Co, 2020 at [2.1110]–[2.1130], [2.1080]–[2.1100]

[The next page is 2301]

Trial procedure

[2-7300] Over-arching discretion

Section 62(1) of the CPA provides that the court may make directions as to the conduct of any hearing, including the following:

- Directions as to the order in which evidence is to be given and addresses made: s 62(1). (This subsection is duplicated by r 29.5);
- Directions as to the order in which questions of fact are to be tried: s 62(2);
- Directions limiting the time to be taken in the examination, cross-examination or re-examination of a witness, the number of witness (including expert witnesses) that a party may call, the number of documents that a party may tender, the time that may be taken for oral submissions, that all or any part of any submissions to be in writing, the time that may be taken in presenting a party's case, or the time that may be taken by the hearing: s 62(3);
- These powers are qualified by s 62(4) which gives priority to the guarantee of a fair hearing, including a reasonable opportunity to lead evidence, to make submissions, to present a case and (except in the case of the Small Claims Division of the Local Court) to cross-examine witnesses;
- Considerations which the court may take into account in deciding whether to make a direction under the section are listed in s 62(5).

Other sections of the CPA also apply:

- s 61 (discretion to give directions for the "speedy determination of the real issues between the parties");
- s 56 (overriding purpose: "just, quick and cheap resolution of the real issues in the proceedings");
- s 58 (directions for the management of proceedings: the court to follow dictates of justice);
- s 59 (elimination of delay); and
- s 60 (proportionality relative to costs).

[2-7310] Jury trial: applications, elections and requisitions

See "Civil juries" at [3-0000].

[2-7320] Time and place of trial

Last reviewed: June 2024

Rule 29.3 provides that the court may make such order as it thinks fit for fixing the time and place of trial. The following statement of principle is taken from *National Mutual Holdings Pty Ltd v Sentry Corp* (1988) 19 FCR 155 at 162:

> [T]he test is: where can the case be conducted or continued most suitably, bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the court? It cannot and should not … be defined more closely or precisely.

For a more detailed discussion, see *Ritchie's* at [29.3.5].

The Court may permit parties or witnesses to the proceedings to give evidence and make submissions by telephone, audio visual link or other form of communication (UCPR r 31.3(1)), a decision that is "for the management of proceedings" within the meaning of CPA s 58. The usual

court etiquette, protocols, procedures and restrictions which apply to in-person hearings apply to a virtual hearing whether virtual in whole or in part: see discussion in *Wang v Yu (No 2)* [2024] NSWSC 4 at [45]–[61].

[2-7330] Adjournment

See "Adjournment" at [2-0200].

[2-7340] Change of venue

See "Change of venue and transfer between New South Wales courts" at [2-1200].

[2-7350] Party absent

Rule 29.7 applies if a party is absent when the trial is called on.

The court may proceed with the hearing or adjourn the proceedings: r 29.7(2).

If the plaintiff appears on a liquidated claim and the defendant does not, the court may take evidence and give judgment against the defendant: r 29.7(3).

In any case where the defendant appears and the plaintiff does not, the court may dismiss the proceedings: r 29.7(4).

[2-7360] Trial to deal with all questions and issues

Unless the court otherwise orders, proceedings are to be listed for trial generally, that is, for hearing of all questions and issues arising on every claim for relief in the proceedings: r 29.4.

As to the determination of issues remitted by the Court of Appeal, see *State of New South Wales v Burton* [2008] NSWCA 319.

[2-7370] The order of evidence and addresses

Rule 29.1 provides, in effect, as follows. If the burden of proof on any issue lies on the plaintiff, the plaintiff is to be the beginning party and the defendant the opposite party; if the burden of proof on all issues is on the defendant, it is the other way around. The rule is expressed to be subject to any direction of the court.

The rule prescribes which party is to adduce evidence first, subject to any direction of the court. The rule also serves as a definition clause. In Pt 29, the terms "beginning party" and "opposite party" have the meanings given to them in the rule.

More particular provisions concerning the order of evidence and of addresses appear in r 29.6. The provisions of that rule are clear but intricate. Nothing would be served by quoting them here.

The rule provides that, in the case of multiple parties, the order of evidence and addresses is to be according to the rule subject to modification as required. The general rule of practice where there is more than one defendant is that counsel for the first defendant addresses first, and so on.

It should be stressed that the procedural scheme laid down by r 29.6 is expressed to be subject to any direction by the court. As an example see *Keramianakis v Regional Publishers Pty Ltd* (2007) 70 NSWLR 395 at [54]–[62].

In particular, the provisional order of final addresses may be altered where, as is usually the case, the plaintiff is the beginning party and the defendant also adduces evidence. The rule provides that the defendant gives the first closing address in those circumstances. However, particularly in a trial without a jury, it is usually best to hear the plaintiff first in final address (with a right of reply)

irrespective of whether the defendant has gone into evidence. This has long been the practice in Equity. The advantage is that the defendant then knows how the plaintiff puts its case rather than having to anticipate it. The saving in time and costs can be considerable.

[2-7380] Order of witnesses

Section 62 of the CPA provides that the court may give directions as to the order in which evidence is to be given. However, the discretion is to be exercised judicially and earlier authorities relating to the exercise of that discretion should be taken to apply.

The general rule is that counsel calling a witness for examination is entitled to determine the order in which the witnesses are called. This has different consequences in practice, depending on whether the trial is on evidence given orally or on evidence given by affidavit.

In a trial on evidence given orally, the evidence is led in whatever order counsel for the party adducing the evidence wishes; and denial of that entitlement is an error which may result in a new trial being ordered on appeal: *Briscoe v Briscoe* [1968] P 501; *Barnes v BPC* [1976] 1 All ER 237; *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1120.

There is a rider to that rule of practice. Having allowed counsel to call the witnesses in whatever order counsel wishes, the court may, on the application of cross-examining counsel, allow the cross-examination of a particular witness to be deferred until a later stage in the proceedings: *Michelson v Nicoll* (1851) 18 LTOS 198; *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 24.

In a trial on evidence given by affidavit, the affidavits are usually read at an early stage of the proceedings. Counsel for a party requiring witnesses for the opposite party to be called for cross-examination is taken to be calling the witnesses and is, accordingly, entitled to decide the order in which such witnesses are cross-examined: *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)*, above, at 24.

[2-7390] Calling a witness by the court

There may be a difference in the principles applicable to criminal and civil trials in relation to this topic. Only the principles relating to civil proceedings are reviewed here.

A statutory basis for a judge having the power to call a witness has been found in s 26 of the *Evidence Act 1995* (*Milano Investments Pty Ltd v Group Developers Pty Ltd* (unrep, 13/5/97, NSWSC)) and in s 11 of the CPA: S Odgers, *Uniform Evidence Law*, 6th ed, 2006, LBC Information Services, Sydney at 1.2.1860 and 1.2.2000. However, it is suggested, with respect, that both approaches are problematic.

The principles governing the exercise of the discretionary power in relation to civil proceedings are not well settled absent such a statutory source of power. For a range of opinions, see *Re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 KB 327; *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 567–568; *Bassett v Host* [1982] 1 NSWLR 206 per Hope JA at 207 and per Mahoney JA at 213; *Damic v R* [1982] 2 NSWLR 750 at 755–756, per Street CJ (in a criminal case but in relation to civil proceedings) and *Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) 10 FCR 518 per Wilcox J at 536–540.

Given the present state of the authorities, it is suggested that it would be unwise for a judge to call a witness except in compelling circumstances.

[2-7400] Witnesses being in court before they give evidence

At common law, the court had a discretion to order that witnesses be excluded from the court room until they gave their evidence: *London Chartered Bank v Lavers* (1855) 2 Legge 884. The discretion

is now codified by s 26(d) of the *Evidence Act 1995* which provides that the court may make such orders as it considers just in relation to the presence in court of any person in connection with the questioning of witnesses. It may be assumed that the common law authorities concerning the exercise of the discretion continue to apply.

What has come to be called "the order for witnesses" is, as a matter of practice, announced by the court officer in the following terms:

> **Order for witnesses**
>
> All witnesses are ordered to leave the court and the hearing of the court until called to give their evidence.

That then stands as an order of the court.

It is usual for the court to make an order for witnesses at the commencement of the hearing. Some judges also have the order made at the start of each succeeding day of a trial.

The making of an order for witnesses is not mandatory. It should however be done on request, if not done routinely.

Disobedience of an order for witnesses is a contempt of court but does not disqualify the witness from giving evidence: *R v Briggs* (1930) 22 Cr App R 68.

A party is entitled to be in court throughout the proceedings, notwithstanding that the party is to be called as a witness: see *London Chartered Bank*, above; *Selfe v Isaacson* (1859) 175 ER 597. It would accordingly be an error in the exercise of discretion to exclude a party from the courtroom at any stage of the proceedings unless that was justified by exceptional circumstances.

Notwithstanding the right to be in court, a party's counsel may elect to keep the client out of court until called to give evidence in order to avoid the suggestion that the client's evidence has been influenced by what the person has heard in court.

Counsel may also elect to keep a party out of court during medical evidence, particularly psychiatric evidence. A judge is at liberty to advise such a course.

It is usual to allow expert witnesses to be in court before giving their evidence.

[2-7410] Splitting a party's case

It is a general rule that parties may not call part only of their evidence in chief, reserving some of their evidence for reply after the opposite party has given evidence.

There is an exception in relation to any issue on which a defendant bears the burden of proof, although even that may not be automatic: *Beevis v Dawson* [1957] 1 QB 195.

Where the situation can be anticipated, it is best to resolve any such question by direction at the start of the trial.

[2-7420] Re-opening a party's case

Leave to adduce further evidence is sometimes sought after the party has closed its case in circumstances where the other side has commenced to adduce evidence or has even completed its evidence.

The general rule is that the decision whether or not to allow such an application is to be made having regard to the interests of justice: *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471. Where the evidence sought to be led was inadvertently overlooked, that is a

consideration in favour of allowing the application. Where the evidence was withheld for tactical reasons, that is a consideration to the contrary: *Smith v New South Wales Bar Association* (1992) 176 CLR 256. Whether the opposite party would be prejudiced by allowing the application is an important consideration.

[2-7430] Dismissal of proceedings on the plaintiff's application

Rule 29.8 provides that, at any time, the court may, on application by the plaintiff make an order dismissing the whole or any part of the plaintiff's claim or any cause of action relevant to that claim or part of the claim.

In the case of a jury trial, the application must be made before the jury gives a verdict: r 29.8(3).

The procedure corresponds with the earlier process of application by a plaintiff for leave to discontinue the proceedings, but the old rule that a plaintiff could not make such an application after the hearing had commenced no longer applies.

Subject to any terms imposed, such a dismissal does not prevent further proceedings being commenced for the same relief: CPA s 91. However, the plaintiff will usually be ordered to pay the costs of the discontinued proceedings and, if such costs are not paid, the further proceedings may be stayed: r 12.10.

[2-7440] Dismissal of proceedings on the defendant's application

Rule 29.9 provides for an application by a defendant for dismissal of the proceedings generally or as to any particular cause of action on the ground that, on the evidence given, a judgment for the plaintiff could not be supported.

The test for such an application, turns on the words "on the ground that, on the evidence given, a judgment for the plaintiff could not be supported". The same words appear in r 29.10, a rule of similar import, and must accordingly be taken to have the same meaning as in r 29.9. There is direct authority as to the meaning of the words in the precursor to r 29.10. See below in relation to r 29.10.

The application may be made at any time after the conclusion of the evidence adduced in the plaintiff's case in chief: r 29.9(2).

The court may only make an order on such an application if the plaintiff elects to argue the question: r 29.9(3) and (4).

If the plaintiff declines to argue the question or if the application is argued and fails, the defendant may go into evidence or may make an application under r 29.10 (judgment for want of evidence).

Where not all of multiple defendants apply, the court must not deal with the application before conclusion of the evidence given for all parties: r 29.10(5).

If the proceedings are dismissed under this rule, fresh proceedings may be brought by the plaintiff but, as in the case of dismissal under r 29.8, there will usually be an order for costs against the plaintiff and further proceedings may be stayed if such costs are not paid.

[2-7450] Judgment for want of evidence

Rule 29.10 provides that the opposite party may apply for judgment, generally or on any claim for relief in the proceedings, on the ground that, on the evidence given, a judgment for the beginning party could not be supported.

Whether a judgment could be supported on the evidence is to be decided on "the jury basis", that is, by asking whether a jury verdict in favour of the beginning party would have to be set aside on appeal as not having been reasonably open to the jury. In that evaluation, the evidence in favour of the beginning party must be taken at its highest.

For these principles, see *Mailman v Ellison* (unrep, 25/11/93, NSWCA) per Mahoney JA at 510.

The application may be made at any time after the conclusion of the evidence adduced in the beginning party's case in chief: r 29.10(2).

There is no provision that the application can only proceed if the beginning party elects to argue the question, as in the case of r 29.9.

If an application under r 29.9 fails, the moving party is precluded from adducing evidence or further evidence in the proceedings generally or on the claim for relief (as the case may be) without leave of the court: r 29.10(4). This is also an important distinction. Under r 29.9, there is no such consequence.

Under the precursors to the rule (SCR Pt 34 r 7 and DCR Pt 26 r 8), the moving party was absolutely precluded from going into evidence if the application failed. That amounted to an election having to be made between making the application and going into evidence. That situation has now been relaxed somewhat by the provision in r 29.10(4) that leave may be granted to adduce evidence notwithstanding the failure of such an application.

As in the case of r 29.9, where not all of multiple opposite parties apply, the court must not deal with any such application before the conclusion of the evidence given for all parties: r 29.10(5).

[2-7460] Fees unpaid

Rule 29.14 provides that a court may refuse to hear or to continue to hear proceedings in respect of which a hearing allocation fee or a hearing fee has not been paid.

Legislation

- CPA ss 11, 56, 58, 59, 60, 61, 62, 91
- *Evidence Act 1995*, s 26(d)

Rules

- UCPR rr 12.10, 29.1–29.11, 29.14, 31.3

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Vexatious proceedings

[2-7600] Introduction

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

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

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

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

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

Last reviewed: August 2023

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

Teoh direction

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

[2-7620] Vexatious proceedings order

Last reviewed: June 2025

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

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

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

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

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

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

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

Orders may be varied or set aside (s 9) or reinstated (s 10). An application to vary or set aside an order under s 9 may not be used to bring a de facto appeal. The only appellant procedure available to a person subject to a vexatious proceedings order which has been made by the NSW Court of Appeal is to seek special leave to the High Court: *Proietti v Proietti* [2025] NSWCA 11 at [20], [28].

[2-7630] "Frequently"

Last reviewed: June 2024

For a consideration of that word, see *Teoh v Hunters Hill Council (No 8)* at [46]–[49] and the cases referred to in those passages. See also *Quach v Health Care Complaints Commission* [2017] NSWCA 267 at [113] where the meaning of "frequently" in s 8(1)(a) was considered, drawing on Leeming JA's analysis (Basten JA and Meagher JA agreeing) in *Potier v Attorney General in and for the State of NSW* (2015) 89 NSWLR 284 at 309–310. See also *Proietti v Proietti* [2024] NSWCA 48 at [18]–[20] and [114] in which repeatedly seeking to re-agitate issues already decided and doing so with some rapidity was held to readily meet the relatively low threshold involved in the notion of "frequently".

[2-7640] Discretion

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

[2-7650] Vexatious proceedings

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

[2-7660] Contravention of vexatious proceedings order

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

[2-7670] Applications for leave

Sections 14 and 16 provide that a person who is subject to an order, or another person acting in concert with someone subject to an order, may seek leave to commence proceedings and makes

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

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

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

[2-7680] Orders limiting disclosure

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

Legislation

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

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Juries

para

Civil juries

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Civil juries

[3-0000] Introduction

Historical background

Traditionally nearly all trials in the Common Law Division of the Supreme Court and many trials in the District Court were heard and determined by juries. Commencing in 1965 with the *Law Reform (Miscellaneous Provisions) Act 1965*, which generally abolished trial by jury in personal injury actions arising out of the use of motor vehicles (running down cases), the role of the civil jury has gradually been diminished almost to the point of extinction save in defamation cases. Prior to 18 January 2002, s 88 of the *Supreme Court Act 1970* (now repealed) provided that proceedings on a common law claim in which there were issues of fact:

- on a charge of fraud against a party,
- on a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage,

were to be tried by a jury, but the court had power to dispense with a jury in such cases where any prolonged examination of documents or scientific or local investigation was required and could not conveniently be made with a jury, or the parties consented: SCA s 89(2) (repealed).

In other cases, apart from running down cases, either party could requisition a jury although the court had power to dispense with such mode of trial: SCA ss 85, 86, 87 (repealed). The right to jury trials in the District Court was regulated by the DCA ss 78, 79, 79A (repealed).

Actions of breach of promise of marriage were abolished by s 111A of the *Marriage Act 1961* and, prior to the *Defamation Act 2005*, trial by jury in defamation cases was governed by the former *Defamation Act 1974* s 7A, which still applies where the matter complained of was published prior to 1 January 2006: *Habib v Nationwide News Pty Ltd* (2006) 65 NSWLR 264.

For some historical background, see *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 394–7.

Current position

Section 85 of the SCA now provides that all proceedings are to be tried without a jury unless the court otherwise orders, but the court may make an order for trial by jury if a party files a requisition and pays the prescribed fee and the court is satisfied that "the interests of justice require a trial by jury in the proceedings". Section 76A of the DCA is in similar terms. There is no provision for jury trials in the Local Court or the Dust Diseases Tribunal.

As to defamation cases, s 21 of the *Defamation Act 2005* provides for trial by jury in such cases if either party elects unless the court otherwise orders. A future chapter on Defamation will deal with relevant directions and issues as to defamation proceedings.

As to the procedure for applications and requisitions for a jury, in proceedings other than defamation proceedings, see r 29.2 of the UCPR; concerning elections for juries in defamation proceedings, see r 29.2A.

The SCA and DCA do not set out any criteria as to which type of cases may be such that "the interests of justice require a trial by jury". The Court of Appeal decision in *Maroubra Rugby League Football Club v Malo* (2007) 69 NSWLR 496 construes the "interests of justice" test (s 85(2)(b) of the *Supreme Court Act 1970*) and holds (at [17]–[18] per Mason P; Ipp and Tobias JJA agreeing) that

the interests of justice refer to "considerations going beyond the private interests of the parties" and that the court "must be positively satisfied that the disinterested interests of justice require departure from the general rule of trial by judge alone". Mason P considered at [32], "that the presence of fraud allegations or major credibility issues" would not suffice to meet the statutory test in s 85(2)(b) of the interests of justice. See also *Flowers v State of NSW* [2020] NSWSC 526 at [16]. See further *Burton v Babb* [2020] NSWCA 331 at [64]–[65], where, although there may be much to be said for malicious prosecution claims being heard by juries, the interest of justice do not *require* it.

Section 127A(1) of the DCA provides that following jury proceedings in the District Court an application for the setting aside of a verdict or judgment, a new trial or the alteration of quantum shall be by appeal to the Supreme Court. Such appeal lies as of right: DCA s 127A(2).

A civil jury is comprised of four jurors, but in the Supreme Court, the court may order a jury of 12 jurors: *Jury Act 1977*, s 20. Such an order has not been made for many years.

[3-0010] Selection and swearing of jury

- associate calls the case
- appearances announced
- judge deals with any preliminary issues
- judge says:

> Call the jury.

- court officer brings the jury panel into court
- the judge requires counsel for each party to inform the jury panel of the nature of the action and the identity of the parties and the principal witnesses to be called; and then calls on members of the panel to be excused if they consider that they may not be able to give impartial consideration to the case: *Jury Act 1977*, s 38(8)
- the judge should also tell members of the panel that they may take an oath or make an affirmation if selected, although, unlike s 23(2) of the *Evidence Act 1995*, there is no obligation to do so. (The choice of oath or affirmation is provided by s 72A of the *Jury Act* which also provides that an oath is not invalidated if the person taking it does not have a religious belief.)
- judge says:

> Empanel the jury.

- associate stands — acknowledges to court officer that he or she is ready
- court officer says:

> Members of the jury as your number is called please take your place in the jury box.

- associate shuffles the jury cards well, places them in the jury box and shakes well
- associate calls four numbers out slowly (allowing the juror to get to his or her seat before calling out the next number)

- court officer says:

  Members of the jury, when your number is called please stand and remain standing.

- associate calls four numbers out one at a time and allows for challenges

  Note: Section 42A of the *Jury Act* provides that each party has the number of peremptory challenges equal to half the number of jurors required to constitute the jury for the trial. In effect this means that in the case of a four person jury, each party, that is, the plaintiff(s) and each defendant or cross-defendant separately represented is entitled to two challenges. Challenges can only be made after the juror has been called to be sworn, but before he or she is sworn (or makes an affirmation): s 45(1). The associate then calls additional jurors as necessary. When challenges are complete the remaining four (or 12) jurors constitute the jury.

- The court officer then hands a bible to those wishing to take the oath and says:

  Members of the jury please stand and face his or her Honour.

- associate says:

  Oaths

  Members of the jury, you will well and truly try the issues in this case and true answers give according to the evidence. Please say: So help me God.

  Affirmation

  Members of the jury, do you solemnly, sincerely and truly affirm and declare that you will well and truly try the issues in this case and true answers give according to the evidence. Please say: I do.

Note: If some jurors wish to take the oath and some make an affirmation, it is desirable that the oath and affirmation be administered separately.

- judge sends balance of panel back to jury assembly area
- order for witnesses to leave court until called upon to give their evidence
- short introductory remarks by judge (see below).

[3-0020] Introductory remarks to jury

His Honour or her Honour

Members of the jury, as you have heard this case is estimated to last somewhere between [.....] and [.....] days. The court will normally sit between 10 am

and 4 pm with an hour for lunch and a break during the morning. At the first adjournment or the first opportunity you get, will you please select one of your members to be foreman or forewoman. That person will sit at the end of the row closest to the bench and will be your means of communication to the court and will be the person who will deliver your verdict in due course. You are at liberty to change your foreman or forewoman during the trial if you wish.

Very shortly, Mr or Ms [.....], the barrister who appears for the plaintiff, will open [his or her] client's case to you, and in that opening address, I anticipate that [he or she] will tell you what the case is all about. It is the function of the plaintiff's counsel to do that and I do not intend to do so now. One thing [he or she] will tell you, and I will tell you now, is that in this case you are the judges of the facts and you are the sole and only judges of the facts. However, it is probable that during the case various questions of law will arise and also questions will arise as to whether certain evidence is admissible. The admissibility of evidence and questions of law are my responsibility and you are bound by the rulings which I give. Having said that, I remind you once again that you and you alone are the judges of the facts.

Because I am responsible for determining the admissibility of evidence and questions of law, it may, and probably will, be the case that during the evidence I will have to rule on these matters and if that arises do not be surprised if at times you are asked to leave the court while I do so. The reason for that is so that counsel can expand on their arguments without the risk of you being embarrassed by having material placed before you which should not be placed before you because it is not admissible. In due course, if the evidence is admissible you will hear it and act on it if you consider it reliable and appropriate, but if it is not admissible you will not hear it.

You must confine your considerations of the case to the evidence presented here in court during the trial, and put out of your minds anything you may have heard, or read, or seen on television about this or any other case or about any of the parties in the case. That is only fair to the parties, so that they may be aware of the case sought to be made against them and be in a position to deal with it if they can. You must not attempt to conduct any independent research of your own such as reading past newspaper reports, accessing the Internet, accessing legal databases, or earlier decisions of the courts, or visiting any locations referred to in the evidence.

At the end of the day, you will be excused and go home to your families and friends who will probably ask you what you have been doing. By all means tell them you have been sitting on a jury in a civil case but do not tell them any more please, because one of your duties is not to discuss the case with anyone outside the other three members of the jury. You are the persons who have been sworn to try the case, not members of your families or friends, and it is your decision we want and not the decision, indirectly or subconsciously, of members of your families. You will also be free during the lunch hour to make your own arrangements.

When you are leaving the court, returning to court, or around the precincts of the court building, be careful not to speak to anyone because it may be that they are people associated with the case; you might be chatting to someone and find out half an hour later he or she is a witness in the case, and that would be most undesirable and result in the case being stopped and started again with another jury, which would be a great

waste of time and cost to the parties involved. Do not speak to anyone about the case except the other members of the jury, and please bear in mind those other matters I have mentioned to you.

[3-0030] Sample civil summing-up

Introduction

Ladies and gentlemen, in this action the plaintiff [.....] sues the defendant [.....] claiming damages for [.....] which he claims to have suffered on or about [.....] when it is alleged [.....] .

You have heard the evidence, and the addresses of counsel are complete. It is now my responsibility to sum up or, in other words, give you the directions of law which are appropriate, and to summarise the evidence for you so that you may then retire and consider your verdict (or your answers to the questions which have been posed for your consideration).

Functions of judge and jury

Let me first say something about our respective functions in these proceedings. You have been brought here as the jury to try this case because our system of justice provides that in certain types of cases, of which this is one, the facts of the case are to be decided by a jury of our citizens. Mr or Ms [.....] is a citizen; he or she brings his or her case against [.....] another citizen [which in this case is a limited company, a form of legal personality] and so four other citizens are brought to the court to try the issues of fact between them in accordance with the principles of law which I am about to give you.

As I say, you are the judges of the facts of the case and you are the only judges of the facts. My function is quite different. You have seen during the case that I have ruled on questions of evidence and I am responsible for the law in the case. It is now my function to tell you what the law is so that you can apply the law to your deliberations in deciding the facts. You are bound by my directions of law, but, as I say, the facts are entirely a matter for you and, if in the course of this summing up, I express any view or opinion of the facts, or if you think I have expressed a view as to the facts, then it is your duty to disregard such a view or opinion of mine unless you, independently, come to the same conclusion.

Now in the course of this summing up I will, for your assistance, remind you of what appears to be the important parts of the evidence, but I certainly will not read all the evidence to you; and you may take a different view to the view that I take as to what parts of the evidence are important and what parts of it are not quite so important. Well as you are the judges of the facts it is your responsibility to decide on the evidence that you have heard and on those parts of the evidence you consider relevant or important. The fact that I only read or summarise parts of it to you does not limit you in any way to those parts.

Assessment of witnesses

In deciding the facts, it is for you, the judges of the facts, to decide which witnesses you accept and witnesses if any you do not accept; and the situation may arise if it seems proper to you, that you accept some parts of the evidence of a witness and don't accept other parts of the evidence of the same witness. The acceptance of witnesses and the determination of which parts of the evidence you accept is a matter for you as judges of the facts based on your assessment of the various witnesses.

In assessing a witness you have to decide whether the witness is firstly truthful, secondly reliable. You see there are two aspects of a witness giving evidence and your assessment of that witness. Firstly, is the witness honest? Is he or she trying to tell the truth as best he or she can recall? That is a question of honesty or truthfulness. The second aspect is whether the witness is reliable, because a witness may be perfectly honest and trying to tell the truth as best he or she can, but the witness may not be reliable because it is a long time ago and his or her memory may not be so good, he or she may have subconsciously reconstructed matters in his or her own mind in the meantime (there may be situations where the witness's opportunity to observe what had happened has not been good) and there may be other reasons why the witness is inaccurate or confused.

So there are two matters to be considered; firstly, whether the witness is truthful and, secondly, reliable. You have seen the witnesses, the manner in which they gave their evidence; the way they answered the questions that were put to them, particularly in cross-examination; whether they hedged, appeared to be frank, or whether there was any pause before they gave their evidence; whether they changed their evidence at any stage, and whether their memory appears reliable; whether their answers are consistent or inconsistent with other parts of their evidence or with the evidence of other witnesses. It is also proper to take into account whether the witnesses, or any of them, have any reason for not telling the truth.

Of course, in relation to memory, you will consider whether there are things that the witness would be expected to remember. Some events in our own lives are more important than others and whilst we might be able to remember some matters quite clearly, there will be other things, particularly things that happened some time ago, and matters of detail, that we do not remember so clearly, and you may feel that a witness would be likely to have the same problem, particularly if the witness is an honest witness.

You may also take into account whether the answers given by a witness are consistent with other evidence given by the same witness or consistent with evidence given by other witnesses. In considering the witness's reliability, you should consider, as I have said, the opportunity that the witness had to observe the event of which the witness gives evidence, its possible similarity to other events and the possibility of reconstruction or suggestion by others (including whether any notes were made at the time or shortly after).

Expert witnesses

Generally witnesses can only give evidence of what they saw, what they did or what they heard, and are not allowed to express opinions, but there is a special category of witness, called "expert witnesses" who, because of their specialised knowledge, training and experience are permitted to express opinions on matters within their areas of expertise, and I refer to the witnesses such as [.....] and [.....]

Well, where there is a conflict between what the expert witnesses have said, well then, it's for you to weigh up the opinions that those experts have given, taking into account their respective qualifications as have been given to you in the witness box, whether you accept them as honest and impartial, and their reasons and, as it were, the back-up material that they furnished to support their opinions, and whether you find their opinions convincing.

You, the jury, are the sole judges of the facts and as such are not bound to accept any expert opinion evidence just because it comes from an expert.

Inferences

Now as ordinary citizens you are not expected to leave your common sense behind, but you are expected to apply such ordinary common sense to the evidence you have heard and your assessment of the witnesses. And, just as you do in your every day lives, it is open and proper for you to draw inferences from the direct evidence you find established. In other words, having heard the evidence you may take the view that if certain facts are proved, well then, it follows naturally and logically from the facts that have been proved, that other events occurred or other facts are established. That doesn't mean of course that you can guess or speculate. There are some inferences that follow logically, there are other ideas that would be pure guess-work or speculation. As I say, you mustn't guess or speculate but it is proper for you to draw inferences which logically follow from the facts which you find proved in any other way.

[Give warning as to hearsay evidence as required by the *Evidence Act 1995*, s 165, if applicable, and any other warnings in the particular case.]

Onus of proof

The action is brought by Mr or Ms [.....]. He or she makes a claim against the defendant, [.....], and, as Mr or Ms [.....] makes the claim, it is up to him or her to prove the claim (If applicable: there is one exception to this which I will describe in a moment, but subject to that exception). You can only find in favour of Mr or Ms [.....], the plaintiff, if he or she has proved his or her case. If there is any part of the case that he or she does not prove, well then, he or she fails on that issue. On the other hand, you have heard it said that the defendant relies on the defence of [describe the defence]. That is a claim made by the defendant and so it is for the defendant to prove that, and if at the end of the day the defendant has not proved that matter, well then, you find that issue against the defendant. The defendant has the responsibility of proving that part of the case.

Some of you may have sat on juries in criminal trials where a person has been charged with a criminal offence. On that occasion, you would have been told by the judge that the crown carries the responsibility or the onus, as it is called, of proving the case against the accused, beyond reasonable doubt. If you have ever sat on criminal cases and have been told that, I ask you to put it out of your minds completely. That standard of proof only applies to criminal cases. This is not a criminal case; no one is charged with any offence whatsoever. This is what we call a civil case. It is not a case of anyone being penalised by gaol or fine or breaking the criminal law — but a claim for damages, not to punish, but as compensation, and there has been no breach of the criminal law. The criminal onus of proof simply does not apply. The onus or standard of proof required in this case is on the balance of probabilities. What do you think is more probable? You may come to the conclusion on any one of the issues, that you are not sure what happened or what is going to happen, but you are satisfied that it probably happened this way, that is sufficient, even though you have doubts. If the issue is proved to be more probable than not; and it need not be a great deal more probable, the slightest degree of probability is sufficient. Bear in mind I do not say “possibility”; I do say “probability”.

It is often compared to weighing the cases in a set of scales; if one side of the scales is weighed down ever so much more slightly than the other side, that is sufficient.

I repeat, the standard of proof required is only proof on the balance of probabilities.

Failure to call a witness

Now, reference has been made to the failure of (the other side) to call particular person(s) as witness(es), and it is desirable that I give you a general direction in this regard. Where it appears that there is a witness who could be expected to be able to give relevant evidence but has not been called, you are not entitled to speculate upon what he or she might have said if he or she had been called; but where that witness is a person who, in the ordinary course, you would expect, for example, a particular side to call and that side offers no satisfactory explanation as to its failure to call that witness, you are entitled to draw the inference that his or her evidence would not have assisted that party. Whether the explanation offered for not calling the witnesses is satisfactory is a matter for you. If it is satisfactory, no such inference can be drawn. Even if the explanation is not satisfactory or even if no explanation is offered, you do not have to draw such an inference, it is for you to decide whether or not you should do so. But, as I say, it is important to remember that you must not speculate or guess on what that other person might have said if they had been called but you may, although you do not have to, draw the inference that the evidence of that person would not have assisted the case of the party who, in the ordinary course of events, would have been expected to call him or her.

Fairness

As members of the jury, you are here as citizens, judging a case between your fellow citizens and, consequently, and I don't need to remind you, it is your duty to decide the case on the evidence and return a verdict based on the evidence; not based on emotion or sympathy.

You have a duty to be fair to both parties and to decide the case on the evidence you have heard, and in accordance with the law as I give it to you.

[Then deal with the law relating to the issues in the case and damages and summarise the evidence in the case, relating it so far as possible to the issues in the case and the major submissions of counsel.]

[3-0040] Disagreement

Where the jury has been retired for more than four hours, and is unable to agree on a verdict or on an answer to any specific questions put to the jury by the court, the verdict or answers of three jurors (or in the case of a jury of 12, of not less than eight jurors) shall be taken to be the verdict or answers of them all: *Jury Act*, s 57. In such case, the court may decide any issue of fact, but only if all the parties to the proceedings agree that it should do so: s 57A.

[3-0045] Discharge

If a juror dies or it becomes appropriate to discharge a juror during the course of the trial, the trial may be continued with a jury of three, or in the case of a jury of 12, of not less than eight: *Jury Act*, s 22.

The decision to discharge a juror and continue the trial with less than the specified number is a two-stage process and reasons must be given. The principles set out in *Wu v The Queen* (1999) 199 CLR 99, where applicable to a civil trial, should be followed.

Mandatory discharge of individual juror

The court must discharge a juror if it is found that the juror was mistakenly or irregularly empanelled (*Jury Act*, s 53A(1)(a)), has become excluded from jury service (s 53A(1)(b)) or has engaged in misconduct in relation to the trial: s 53A(1)(c). As to the meaning of misconduct, see s 53A(2).

Discretionary discharge of individual juror

The court may discharge a juror if:

- The juror (though able to discharge the duties of a juror) has, in the judge's opinion, become so ill, infirm or incapacitated as to be likely to become unable to serve as a juror before the jury delivers their verdict or has become so ill as to be a health risk to other jurors or persons present at the trial: s 53B(a)
- it appears to the court that the juror may not be able to give impartial consideration to the case because of familiarity with the witnesses, parties or legal representatives, reasonable apprehension of bias or conflict of interest or similar reason: s 53B(b)
- a juror refuses to take part in the jury's deliberations (s 53B(c)), or
- it appears to the court that for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror: s 53B(d).

Discretion to continue trial or discharge whole jury

If a juror dies or is discharged, the court must discharge the jury if it is of the opinion that to continue the trial with the remaining jurors would give rise to the risk of a substantial miscarriage of justice. If the court is not of that opinion, it must order that the trial continue provided there remain three jurors from a jury of four, or at least eight jurors from a jury of 12: s 53C(1) and s 22(b).

Where the jury is discharged, no new process is required for the matter to be set down as the court may order: s 53C(3).

Other matters

Section 73 provides that the verdict of a jury shall not be invalidated by certain irregularities. In particular, amendment to the section has overcome the invalidity established in *R v Brown* (2004) 148 A Crim R 268.

Section 75C provides that jurors and former jurors may report irregularities as defined in s 75C(4).

In *Smith v Western Australia* (2014) 250 CLR 473, a criminal case, the High Court considered what material should be taken into account in determining whether a real suspicion that a juror had been improperly influenced could be excluded. In *Smith v The Queen* (2015) 322 ALR 464, a criminal case, the High Court considered appropriate disclosure to the parties of the contents of notes from a jury.

In *Lyons v Queensland* (2016) 90 ALJR 1107; [2016] HCA 38 the High Court held that a deaf person who requires the assistance of an interpreter in the jury room is not eligible for jury service under the *Jury Act 1995* (Qld).

[3-0050] Taking verdict

Return of jury

- court officer says:

  Would the foreman or forewoman please stand.

- associate

  Members of the jury, have you agreed upon your verdict?

- foreman or forewoman

  We have (or words to similar effect).

- associate

Where jury asked for verdict

  How do you find, for the plaintiff or the defendant?

- foreman or forewoman replies
- if for plaintiff, associate continues:

  What damages do you award?

- foreman or forewoman replies
- associate

> So says your [foreman or forewoman], so say you all.

- foreman or forewoman sits down

Where jury asked to answer questions

- associate

> How say you, have you agreed upon your answer

- foreman or forewoman answers

> We have (or words to similar effect)

- reads question 1 and
- foreman or forewoman replies (and so on through each question).
- After last answer, associate says

> So says your [foreman or forewoman] so say you all.

- judge then thanks the jury for their attendance and attention to the case, and discharges them and they leave with the court officer. Judge then deals with any outstanding issues such as costs, interest, etc, and makes orders for entry of judgment or otherwise.

Legislation

- *Defamation Act 2005*, s 21
- DCA ss 76A, 78, 79, 79A (repealed), 127A
- *Evidence Act 1995*, ss 23(2), 165
- *Jury Act 1977*, ss 20, 22, 38, 42A, 53A, 53B, 53C, 57, 57A, 72A, 73, 75C
- *Marriage Act 1961*, s 111A
- SCA 1970, ss 85–89

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Evidence introduction

[4-0000] Interpretation

The *Evidence Act 1995* deals with the admissibility of evidence in Ch 3 of the legislation. An introductory note to Ch 3 outlines the scheme of the statute by a sequential series of questions and answers with cross-references to the parts of the statute where those issues are dealt with. That sequence of questions and answers is reproduced here, together with further cross-references to the chapters of this Bench Book where those issues are annotated.

	Evidence Act	**Bench Book**	
Is the evidence **relevant**?	Pt 3.1	[4-0200] ff	If "No", it is not admissible
If "Yes", does the **hearsay** rule apply?	Pt 3.2, plus Pt 3.4 (admissions), Pt 3.8 (character evidence)	[4-0300] ff	If "Yes", it is not admissible
If "No", does the **opinion** rule apply?	Pt 3.3, plus Pt 3.4 (admissions), Pt 3.8 (character evidence).	[4-0600] ff	If "Yes", it is not admissible
If "No", does the evidence contravene the rule about evidence of judgments and convictions?	Pt 3.5	[4-1000] ff	If "Yes", it is not admissible
If "No", does the tendency rule or the coincidence rule apply?	Pt 3.6, plus Pt 3.8 (character evidence).	[4-1100] ff	If "Yes", it is not admissible
If "No", does the **credibility** rule apply?	Pt 3.7, plus Pt 3.8 (character evidence).	[4-1200] ff, plus [4-1300] ff	If "Yes", it is not admissible
If "No", does the evidence contravene the rules about identification evidence?	Pt 3.9		If "Yes", it is not admissible
If "No", does the privilege apply?	Pt 3.10	[4-1500] ff	If "Yes", it is not admissible
If "No", should the **discretion** to exclude the evidence be exercised?	Pt 3.11	[4-1600]	If "Yes", it is not admissible
If "No", the evidence is admissible			

The provisions of the *Evidence Act* apply to both civil and criminal proceedings. This chapter of the *Civil Trials Bench Book* has been designed for use in both civil and criminal proceedings, so that individual judges may, if they so wish, keep the chapter in a separate folder for that purpose.

The *Evidence Act* has made substantial changes to the law of evidence in New South Wales: *Papakosmas v R* (1999) 196 CLR 297 at [10], [46], [88]. Where it makes an express provision different from the common law, it is the language of the statute which determines the issue in question, and the meaning and effect of the language of the statute is not to be determined so as to conform with the pre-existing common law: *Papakosmas v R* at [10], [88]; *R v Stewart* (2001) 52 NSWLR 301 at [3], [70]. The pre-existing common law is of assistance in interpreting the statute where it has adopted formulas well known to the common law: see, for example, *R v BD* (1997) 94 A Crim R 131 at 139, where the cognate phrases "unfairly prejudicial" and "unfair prejudice" in ss 135–137 in Pt 3.11 were interpreted in accordance with a number of decisions concerning the common law, in a manner approved by the High Court in *Papakosmas v R* at [29], [91].

[The next page is 4151]

Relevance

Evidence Act 1995, Pt 3.1 (ss 55–58).

[4-0200] Relevant evidence — s 55

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

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

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

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

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

The evidence must affect the probability of the existence of the fact sought to be proved. In a case where it was alleged that the accused had acted in self-defence, evidence that the victim had previously carried a firearm did not go to the probability that he was carrying a firearm on the

occasion in question: *Elias v R* [2006] NSWCCA 365 at [26]; although it would have been relevant to the issue of his tendency to carry such a weapon (at [31]); *R v Cakovski* (2004) 149 A Crim R 21 at [36], [56]–[57], [70] (see [4-1610]) doubted.

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

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

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

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

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

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

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

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

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

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

[4-0220] Provisional relevance — s 57

This provision is similar to the practice before the *Evidence Act* of admitting evidence subject to relevance: *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336 (Young J) at 338. Where the relevance of particular evidence is initially unclear, it remains appropriate under

the Act for evidence to be admitted in a non-jury case subject to relevance, and for a ruling to be made as to its effect at the conclusion of the case: *Merrylands Bowling, Sporting and Recreation Club Ltd v P & H Property Services Pty Ltd* [2001] NSWCA 358 at [35].

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

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

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

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

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

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

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

Legislation

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

Further References

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Hearsay

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

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

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

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

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

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

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

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

"can reasonably be supposed that the person intended to assert"

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

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

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

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

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

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

"personal knowledge"

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

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

"purpose"

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

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

par 685; *R v Welsh* (1996) 90 A Crim R 364 at 367–369; *Eastman v R* (1997) 158 ALR 107 at 170; *R v BD* (1997) 94 A Crim R 131 at 137. Thus, the history given to a medical practitioner, and recited by the practitioner as the basis for his expert opinion, establishes the truth of that history: *R v Welsh*, above, at 367–369; subject to the power to limit its use for that purpose pursuant to s 136 (see, for example, *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 625).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

is to identify the "fact" that person intended to assert in that representation; and the third task is to identify the fact in issue (or the fact relevant to a fact in issue) the probability of the existence of which is said to be affected by the evidence: *Vickers v R* (2006) 160 A Crim R 195 at [51]. (The third task invokes the issue of relevance in accordance with s 55; see **[4-0200]**.) Thus, if the fact to be established is said to be relevant to the issue of whether a party did a particular act, and if that fact is sought to be proved by a previous representation by a person who intended to say only that he had heard the party say (or imply) that he had done that act, such a representation is inadmissible to establish that he had done that act because the person had not seen the party do so: *Vickers v R* at [50]–[53]. See also *Caterpillar Inc v John Deere Ltd (No 2)* [2000] FCA 1903 at [15].

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

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

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

"not available"

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

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

(ii) if that incapacity cannot be overcome.

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

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

"attendance"

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

"reasonable steps"

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

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

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

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

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

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

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

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

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

"reasonable notice"

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

Miscellaneous

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

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

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

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

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

Notice

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

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

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

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

Whether the expense would be "undue" if the person who made the representation were to be called to give evidence may be determined by comparison of that cost with the value of what is at stake in the litigation and an assessment of the importance of the evidence that person might give: *Caterpillar Inc v John Deere Ltd (No 2)* [2000] FCA 1903 at [25]; *Citibank Ltd v Liu* [2003] NSWSC 69 at [6]–[9]. Whether the delay caused by having to call that person to give evidence is "undue" may be determined by comparison with the overall length of the proceedings, taking into account the importance of the evidence and the extent to which the evidence to be given is disputed: *De Rose v South Australia (No 4)* [2001] FCA 1616 at [13]–[16]; *Citibank Ltd v Liu*, above, at [5]. Also relevant is the willingness of the witness to give evidence, whether in person or by means of electronic technology: *Citibank Ltd v Liu* at [6], [8].

The hearsay rule will not apply to the previous representation made by a person if that person gives evidence: s 64(3). Since the *Evidence Amendment Act*, where the maker of the representation

is available and giving evidence, it is no longer a requirement that the occurrence of the asserted fact was fresh in the memory of that person when making the representation. The previous representation must, however, have been made with personal knowledge of the asserted fact: s 64(2)(a).

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

Where the person who made the representation has not and will not be called as a witness, evidence relevant only to that person's credibility is admissible only where it has substantial probative value (s 108A) — the same phrase used in s 103, where the evidence must be capable of bearing significantly on the assessment of that person's credibility: *R v RPS* (unrep, 13/8/97, NSWCCA) at 29; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 595 at [85]–[88]; *R v El-Azzi* [2004] NSWCCA 455 at [179]–[183].

Notice

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

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

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

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

Section 65 does not render admissible an entry in a document where that entry was neither seen nor otherwise perceived to have been made: *Conway v R* [2000] 98 FCR 204 at [154] (this issue did not arise in the appeal to the High Court: *Conway v The Queen* (2002) 209 CLR 203).

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

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

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

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

Reliability

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

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

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

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

Against interest

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

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

The High Court has recently examined the requirement in s 65(2)(d), "made in circumstances that make it likely that the representation is reliable", in *Sio v The Queen* (2016) 259 CLR 47. The

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

Opportunity to cross-examine

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

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

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

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

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

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

Section 65(8) permits the accused to adduce evidence of a previous representation if the person giving the evidence saw, heard or otherwise perceived the representation being made where the maker of the representation is unavailable to give evidence. Proof of the reliability of that representation such as is required of the prosecution by s 65(2) is not required of the accused, but s 65(9) permits the prosecution (or another accused) the same freedom to retaliate without proof of the reliability required by s 65(2).

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

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

Credit of representor

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

"Retaliatory" evidence

It has been suggested that the "retaliatory" provisions of s 65(9) (so described in MJ Beazley, "Hearsay and Related Evidence — A New Era?" (1995) 18 *UNSWLJ* 39 at 49) may be wide enough to apply where evidence of a previous representation has been admitted under some provision of the *Evidence Act* other than s 65(8) (such as s 60): *Eastman v R* (1997) 76 FCR 9 at 173. There is also an issue (so far unresolved) as to whether "the matter" in relation to which the first previous representation was admitted should be given a liberal or a narrow construction: *R v Mankotia* (unrep, 27/7/98, NSWSC) at 13; the point did not arise in the appeal against conviction in that case: *R v Mankotia* (2001) 120 A Crim R 492.

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

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

Recorded representations

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

Notice

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

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

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

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

"fresh in the memory"

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

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

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

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

Evidence of a conversation — prior to an attack alleged to have been made by the accused on the victim — between the victim and another person which demonstrated a friendly relationship

between the victim and the accused, and which would have militated against the probability that the accused would have been the attacker, was held to have been admissible under s 66(2) and wrongly rejected at the trial: *R v Diamond* (unrep, 19/6/98, NSWCCA), Ground 1.

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

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

Identification

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

Proofs of evidence

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

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

Exculpatory evidence

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

In *R v Rymer* (2005) 156 A Crim R 84, it was accepted (at [32]) that such was long standing practice in this State both before and (to a significant extent) since the *Evidence Act*, but it was held (at [52]–[53]) that s 59 of the *Evidence Act* had subordinated the common law to the terms of the statute and that such exculpatory evidence was admissible only pursuant to s 60 after it had been tendered for a non-hearsay purpose, although the Court of Criminal Appeal did state (at [59]–[61]) that, absent some particular reason for refraining from doing so, such evidence of the response by the

accused to confrontation by denial should continue to be put before the court by the prosecution. The accused's denial is admissible as an exception to the hearsay rule as demonstrating his credibility by the circumstances of his denial, and thus becomes evidence of its truth pursuant to s 60 (at [64]). The decision is not authority enabling the prosecution to call evidence in its case challenging the general credibility of the accused: *R v Rymer* at [62]; *R v Sood (Ruling No 3)* [2006] NSWSC 762 at [80]–[84].

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

Representations by vulnerable persons

Evidence from vulnerable persons (including children and complainants in sexual assault case) is now governed by the *Criminal Procedure Act 1986*, Ch 6 (Evidentiary matters), Pt 6 (Giving of evidence by vulnerable persons), Div 3 (Giving evidence of out-of-court representations) which inter alia permits evidence of previous representations made by such persons when interviewed by investigating officials to be given in the form of a recording of that interview. Section 306V provides that neither the hearsay rule nor the opinion rule prevents such evidence being given in that way. Division 4 permits such evidence to be given by closed-circuit television. The new legislation commenced on 12 October 2007, and applies to proceedings commenced on or after that date. The proceedings for trial on indictment commence on the filing or presentation of a valid indictment (*R v Janceski* (2005) 64 NSWLR 10 at [219]); the practice as to when such an indictment (rather than a draft indictment) is filed or presented differs: *R v Howard* (1992) 29 NSWLR 242 at 247. The trial itself commences with the presentation of the indictment and arraignment of the accused before the jury panel: *R v Nicolaidis* (1994) 33 NSWLR 364 at 367; *DPP v B* (1998) 194 CLR 566 at [17], [32]; *The Queen v Gee* (2003) 212 CLR 230 at [43]–[44]; *Gilham v R* (2007) 73 NSWLR 308 at [174]–[176], [237]. See also s 130 of the *Criminal Procedure Act*: *Cornwell v The Queen* (2007) 231 CLR 260 at [87]–[88]; *R v JS* (2007) 175 A Crim R 108 at [49].

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

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

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

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

In *R v Clark* (2001) 123 A Crim R 506 at [147], Heydon JA (at [158]) commented that the former s 72 was "significantly wider than the equivalent common law rules" that had been stated in the

older cases such as *Wilson v The Queen* (1970) 123 CLR 334 and *Ratten v R* [1972] AC 378, and he drew attention to *Walton v The Queen* (1989) 166 CLR 283. The comment would appear to apply equally to the new s 66A. Although referring to *R v Clark* in relation to a different issue, *ALRC Report 102* is silent in relation to this comment.

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

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

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

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

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

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

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

> The rule that[,] if a mark or get-up for goods is adopted for the purpose of appropriating part of the trade or reputation of a rival, it should be presumed to be fitted for the purpose and therefore likely to deceive or confuse […] is as just in principle as it is wholesome in tendency. […] [W]hen a dishonest

> trader fashions an implement or weapon for the purpose of misleading potential customers he at least provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive. Moreover, he can blame no one but himself, even if the conclusion be mistaken that his trade mark or the get-up of his goods will confuse and mislead the public.

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

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

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

[4-0370] Notice to be given — s 67

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

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

Both the Commonwealth *Evidence Regulations* 1995 and the *Evidence Regulation 2020* make provision (by cl 4 "Notice of previous representation") as to the content of the notice required. The notice must identify the substance of the particular representation and the relevant part of any document in which it is to be found: *ACCC v CC (NSW) Pty Ltd* [1998] ATPR #41-650 at 10. It must also notify the substance of all other representations made by the person who made that previous representation, so far as they are known to the notifying party; for that reason, knowledge of the contents of a statement which is later tendered without notice may not be a sufficient basis for dispensing with the notice requirement: *Trewin v Felton* [2007] NSWSC 919 at [2].

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

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

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

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

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

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

Intention of statute:

The business records provisions of the *Evidence Act* introduced fundamental changes to the previous business records provisions of Pt IIC of the *Evidence Act 1898*: *Schipp v Cameron (No 3)* (unrep, 9/10/97, NSWSC) at 2. Both the inclusive and the exclusionary provisions of s 69 of the *Evidence Act 1995* should be regarded as being of wide import and construed accordingly (*Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1083 at [4](3)); as should the term "business": *Valoutin Pty Ltd and Harpur v Furst, Tremback and Official Trustee in Bankruptcy* [1998] FCA 339 at 129; *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] FCA 1862 at [293].

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

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

"business records"

Business records are the documents or other means of holding information by which the activities of the business are recorded: *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98 at [47], citing *Compafina Bank v ANZ Banking Group Ltd* [1982] 1 NSWLR 409 at 412; *Atra v Farmers and Graziers Co-op Co Ltd* (1986) 5 NSWLR 281 at 288; *Roach v Page (No 15)* [2003] NSWSC 939 at [5]; *Silver v Dome Resources NL* [2005] NSWSC 348 at [7]. However, such records are restricted to those kept in the ordinary course of business, and they do not include the products or marketing documents of that business — even where such documents purport to record activities of the business: *Roach v Page (No 27)* [2003] NSWSC 1046 at [9]; *ASIC v Rich* [2005] NSWSC 417 at [180]–[182], [188]; *Hansen Beverage Co v Bickfords (Australia) Pty Ltd* (2008) 75 IPR 505 at [133]. An expert audit report on a company's financial position can fall within that description, and the lack of opportunity to test the contents of the report is not automatically fatal to its admission as a business record: *Forbes Engineering (Asia) Pte Ltd v Forbes (No 4)* [2009] FCA 675 at [103]–[104].

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

Minutes prepared by an officer of the Department of Foreign Affairs and Trade, present at a meeting between the Minister and the Chairman of AWB Ltd, recording statements made by the Chairman to the Minister are admissible pursuant to s 69 as business records made by a person who had personal knowledge of what the Chairman had said: *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [82].

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

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

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

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

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

A document may be a business record even if it is a draft, or otherwise appears to be a document "along the way" to completion of a final document: *Timms v Commonwealth Bank of Australia* [2003] NSWSC 576 at [17]; *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA 1549 at [9]; *ASIC v Rich* [2005] NSWSC 417 at [188]. A "one-off" record of a meeting may be a business record; it need not be part of systemic record-keeping involving more than a single document: *Feltafield Pty Ltd v Heidelberg Graphic Equipment* (1995) 56 FCR 481 at 483; *ASIC v Rich* at [190].

A faxed copy of a document may be a business record of the person who received the facsimile even though the original document faxed may not be a business record of the person who sent the fax: *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 654 at [36]. A rough diagram made by a police officer based on what he had been told by two witnesses, and which denied the basic allegation by the plaintiff that another vehicle was involved in his accident, is a business record of what is recorded in accordance with s 69 and, as such, is evidence of the facts recorded: *Tran v Nominal Defendant* (2011) 58 MVR 462 at [177]–[178].

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

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

Leeming JA's decision in *Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, is a valuable illustration of the approach to be taken in determining whether representations in business records tendered at a hearing may be accepted as an exception to the hearsay rule. In this case, the appellant sought possession of a property at Heatherbrae owned by the respondents. The claim was based in default under a guarantee arising in connection with a mortgage. The appellant's claim was dismissed by the primary judge. An important issue in the trial related to copies of Baycorp "file notes"

produced on subpoena and subsequently included in the Court Book. Ultimately, these documents were rejected by the primary judge on the basis that they were not accurate business records and that they contained errors or misleading statements. In the event, this aspect of her decision was incorrect. She also rejected them under s 135 *Evidence Act* as being overly prejudicial.

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

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

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

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

4. The court may draw inferences not just from the form of the document, but from the nature of the information in it. Section 48(1)(b) *Evidence Act* allows inferential reasoning from the form and content of the document.

5. The court may also draw inferences from other matters as well — s 183 *Evidence Act*. Here, the file notes were clearly derived from documents which comprised business records of Baycorp. They were provided in response to a third party subpoena which called for the very records which the prosecuting party asserted had been produced. The fact that the "heading and footer" bore the date "2017" did not detract from the fact that the copies of the electronic file notes themselves related to the relevant years. The representations in the file notes were highly probative and accordingly relevant to the issues at trial.

6. The primary judge's discretionary exercise under s 135 *Evidence Act* miscarried because she had not correctly evaluated the probative value of the representations in the copy business records.

"previous representation"

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

"personal knowledge"

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

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

The court may draw inferences from the form of the document and from the nature of the information contained in it as to whether the person who supplied the information to the person making the representation "might reasonably be supposed to have had personal knowledge of the

asserted fact" (see s 69(2)(a)): *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 at [19] where the finding was based on the precision of the information recorded in the document: *Wood v Inglis* [2009] NSWSC 313 at [5].

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

Opinion

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

Reliability

There is no requirement that the representation be recorded contemporaneously with the facts recorded; rather, the section assumes that the status of the document as a business record will give sufficient assurance as to its reliability for it to be admissible. The weight of the business record may nevertheless need to be carefully assessed if it is made sometime after the representation was made: *Gordon v Ross* [2006] NSWCA 157 at [37] (Basten JA, with whom Hodgson and Bryson JJA agreed on this issue).

"in contemplation of"

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

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

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

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

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

In *Vitali v Stachnik* [2001] NSWSC 303 at [13]–[14], Barrett J found it unnecessary to determine whether the *Sellers Fabrics* decision was a "surprising" one because the representation in that case was made by a company of which the party to the proceedings was the sole director and shareholder, and thus its alter ego. In *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 at [35], McDougall J found it unnecessary to determine whether the decision of Rolfe J was correct because he had already found (at [32]) that the document was prepared to enable the recipient to consider its prospects of recovery in the event it was held liable in other litigation. In *Kang v Kwan* [2002] NSWSC 1187, Santow J (at [177]) gave consideration only to the contemplation of the proceedings before him (which he held had been a mere possibility at the relevant time) and disregarded other proceedings in the District Court then in contemplation, having stated the purpose of the exclusion described by Barrett J in *Vitali v Stachnik*, above. There does not appear to be any reference to this issue in the Report of the three Law Reform Commissions, and certainly no amendment has been made to s 69.

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

"in connection with"

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

"Negative hearsay"

Where a system of business records has been followed of making and keeping a record of all events of a particular kind, s 69(4) permits proof that such an act did not occur if no record of it has been kept in that system. This has been described as "negative hearsay" in J Heydon, *Cross*

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

General

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

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

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

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

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

It has been suggested that provisions such as s 70 refer to material that has an inherent likelihood of its integrity and accuracy: *Australian Petroleum Pty Ltd v Parnell Transport Industries Pty Ltd* (1998) 88 FCR 537 at 481.

The tag or label must be attached to or written on the object to be identified before the exception applies; signs in the near vicinity of objects on display containing representations do not fall within that exception: *Daniel v Western Australia* [2000] FCA 413 at [25]–[26].

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

[4-0410] Exception: telecommunications — s 71

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

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

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

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

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

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

The experience gained in litigation under the *Native Title Act 1993* demonstrated serious problems in the proof of Aboriginal and Torres Strait Islander traditional laws and customs in accordance with the *Evidence Act*, in particular with the way in which that statute dealt with hearsay evidence, largely because the basis of an Aboriginal connection with land is usually based on oral traditions and history which do not easily accord with either the common law or the *Evidence Act*: *ALRC Report 102*, Ch 19. The Explanatory Memorandum accompanying the Bill for the *Federal Evidence Act* accepted (at [96]) that it was not appropriate for the legal system to treat orally transmitted evidence of traditional law and customs as prima facie inadmissible when this has been the very form by which such laws and customs are maintained under Indigenous traditions.

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

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

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

This provision widens the range of matters which may be proved by reputation to some extent beyond the common law relating to pedigree, but the family history of real estate transactions represented in a hearsay statement does not fall within the exception: *Day v Couch* [2000]

NSWSC 230 at [69]. Family history does not mean family gossip; it encompasses date and place of birth, date and place of marriage, date and place of cohabitation over the last century and place of work of ancestors of the maker of the representation, and it is not to be understood as making admissible broad genealogical material: *Ceedive Pty Ltd v May* [2004] NSWSC 33 at [9]. The information may be based on a conversation of only one blood relative: *Ceedive Pty Ltd v May* at [10]. Odgers, at [1.3.3500], has suggested that the statement in [9] of *Ceedive Pty Ltd v May* may be an unduly narrow approach to the provision.

An illustration of the use to which s 73 may be put is referred to in *Yarmirr v Northern Territory of Australia* (1998) 82 FCR 533 at [21], as establishing traditional laws and customs practised more than 150 years earlier and genealogical connections to ancestors living at or prior to European settlement in the necessary absence of official records. Reliance was also placed on s 74, below (the new s 72 would appear now to have covered that particular area).

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

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

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

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

Section 74 permits anthropological evidence as to the "reputation" of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period: *Yarmirr v Northern Territory of Australia*, above; *De Rose v South Australia* [2002] FCA 1342 at [265]–[270]; *Gumana v Northern Territory of Australia* (2005) 141 FCR 457 at [157]. Evidence of Aboriginal custom and tradition is not a special exception to the usual rules of evidence: *Gumana*, above, at [157]–[160]. These issues did not arise in the unsuccessful appeal: *Gumana v Northern Territory of Australia* (2007) 158 FCR 349 (the new s 72 would appear now to have covered that particular area).

[4-0450] Interlocutory proceedings — s 75

Interlocutory proceedings are to be distinguished from proceedings which, subject only to appeal, finally dispose of an action or an existing dispute between the parties: *Hall v Nominal Defendant* (1966) 117 CLR 423 at 444. It is the legal rather than the practical or real effect of the order sought in the proceedings in question: *Sanofi v Parke Davis Pty Ltd (No 1)* (1982) 149 CLR 147 at 152. If, for example, the orders sought are to have only an interim effect, the proceedings will be considered to be interlocutory: *Director of Public Prosecutions (ACT) v Hiep* (1998) 86 FCR 33 at 124–125.

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

Where proceedings are brought pursuant to s 39B of the *Judiciary Act 1903* (Cth) to enforce a common law right or immunity based on legal professional privilege, and where they are to resolve the dispute or controversy between the parties on that issue, they are final and not interlocutory in nature: *Kennedy v Wallace* [2004] FCA 332 at [112].

Section 9 of the *Evidence Act* (providing that that Act does not affect the operation of a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding) does not create an independent statutory basis for dispensing with the operation of the rules of evidence. Rather, it recognises (so as not to affect) any rule of common law or in equity in relation to evidence in a proceeding insofar as it relates to the court's power to dispense with the operation of a rule of evidence in an interlocutory proceeding: *International Finance Trust Co Ltd v NSW Crime Commission* [2008] NSWCA 291 at [12]–[15]. This is because, in the latter, the purpose of the evidence is to determine whether there is a serious issue to be tried, not to determine the issue itself: *Geoffrey W Hill & Associates v King* (1992) 27 NSWLR 228 at 229–230.

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

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

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

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

A telephone survey conducted with persons who answered the telephones of identified companies, without ascertaining whether those persons were appropriate persons from whom the required information could be obtained was rejected in *Humphries v SAS Signage Accessories Supplier Pty Ltd* [2009] FCA 1238 at [14]. On the other hand, a survey taken of customers of the party tendering it before there was any question of litigation, who had been telephoned by its employees and asked specified questions which were contemporaneously recorded on the documents that identified the questions to be asked, was held to be admissible notwithstanding that the employees had no memory of the conversations with them: *Mobileciti Pty Ltd v Vodafone Pty Ltd* [2009] NSWSC 891 at [1]–[3].

Where the proceedings are interlocutory, the "source" which must be identified in s 75 is the maker of the representation as to the asserted fact to which s 59 applies: *Levis v McDonald* (1997) 75 FCR 36 at 307. A somewhat broader rule was stated by Hunter J in *Proctor and Gamble Australia Pty Ltd v Medical Research Pty Ltd* [2001] NSWSC 183 at [55], where he held that this requirement had been satisfied where the deponent of the affidavit had identified compendiously all of his sources for all of his statements, without identifying the source of each individual statement.

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

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

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

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

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

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

Legislation

- *Australian Securities and Investments Commission Act 2001* (Cth) ss 76–77
- *Criminal Procedure Act 1986*, s 285, Ch 6 Pt 6 Div 3 and Div 4
- *Evidence Act 1995*, ss 17(2), 55, 59–77, 103, 108A, 135–139, 142, Dictionary
- *Evidence Act 1995* (Cth), ss 161, 162, 163, 182, 183
- *Evidence Amendment Act 2007*
- *Evidence Regulations* 1995 (Cth), cl 5
- *Evidence Regulation 2020*, cl 4 (now repealed)

Further references

- S Odgers, *Uniform Evidence Law*, 9th edn, Thomson Reuters, Sydney, 2010
- J Anderson, N Williams and L Clegg, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts*, 2nd edn, LexisNexis, Sydney, 2009
- Hon M J Beazley (1995) 18 *UNSWLJ* 39
- J D Heydon, *Cross on Evidence*, 8th edn, LexisNexis, Sydney, 2010
- *Uniform Evidence Law*, ALRC Report 102; NSWLRC Report 112, VLRC Final Report, Australian Law Reform Commission, Sydney, 2005
- *ALRC Report 26*, vol 1, Australian Government Publishing Service, Canberra, 1985
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005.

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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) 90 FCR 565 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].

Generative AI must **not** be used in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination (note this does not prohibit the use of Gen AI for work that is merely preparatory to the drafting of the affidavit or other document setting out the witness' evidence and/or opinion): Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence (adopted by District Court of NSW and Land and Environment Court of NSW), commenced 3/2/2025, at [10]–[12]; Industrial Relations Commission of NSW Practice Note No 33 — Use of Generative Artificial Intelligence, commenced 19/2/2025, at [12]–[14]. An affidavit, witness statement or character reference must contain a disclosure that Gen AI was not used (except where the annexure or exhibit has not been prepared or created for the purposes of the proceedings): Supreme Court Practice Note at [13]–[15]; Industrial Relations Commission of NSW Practice Note at [15]–[16].

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

Last reviewed: December 2024

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 (ALRC) 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 ALRC 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].

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].

If a witness cannot remember the actual words used, the accepted practice in NSW is that affidavit evidence is given in direct speech prefaced with a phrase such as "words to the following effect": *Wild v Meduri* [2024] NSWCA 230. The established practice has, as its underlying purpose, an attempt to come as close to capturing the essence of a past conversation as possible without, when the customary preface is used, purporting to supply exactitude: at [244]–[254]. Such evidence can also be given in the form of indirect speech, however in instances where particular spoken words are the foundation of a legal claim, it is desirable that the witness's recollection of the substance of those words be put into direct speech, in terms indicating that the witness is testifying to the substance or gist of what was said: at [254], [356].

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: December 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].

Generative AI must not be used to draft or prepare the content of an expert report (or any part of an expert report) without prior leave of the Court: see Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence at [20]–[25]; Industrial Relations Commission of NSW Practice Note No 33 — Use of Generative Artificial Intelligence at [22]–[26].

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) 278 CLR 323 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] NSWSC 149 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.

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].

Note in *Alora Davies Developments 104 Pty Ltd (in liq)* (2024) 114 NSWLR 77, a liquidator giving evidence in the liquidator's own case was held to be an "expert" but not an "expert witness" for the purposes of the definitions in UCPR r 31.18. As a result, UCPR r 31.23 did not apply. It was not necessary to dispense with the requirements of the expert witness code in this case although Black J would likely have done so, had he been asked to do so and had it been necessary to do so: at [7].

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) 159 FCR 397 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] NSWCCA 114. 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]. In a case where two medical experts had never met nor examined the deceased but gave evidence as to the deceased's testamentary capacity when she made a will in 2009, their opinions were based upon a process of reverse extrapolation from medical records relating to the deceased in 2014. In *Wild v Meduri* [2024] NSWCA 230, the Court of Appeal did not deny the expert evidence as to the progressive nature of dementia but held that the primary judge gave appropriate weight to the expert evidence and also the body of lay evidence from the deceased's children and acquaintances who saw her on a regular basis in the years leading up to the execution of the 2009 will and on the evidence of the deceased's treating doctors: [212]–[214]. The testamentary capacity criteria in *Banks v Goodfellow* (1870) LR 5 QB 549 are matters for commonsense judicial judgment on the basis of the whole of the evidence, which may include evidence from expert and non-expert witnesses (see *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65]), with lay evidence usually of far more value than reports of expert specialist medical practitioners who have never seen the deceased: *Revie v Druitt* [2005] NSWSC 902 at [34], citing *Kerr v Estate of Badran* [2004] NSWSC 735 at [34]; *Lim v Lim* [2022] NSWSC 454 at [217]–[218]; *Wild v Meduri* at [213]–[214].

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.

See also *Lederer Group Pty Ltd v Hodson* [2024] NSWCA 303 (applying *Kubovic v HMS Management Pty Ltd* [2015] NSWCA 315 and considering *Makita (Australia) Pty Ltd v Sprowles*, above), a claim for psychological injury, in which the expert medical reports on the plaintiff's

diagnosed PTSD and major depressive disorder were premised upon an incorrect history as to the extent of the plaintiff's exposure to the aftermath of a fatal accident, and more particularly, that the plaintiff had directly witnessed the uncovered body of the deceased, which CCTV footage proved to be incorrect: at [245], [284]. As there was no objection to the admission into evidence of the expert reports (and no challenge based on their admission), the matter simply turned to the weight that could be attributed to them. In the absence of the key factual assumption being made good (ie that the plaintiff had actually observed the injuries that he so graphically described), the weight that could be attributed to the expert reports on the issue of causation was limited at best: at [248]. In the absence of evidence that the plaintiff's injury was caused by exposure to the fatality, the primary judge's finding as to causation was in error: at [256]–[257], [285].

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) 167 FCR 84 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] NSWCA 448 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) 159 FCR 397 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] NSWCA 448 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
- Uniform Civil Procedure Rules 2005*,* Sch 7.

Practice notes

- District Court General Practice Note 2 — Generative AI Practice Note
- Industrial Relations Commission of NSW Practice Note No 33 — Use of Generative Artificial Intelligence (Gen AI)
- Land and Environment Court Practice Note — Use of Generative Artificial Intelligence (Gen AI)
- Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence (Gen AI).

Further References

- S Odgers, *Uniform Evidence Law*, 18th edn, Thomson Reuters, Sydney, 2023
- J Heydon, *Cross on Evidence*, 14th edn, LexisNexis Butterworths, Sydney, 2024
- R Weinstein, J Anderson, J Marychurch and N Wooten, *Uniform Evidence Law in Australia*, 4th edn, LexisNexis Butterworths, 2023
- *ALRC Report 26*, vol 1, Australian Government Publishing Service, Canberra, 1985
- *ALRC Report 38*, Australian Government Publishing Service, Canberra
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005.

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Admissions

Evidence Act 1995, Pt 3.4 (ss 81–90)

[4-0800] General definitions

Relevant definitions

The Dictionary to the *Evidence Act* defines the terms "admission", "previous representation" and "representation" (Dictionary, Pt 1) and the expression "a representation is contained in a document is taken to have been made by a person" (Dictionary, Pt 2 cl 6).

Admission

An answer to a question and the question to which it is given are relevant if the answer is an admission of guilt or of a fact relevant to the proof of guilt, or if it is capable of being regarded as such an admission; if the answer does not unequivocally amount to an admission but is capable of being regarded as such, and subject to the exercise of the judge's discretion, it is a question for the jury whether it is an admission, but the jury must be clearly and fully directed that it is a question for them as to whether the answer does or does not amount to a relevant admission: *R v Plevac* (1995) 84 A Crim R 570 at 579–580; *R v JGW* [1999] NSWCCA 116 at [37]–[41]. If the answer is a denial, if it is not capable of being regarded as an admission, and if its tender is objected to, it is irrelevant and it must be rejected: *Graham v The Queen* (1998) 195 CLR 606 at [1], [2], [40], [45].

If, however, the denial becomes relevant for another purpose, and such a denial is capable of affecting, directly or indirectly a fact in issue, it is becomes relevant and admissible. The previous representation constituting the admission must be adverse to the interests of the party against whom the evidence is tendered in the outcome of the proceeding (Dictionary definition, par (b)). At common law, conduct by a party such as lies, flight, the discouragement of witnesses from speaking to police and the destruction of relevant evidence, where it could amount to consciousness of guilt, is admissible to prove that guilt: *Edwards v The Queen* (1993) 178 CLR 193.

Edwards v The Queen, above, has now been applied under the *Evidence Act* to include denials to questions where the denials are expressed in the form of exculpatory statements that are shown to be lies — thereby becoming admissions, even though the adverse nature of the exculpatory denial may depend on subsequent conduct by the party: *R v Esposito* (1998) 45 NSWLR 442 at 458–9; *Adam v R* (1999) 106 A Crim R 510 at [34]–[66]. (*Adam v R* is not the decision leading to the appeal in *Adam v The Queen* (2001) 207 CLR 96.)

An early case in which such an exculpatory statement was illustrated was *R v Horton* (1998) 45 NSWLR 426 at 437–439, the validity of which has been the subject of continuing debate in the Court of Criminal Appeal. The appellant had been found guilty of murder by stabbing the deceased. The Court of Criminal Appeal was concerned with the admissibility of a statement made by the defendant when arrested by the police that the deceased had fallen on a knife. That statement was not itself inculpatory, but it was inconsistent with the version she subsequently gave during her formal interview — electronically recorded in accordance with what is now s 281 of the *Criminal Procedure Act 1986* — that the state of her intoxication was such as to deny the intention required for murder. This was because the earlier statement (or representation) demonstrated that she had been functioning cognitively at the time sufficiently to have formed an intent required for the crime of murder. The earlier representation was therefore held to be adverse to her interests in accordance with the definition of "admission" in the *Evidence Act*, and thus admissible in evidence as an admission.

(Section 281 of the *Criminal Procedure Act* makes inadmissible any admission made by a defendant in the course of official questioning that has not been electronically recorded. It was held in *R v Horton*, above, (at 437–439) that the word "admission" in the *Criminal Procedure Act* was to be interpreted so as to include an admission within the meaning of the *Evidence Act*, and thus the earlier representation (that the deceased had fallen on the knife), although admissible as evidence

that the death of the deceased was not a result of any act by the appellant, could not be used by the Crown as a previous inconsistent representation by her to meet a "defence" of intoxication because it had not been electronically recorded. That is not the issue in *R v Horton* which has been the subject of continuing debate.)

It has nevertheless been held that neither a refusal to consent to participate in an identification parade (*Re A (a Child)* [2000] NSWSC 627 at [28]–[44]) nor a refusal to consent to a search (*DPP v Leonard* (2001) 53 NSWLR 227 at [89]–[94]) amounts to an admission of guilt. Although *Petty v The Queen* (1991) 173 CLR 95 was not referred to in either of those decisions, the High Court confirmed in that case (at 99–102, 106, 118–122) that no adverse inference can be drawn against a defendant by reason of his exercise of a fundamental right, such as the right to silence. In *Re A (a Child)*, above, at [28], [37]–[39], Bryson J distinguished *R v Horton* from the case before him on the basis that the words of the refusal themselves constituted the refusal, stating that it was a highly artificial concept that they represented any other state of mind, and that it could not be said, even in the most indirect way, that the refusal to consent to participate in an identification parade was an admission that the plaintiff was the offender. In *DPP v Leonard*, above, at [93]–[94], James J adopted the reasoning of Bryson J that the words used constituted the fact of refusal and should not be characterised as a representation about the maker's then state of mind.

R v Horton was not followed by the Full Federal Court in *R v GH* (2000) 105 FCR 419. In that case, the defendant was charged with perverting the course of justice. The Crown case was that one TF had shot GH when both were involved in a falling out over the distribution of illicit drugs in the Northern Territory, and that, both when being taken to hospital by the police and subsequently, GH had claimed that he had shot himself accidentally. Both statements were electronically recorded. The Crown alleged that the defendant had agreed with others to tell the police a false story to prevent TF and others being brought to justice should the truth emerge as to how he had been injured. The trial judge rejected both recordings on the basis that the Crown had not discharged the onus under s 84 of the *Evidence Act* (Exclusion of admissions influenced by violence and certain other conduct) of proving that the admissions were not made under the influence of threats of violence from the co-conspirators.

The issue in *R v GH* was whether each statement recorded was false and thus adverse to the defendant's interest in the outcome of the proceedings, amounting to an admission, within the meaning of the *Evidence Act*. The Crown submitted that it was the content of the representation that is in point, and not the circumstances in which it was made. The Full Federal Court held (at [54]–[55]) that the NSW decisions were not relevant because none was concerned with the admissibility of a statement tendered by the prosecution as an act forming part of the offence charged, that in any event the representation was made by the defendant in his own interests (that there was no criminality in the circumstances in which he was shot), and that it became adverse to his interests only if taken in conjunction with the whole of the evidence of the conspiracy; it did not amount to an admission, and s 84 was therefore applicable. A further argument accepted by one member of the Full Court (at [64]) was that s 9 of the Commonwealth *Evidence Act* saves existing law only in relation to here irrelevant subject matters, whereas s 9 of the NSW *Evidence Act* retains the common law generally except so far as the Act provides otherwise or by necessary intendment, and (at [78]) that the elaborate structure of the *Evidence Act* in relation to admissions makes it unlikely that there was any intention by the legislature that "any mere implication" arising out of the common law should readily override the protection afforded by that structure.

In *R v Knight* [2001] NSWCCA 114, the appellant was charged with various forgery type offences relating to applications for birth and death certificates. His handwriting on the documents was identified by comparison with his handwriting on police handwriting forms (P59B) which persons arrested and fingerprinted are requested to complete, these documents having been completed when the appellant had been arrested on other occasions in relation to different criminal offences. The form requires the person charged to give various details such as full name and address, and details of birthplace, education, employment, illnesses and injuries. He was not advised that completion

of the forms was not compulsory or that they may be used for such a comparison purpose. The "crucial" opinion of the handwriting examiner of the forged documents was based on the comparison made with the P59B documents. The judge declined to exercise his discretion to exclude the police handwriting forms, and the Court of Criminal Appeal refused to interfere with that decision.

It was held in *R v Knight*, above, (at [80]) that the handwriting was not a representation and that Pt 3.4 of the *Evidence Act* (Admissions) did not apply to "lawfully obtained evidence where the particular enabling statute negates any requirement for consent". The statute in question, the since repealed provisions of Pt 10 of the *Crimes Act 1900* (see now Pt 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002*), permitted the police officers to take fingerprints, but it did not compel the arrested person to complete the police handwriting form. In that case, the arrested person was wrongly informed by police officers that he was required to complete it. It was conceded at the trial that the police behaviour was unfair, although this concession was later withdrawn; this fact appears from the unsuccessful application for special leave to appeal: *Knight v The Queen* [2002] HCATrans S109/2001 (5 March 2002). The quoted statement in the judgment at [80], stating that the enabling statute negated any requirement for consent, should, it is suggested, be considered erroneous. It was then held (at [83]) that the police handwriting documents were not representations (scilicet previous representations made by the appellant), so that Pt 3.4 (Admissions) and s 139 (Cautioning of persons) of the *Evidence Act* did not apply. The reasoning on which those conclusions were based was not disclosed. Special leave to appeal was refused by the High Court on the basis that the trial judge had taken the unfairness of the police procedure into account when holding, in the exercise of his discretion, that the significant probative value of the evidence outweighed that unfairness, and that the application had insufficient prospects of success on an appeal to warrant the grant of special leave to appeal.

In *R v Rahme* [2001] NSWCCA 414, counsel for a co-defendant of the appellant, in cross-examination of the appellant, was permitted to put into evidence statements made by the appellant to the police as to various incidents in the events in question which went to the appellant's credit (in that those statements contradicted the evidence he had given) but which incidents had been excluded by the judge when tendered by the Crown in its case against the appellant because of s 84 (Exclusion of admissions influenced by violence and certain other conduct). It was argued by the Crown that the excluded statements did not amount to an admission by the appellant within the definition in the *Evidence Act* because they were not in themselves adverse to his interests, but it was held (at [40]–[43]) that their use to attack his credit, and thereby to undermine his case, meant that they were being used in a manner "adverse to the [appellant's] interests in the outcome of the proceeding", following *R v Horton*. This ruling was then followed, without comment, in an appeal by the co-defendant: *R v Bunevski* [2002] NSWCCA 19 at [2]–[3].

In *R v Spathis* [2001] NSWCCA 476, the Court of Criminal Appeal suggested (at [414]–[416]) that, in the light of the Full Federal Court's decision in *R v GH*, *R v Horton* may have been wrongly decided, but it did not need to resolve the issue. The High Court refused special leave to appeal on this particular issue because there had been no objection taken to the evidence of admission at the trial: *Spathis v The Queen* [2002] HCATrans S150/2002 (5 November 2002). In *Kelly v The Queen* (2004) 218 CLR 216, the High Court referred (at [21]) to the debate concerning the meaning of "adverse to the person's interest in the outcome of the proceeding" in the definition of "admission", and to the importance of its resolution, but said it was undesirable to decide the issue in that case. The Tasmanian Court of Criminal Appeal also found the issue unnecessary to determine, in *Director of Public Prosecutions v Cook* (2006) 166 A Crim R 234 at [31], [68]–[69]. In *Gonzales v R* (2007) 178 A Crim R 232, the Court of Criminal Appeal said (at [21]) that no occasion arose in that appeal to consider the correctness of *R v Horton*.

Meanwhile, in *R v Hodge* [2002] NSWCCA 10, there was no attack on the decision in *R v Horton*, and (at [18]) the Crown successfully relied on it to defeat an appeal based on directions as to the use of statements made by the appellant as consciousness of guilt (to which no objection had been taken at the trial).

In *R v G* [2005] NSWCCA 291, the defendant had willingly posed for a photograph by the police during a lawful search of his premises, and this photograph was used in the trial pursuant to s 115 of the *Evidence Act* as part of a photo array containing that photograph and photographs of others who resembled him to enable witnesses to identify the defendant as the person who had committed the offences charged, and thus became adverse to him at that stage. Of *R v Knight*, above, the Court of Criminal Appeal said (at [26]) that any privilege against self-incrimination cannot be determinative of whether an act or utterance is an admission. The decisions in *R v Knight*, above, and in *Re A (a Child)*, above, were said by the Court of Criminal Appeal in *R v G*, above, (at [28]) to demonstrate that treating the handwriting in *R v Knight* and the refusal to participate in an identification parade in *Re A (a Child)* as admissions distorted the meaning of the word, as did treating as an admission the act of willingly posing for photographs in that particular appeal. It was held that such an act could not be characterised as an admission.

In *R v Kaddour* [2005] 1NSWCCA 303 at [60], the Court of Criminal Appeal applied *R v Horton* to accept that an exculpatory statement constituted an implied admission where it grounded an argument that the appellant exhibited a consciousness of guilt. Although a passing reference was made to *R v Spathis* (at [62]), the continuing debate as to whether *R v Horton* is correct was not referred to by the Court of Criminal Appeal, and it does not appear to have been raised by the appellant.

Odgers, *Uniform Evidence Law* (9th edn at [1.3.4740]), suggests that *R v Horton* was wrongly decided in that it involved reliance on neither an intentionally asserted fact nor an implied belief as to the existence of a fact. It is suggested that, in the light of the conflicting decisions in the Court of Criminal Appeal concerning *R v Horton*, judges should exercise caution in applying that decision. However, the prospects of the issue being finally determined should perhaps be judged by the continuing reluctance of appellate courts to undertake that determination in the period since *R v Horton* was decided in 1998 (see, for example, *Gonzales v R* (2007) 178 A Crim R 232) at [21]).

The decision of the High Court in *Lustre Hosiery Ltd v York* (1935) 54 CLR 134 (at 143–144) — that an admission made by a party disclosing an intention to affirm or acknowledge the existence of a particular fact is admissible against that party independently of that party's actual knowledge of the true facts — is applicable under the *Evidence Act*: *Smith v Eurobodalla Shire Council* [2004] NSWCA 479 at [89]; but (as made clear by the High Court in *Lustre Hosiery*, at 143–144) the probative value of the admission may depend upon the party's source of knowledge, as well as the nature of the (commercial) relationship between the parties: *Gordon v Ross* [2006] NSWCA 157 at [131]–[136].

[4-0810] Hearsay and opinion rules: exception for admissions and related representations — s 81

The hearsay rule is stated in s 59, see [4-0300] ff. The opinion rule is stated in s 76, see [4-0600].

The effect of s 81 is to exclude from the operation of the hearsay rule a hearsay statement which amounts to an admission, so that (as it was before the *Evidence Act*) that statement remains evidence of the truth of what was stated.

Only first-hand hearsay evidence of an admission can amount to evidence of the truth of what was said by a party (ss 62, 82), see *Lee v The Queen* (1998) 195 CLR 594 at [30]–[35]. If other hearsay evidence of an admission made by a party is admitted for a different purpose, the limited effect of that evidence must be made clear to the jury: *Lee v The Queen*, above, at [41]; *Klein v R* (2007) 172 A Crim R 290 at [32]–[37].

Note the special provision concerning the burden of proof of an admission, which is less than in relation to other issues relating to the admissibility of evidence: see **[4-0880] Proof of Admissions — s 88**.

There has been no case law that illuminates the nature of the link required by s 81(2) — that the two rules do not apply to evidence of a previous representation to which it is reasonably necessary to refer in order to understand the admission — but Odgers, *Uniform Evidence Law* (9th edn at [1.3.4840]), suggests that it should be given a wide operation, particularly in the light of pare (b) of the example in the section, that the witness formed the opinion that the defendant was sane when he made the admission.

In *R v JGW* [1999] NSWCCA 116, the defendant offered to make formal admissions of the information obtained during an ERISP interview and objected to the Crown's tender of the recording on the basis that it depicted him in an unfavourable light. The Court of Criminal Appeal (at [42]) rejected the claim that the recording depicted him in an unfair light, and it held that the Crown was entitled to prove its case as it wished, that the proposed course was more likely to have led to a subsequent claim of unfairness because it would have excluded his denials of the matters charged, and that there was nothing in the interview that was truly irrelevant or otherwise prejudicial. No consideration was given to s 81(2).

In *R v Hannes* [2000] NSWCCA 503, the defendant sought to have tendered pursuant to s 81(2) an entry from the same book as entries tendered by the Crown, but the Court of Criminal Appeal held (at [483]) that there was nothing in the further entry to suggest that it was "made in relation to" those entries; nor could it be said that it was "reasonably necessary" to refer to the further entry in order to understand those entries. There is no discussion on what the section involves.

[4-0820] Exclusion of evidence of admissions that is not first-hand — s 82

This is complementary to s 62 (Restriction to "first-hand" hearsay). The term "document" is widely defined in Pt 1 of the Dictionary, and is further extended by the Dictionary, Pt 2, cl 8.

Anderson, *The New Evidence Law* (2nd edn), emphasises (at [82.3]) that the admission must be "made" (as opposed to merely recorded) in the document, so that a police officer's written *record* of an admission made by a person who has not adopted the admission by signing the document is not a document in which the admission is *made*, and the hearsay rule will apply to it so that it does not establish the truth of the admission recorded. Such was the factual situation in *Klewer v Walton* [2002] NSWSC 809, although s 82 was not the basis of the decision to uphold the magistrate's exclusion of the police officer's note of what had been said to him. The Court of Appeal refused leave to the appeal without reference to s 82: *Klewer v Walton* [2003] NSWCA 308.

A lie told by a party, and thus conduct amounting to an admission, must similarly be proved by first-hand evidence, and hearsay evidence that records the lie, tendered for another purpose, remains caught by the hearsay rule: *Lewis v Nortex Pty Ltd (In Liq)* [2002] NSWSC 319 at [6]; see also *Lee v The Queen* (1998) 195 CLR 594 at [28]–[31]. The restriction to first-hand hearsay has been emphasised by the note added to s 82 by the *Evidence Amendment Act*, Sch 1, par [35] (Exclusion of evidence of admissions that is not first-hand):

> Note: Section 60 does not apply in a criminal proceeding to evidence of an admission.

[4-0830] Exclusion of evidence of admissions as against third parties — s 83

The ALRC intended by this section to permit one co-defendant (D2) to use evidence that has been led against another co-defendant (D1): *ALRC Report 26*, vol 1, par 755. An example of the application of s 83(2) would be an admission to the police by D1 that he acted alone in committing the crime, which would ordinarily be relevant only in the case against D1. Section 83(2) permits D2 to consent to the use of that admission in his favour, but the consent cannot be given in respect of part only of that evidence: s 83(3).

There have been few decisions on this section.

In *Vale v Vale* [2001] NSWCA 245, the plaintiff (Mrs Vale) sued her husband for damages alleging that he was the driver and she a passenger when she was injured in an accident involving the motor vehicle. The husband admitted liability. The vehicle was insured with the NRMA, which intervened in the proceedings as a defendant claiming that the plaintiff had in fact been the driver. No claim was made against the NRMA. The judge dismissed the plaintiff's claim on the basis that she had not established that her husband was the driver, despite his admission. It was held on appeal that the trial judge's ruling, relying on s 83, that the husband's admission of liability as the driver was irrelevant to the position of the NRMA was erroneous, but that the admission was of such minimal weight in the circumstances that there had been no miscarriage of justice.

Other cases illustrate situations in which s 83 has been considered, but none states any relevant proposition to assist in its interpretation.

[4-0840] Exclusion of admissions influenced by violence and certain other conduct — s 84

The terms adopted by s 84(1)(a) are not defined in the Act, but they have been described in broad terms as referring to the circumstances in which the common law excluded evidence of admissions because of the absence of true voluntariness on the part of the person making them: *R v Zhang* [2000] NSWSC 1099 at [38].

Onus and burden of proof

Where the party against whom the evidence of an admission is tendered raises an issue about whether the admission or its making was so influenced, the party tendering the evidence bears the onus of proof that the conduct did not influence the admission or the making of the admission. The onus placed by the common law on a party asserting improper conduct as warranting exclusion (*R v Coulstock* (1998) 99 A Crim R 143 at 147; *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at [33]) has thus been reversed in s 84. The burden of proof on this issue carried by the party tendering the evidence is on the balance of probabilities: s 142(1).

Section 84(2) nevertheless places an evidentiary onus on the party raising the issue to point to or to produce evidence from which it could be inferred that the specified conduct took place, before the other party bears the onus of satisfying the court that the admission, or the making of the admission, was *not* influenced by that conduct: *Purkess v Crittenden* (1965) 114 CLR 164 at 168, 171; *R v Youssef* (1990) 50 A Crim R 1 at 3–4; *Habib v Nationwide News Pty Ltd* (2009) 76 NSWLR 299 at [229]–[235], in particular [234].

Discretion

Section 84 confers no discretion: *R v Zhang* at [38].

Scope

The ALRC intended this provision to exclude evidence produced by techniques perceived to be particularly likely to substantially impair the mental freedom of a suspect because any admission so produced may be untrue: *ALRC Report 26*, vol 1, par 765. Reference is usually made to international instruments which Australia has either recognised, ratified or adopted as relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*, see, generally, s 47. The UN International Covenant on Civil and Political Rights was considered relevant in *R v Truong* (1996) 86 A Crim R 188 at 195–196. The other currently relevant international instruments are identified in the document *Extrinsic Material Relating to the Evidence Act 1995* at [4-2000] ff.

The source of the conduct prohibited by the section is not limited to a person in authority or during "official questioning": *R v GH* (2000) 105 FCR 419 at [39]–[41], although the prohibited conduct must be causally connected to the admission: *R v Douglas* [2000] NSWCCA 275 at [58]–[61]. The section does not require the isolation of a single reason or a single event or incident or instance

of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If the Crown has failed to negative oppressive conduct on the part of police as one of those factors, then the evidence is inadmissible: *R v Zhang* at [44].

There is conflict within the decisions as to whether the circumstances to be considered under s 84 are restricted to those known to the police at the time of the questioning. In *R v Taylor* [1998] ACTSC 47, Higgins J stated (at [29]) that it was obvious from the terms in which s 85 is expressed that the circumstances to be considered are not confined to those known to the interrogator. On the other hand, in *R v Munce* [2001] NSWSC 1072 at [27]–[29], McClellan J accepted that, although by reason of an undoubted psychiatric problem there may be real doubt as to whether the accused was giving an accurate account of the relevant events when interviewed by the police, an otherwise scrupulously fair interrogation did not fall within the terms of the section.

Oppressive conduct is not limited to physical or threatened physical conduct, and may encompass mental and psychological pressure: *Higgins v R* [2007] NSWCCA 56 at [26]. In *R v Helmhout (No 2)* [2000] NSWSC 225 at [23]–[26], it was accepted by the Crown that a threat by a policeman to the mother of a young baby who had been caught out telling lies — that she would look like a bad mother if she did not tell the truth (which she interpreted as meaning that she would lose her children) — would, if made, amount to oppressive conduct within the meaning of s 84(1). The issue as to whether the Crown had established that the threat had not influenced her to make the admissions turned on the stage at which the threat was made (see [30]–[34], particularly [31]). The admissions were ruled to be inadmissible (at [34]).

In *R v Zhang*, above, the evidence accepted by Simpson J (at [40]) as amounting to oppressive conduct was the cumulative effect of being offered witness protection in return for co-operation, in the context of being confronted with only two alternatives (co-operate with the police or be charged with murder), together with a threat of physical violence and, finally, being told that he would not be given any further opportunity to co-operate with the police after the detective had left the room. Where there are a number of accumulated factors that cause the admission to be made, of which the conduct on the part of the police is only one, the evidence is inadmissible if the Crown fails to negative that conduct of the police as one of those factors: *R v Zhang* at [44].

The revelation to a person in custody that his alleged co-offender had co-operated with the police, that evidence had been collected through the use of listening devices and that his wife would be questioned, was not considered as conduct falling within s 84: *R v Douglas* [2000] NSWCCA 275 at [60]. Nor does an obligation imposed by an employment contract to attend an interview amount to oppressive conduct: *Higgins v R*, above, at [27].

The assumption by ASIO officers of the unlawful powers of direction, control and detention under cover of a search warrant well known by them not to justify such conduct, deliberately engaged in for the purpose of overbearing the defendant in the hope that he would co-operate, falls within oppressive conduct pursuant to s 84: *R v Ul-Haque* [2007] NSWSC 1251 at [95]. The conduct of the ASIO officers rendered the subsequent interviews of the defendant by Australian federal police officers (one of whom had been present during the earlier conduct of the ASIO officers) inadmissible (at [98]).

In *R v Baladjam (No 47)* [2008] NSWSC 1466 the accused, Jamal, complained that radical Islamist statements made by him at the time of his arrest should be excluded because of oppressive conduct on the part of the arresting officers.

Whealy, J held that the Crown had discharged its onus and that the evidence of "admissions" should be allowed. The scope of s 84 was examined. It was the accused's belligerent, abusive and anti-authoritarian manner which had caused the police to handcuff him. The accused's statements were not made as a consequence of oppressive conduct but because he was angry that he had been arrested and was present while his house and family were searched.

See also *R v Baladjam (No 48)* [2008] NSWSC 1467 for a further illustration of police conduct held not to be oppressive within s 84.

Effect of exclusion in relation to one defendant only

Where evidence of an admission by one defendant is rejected against that defendant because the making of the admission was influenced by such conduct of others (s 84), the evidence may nevertheless be admissible pursuant to s 83 in favour of another defendant; but the jury, if there is one, must be warned of the limitations of the use to which the evidence may be put, and it may be necessary to order separate trials if no such limitation is practically possible: *R v Rahme* [2001] NSWCCA 414 at [35]–[43]; *R v Bunevski* [2002] NSWCCA 19 at [2]–[3].

Application to civil cases

Section 84 has been considered in the context of a civil case, where it was held by the Court of Appeal that a signed admission of responsibility by the defendant (a dentist) should not have been excluded pursuant to s 84 where the judge had found that, by reason of his fear that the plaintiff (his patient) was going to make a scene in his surgery and embarrass him and his other patients, he had been influenced by degrading conduct. The Court of Appeal held such conduct was not degrading and that, even if it were degrading, it had not influenced the defendant in signing the document: *Jung v Son* (unrep, 18/12/1998, NSWCA), at 4–5.

[4-0850] Criminal proceedings: reliability of admissions by defendants — s 85

This section is limited in its operation to criminal proceedings. The terms "criminal proceeding", "investigating official" and "police officer" are defined in the Dictionary. Note that the definition of an "investigating official" excludes a police officer who is engaged in a covert investigation under the orders of a superior.

Section 85 has been described as "the provision particularly directed to unreliable confessions": *Em v The Queen* (2007) 232 CLR 67 at [41]. It was intended by the Australian Law Reform Commission to be concerned with circumstances affecting the truth of the admissions, not with the choice whether or not to make the admission: *ALRC Report 38*, par 160(b); *Em v The Queen* at [51] (where *ALRC Report 38* at par 160(b) was adopted), [121]. In *R v McNeill* (2007) 209 FLR 124, Weinberg CJ held (at [53]) that s 85 of the Norfolk Island *Evidence Act 2004* (which is and was in precisely the same terms as s 85 of the uniform *Evidence Act*) was focussed on "reliability, and not what the police, or someone else, may have said to the accused immediately before any admissions were made", although he later stated (at [56]) that s 85 "implicitly" picks up the principles developed at common law in relation to inducements. On appeal from the conviction in that case, the Federal Court did not refer to that statement by Weinberg CJ; but it made it clear that s 85 of the *Evidence Act* is wider than the pre-existing provisions of s 410(1)(a) of the *Crimes Act 1900* which was repealed, and therefore had no need to deal with the quoted statement: *McNeill v R* (2008) 184 A Crim R 467 at [66]–[109]. In *R v Bartle* [2003] NSWCCA 329 at [232], the NSW Court of Criminal Appeal considered whether admissions induced by a promise of advantage should have been excluded pursuant to s 85(3)(ii), as its terms expressly provide. It is suggested that the statement by the trial judge in *R v McNeill* at [53] should not be followed.

Admissions made by defendants to persons in authority before prosecution

Where electronic recording is made a condition for the admissibility of admissions made to or in the presence of persons capable of influencing the decision whether a prosecution should be brought or continued, as in s 281 of the *Criminal Procedure Act 1986*, admissions so made are admissible even if not responsive to any particular question put or representation made, as are admissions made without any causal connection with the official questioning: *Kelly v The Queen* (2004) 218 CLR 216 at [45]. This follows from the difference between ss 85 and 86; s 86, in contrast to s 85, refers to "an oral admission in response to a question put or a representation made by the official". *Kelly v The Queen* was an appeal from Tasmania, and the majority decision was based on the *Evidence Acts* of the Commonwealth, NSW and Tasmania (the last was introduced in 2001).

The majority in *Kelly v The Queen* accepted (at [45]) that a monologue in response to a general enquiry about what happened (see *R v Donnelly* (1997) 96 A Crim R 432, Hidden J, at 437); an

answer volunteered by the person being questioned (see *R v Julin* [2000] TASSC 50 at [12]); a statement entirely unresponsive to any question and one uttered during a pause in the flow of the questions without being stimulated by any particular question, were all in the course of official questioning for the purposes of s 85. It is not necessary that the statement was made while that person was in custody or under arrest: *Kelly v The Queen* at [50]–[52]. It is suggested that these particular statements in *Kelly v The Queen* have survived the amendment identified in the next paragraph to widen the application of s 85 so that it is no longer restricted (as it was in *Kelly v The Queen* at [49]) to statements made "in the course of official questioning" after the questioning commences and before it ceases.

Section 85 was amended by the *Evidence Amendment Act* in response to the decision of the High Court in *Kelly v The Queen* (at [49]) so that it now applies to admissions made by a defendant:

- to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or
- as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

This provision was inserted by the *Evidence Amendment Act* in response to the decision of the High Court in *Kelly v The Queen*. There is no longer any reference in the *Evidence Act* to, or definition of, "the course of official questioning".

It was held in *R v Donnelly*, above (at 437), that the admissions made in answer to the initial questions asked by the police officer (who had attended the defendant in hospital in his capacity as the defendant's cousin) were not made in the course of official questioning (a phrase used in s 85 before it was amended), but that those made in answer to the questions asked after the officer had told the defendant that he now had to approach the matter as a police officer and record what was said and had cautioned him, were in the course of official questioning, even though the officer had not been assigned to investigate the matter. It is suggested that the phrase "official questioning" remains appropriate to describe the circumstances to which s 85 is directed, those which adversely affect the reliability of admissions made: *Em v The Queen*, above, at [28]–[29].

It does not matter where the statement is made; it may be in police stations or police cars, at the scene of a crime or during informal encounters: *Kelly v The Queen* at [52].

If upon the evidence led either in the trial or on a voir dire a question legitimately arises as to whether the circumstances in which the admission was made were such that the truth (or untruth) of that admission might have been adversely affected, then it falls to the Crown to establish upon a balance of probabilities (in accordance with s 142 of the *Evidence Act*) that it was unlikely that this was the case. The inquiry undertaken by the judge is not concerned with the question whether the admission was in fact made, or whether it was true (or untrue); each is for the jury (s 189(3)): *R v Esposito* (1998) 45 NSWLR 442 at 460.

Section 85 applies equally where the Crown relies on an answer given by a defendant when interviewed that, although not on its face inculpatory, becomes so because its untruth amounts as an implied admission of guilt: *R v Esposito*, at 459.

Another person "capable of influencing" decision to prosecute

Section 85 is concerned with the circumstances in which an admission is made by the defendant, specifically with those applicable during official questioning, but also with anything which may have been done *before the admission is made* by another person who is capable of influencing the decision whether to commence or continue a prosecution of the defendant: *R v Esposito*, above, at 459. The wording of s 85(1)(b) makes it clear that the relevant act of the other person may take place before or during the official questioning provided that it resulted in the admission being made during that questioning.

A person who reports to police information that another person known to him had committed an offence, and who thereafter co-operates with the police by speaking to that person armed with a listening device in the expectation that the other person would further incriminate himself, was neither an agent of the police (so that his speaking to the other person would constitute "official questioning") nor a person capable of influencing the decision to prosecute: *R v Truong* (1996) 86 A Crim R 188 (Miles CJ) at 8–9. Notwithstanding that it was this person's choice as to whether or not he co-operated with the police and that his co-operation was likely to be a factor in influencing the police as to whether or not to prosecute, the section is not aimed at such an indirect capacity to influence: above, at 9.

Such circumstances in which admissions are obtained are relevant to the exercise of the court's discretion to exclude the admissions: *The Queen v Swaffield* (1998) 192 CLR 159 at [26] ff, [74], [128]; *Pavitt v R* (2007) 169 A Crim R 452 at [29] ff. The High Court did not give s 85 any particular consideration in *Em v The Queen* (2007) 232 CLR 67.

This issue did not arise in *R v Donnelly*, above, in which the initial official questioning of the defendant was by a police officer who was his cousin.

"unlikely that the truth of the admission was adversely affected"

If an issue of reliability legitimately arises, the onus lies on the Crown to establish that the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected (s 85(2)): *R v Esposito*, above, at 460. The burden of proof is on the balance of probabilities: s 142.

It has been held that the "circumstances" to which s 82(2) refers are not confined to those known to the interrogator: *R v Taylor* [1999] ACTSC 47 at [29]; *R v Fischetti* [2003] ACTSC 9 at [7]. Odgers, *Uniform Evidence Law* (9th edn at [1.3.5220]), has suggested that "any relevant condition or characteristic of the person" in s 85(3)(a) is similarly not confined to those known to the interrogator, arguing that the emphasised words in the phrase "to which the person is *or appears to be* subject" in that paragraph were included in order to negate any burden of proof on the defendant to prove that he was in fact subject to the condition or characteristic. There appears to have been no judicial discussion on that issue.

The matters specified in s 85(3) do not limit those to be taken into account. The ALRC intended the trial judge to consider all the circumstances, including the characteristics of the person making the admission, whether there was misconduct by those interrogating, whether procedural safeguards were adopted, whether the ability of the person making the admission to make rational decisions was substantially impaired, and whether other incriminating evidence was discovered or obtained as a consequence of the admission being made: *ALRC Report 26*, par 765. The Court of Criminal Appeal said, in *R v Esposito*, above, at 459, that an inquiry should be initiated if a doubt arises as to the truth of what was said by the defendant where his age, mental or physical condition, intellectual capacity, or state of sobriety were such as to impair his orientation, comprehension, or recollection and hence the reliability or factual accuracy of anything said by that person. That judgment (at 459) gave as examples evidence that showed, or raised a doubt as to whether, a defendant had been suffering from brain damage, intoxication, or amnesia when interviewed, and as a consequence to have been confabulating.

The issue under s 85 is not concerned with the question whether the admission was in fact made, or whether it was true or untrue; each of those questions is for the jury: *R v Esposito* at 460. In an earlier appeal, the Court of Criminal Appeal had held that s 85 is directed to the process by which the official questioning produced the evidence tendered (that is, the answers to the questions given), and that the inquiry was as to whether the circumstances of that official questioning were such as to produce untruthful evidence of admissions; whether the admissions were untruthful for reasons other than the way in which they were obtained was a question for the jury and not for the judge: *R v Rooke* (unrep, 2/9/97, NSWCCA), at 14–16.

Odgers, above, (9th edn at [1.3.5220]), has argued that the decision in *R v Rooke* is wrong, as a finding that the alleged admission was untrue would tend to support an argument that the admission was made in circumstances which were likely to adversely affect the truth of any admission made, thus requiring the evidence to be excluded. The facts of that case (described at 13–14) demonstrate that the alleged admissions (which had not been electronically recorded) were inconsistent with objective facts asserted by the defendant at the time and which the police officers discovered only later were true. One clearly available explanation for their presence in the police record of interview was therefore that they had been concocted by the police officers.

The point made in *Rooke*, and reinforced by the decision in *R v Esposito*, is that, when considering the application of s 85, the judge is required to assume that the admission was made and consider only whether the process by which the admission was obtained affected its truth. This would mean that the factual arguments put forward by Odgers cannot be taken into account in determining the issues raised under s 85 in order to exclude the evidence, but they remain available, and substantial, arguments for the jury to consider as to whether the admissions were in fact made.

Section 189(3)

The position is, however, complicated by s 189(3), which states that the issue of an admission's truth or untruth is to be disregarded in determining its admissibility unless the issue is introduced by the defendant. It has been held that this subsection envisages that there may be cases where it is legitimate for the defendant to prove that the admission (assuming it to have been made) is untrue, and that, where such an issue is raised by the defendant, the Crown is entitled to adduce evidence in support of its truth: *R v Donnelly* (1997) 96 A Crim R 432 at 438.

Section 189(3) has been described as an "exception" to s 85: *R v Zhang* [2000] NSWSC 1099 at [52]. In *Zhang*, Simpson J held (at [51]) that the position stated by *R v Rooke* was "not absolute", and (at [52]) she interpreted s 189(3) as having been intended to prevent the Crown using a "bootstraps" argument that the truth of the admission demonstrates that it was made, and that, once the defendant introduces the question of truth or falsity, neither the Crown nor the court is precluded from embarking on an examination of the proof of the admission, "although it may be that the extent to which that [issue] will be considered is limited".

Section 189(3) was referred to in *R v Esposito* (at 460) as authority for the proposition that the inquiry undertaken by the judge is not concerned with the question whether the admission was in fact made, or whether it was true (or untrue), as each is for the jury — a proposition repeated in *R v Moffatt* (2000) 112 A Crim R 201 at [46]. The second part of that proposition appears to have been intended to relate solely to a voir dire concerned with s 85. Section 189(3) relates to a voir dire to determine any issue of admissibility of an admission provided in Pt 3.4 of the *Evidence Act*, not necessarily one concerned with s 85. If the defendant does seek to introduce the issue of untruth into the voir dire, he can do so only if that issue is relevant to the issue to be determined in that particular voir dire. The existence of s 189(3) assumes that such an issue would be relevant to the determination of at least one of the exclusionary provisions in Pt 3.4, but it cannot be assumed that it is relevant to the determination of every one of those exclusionary provisions. The decisions in *R v Donnelly* and *R v Zhang*, above, authorise the Crown also to lead evidence of the truth on the voir dire where the defendant has led evidence of its untruth, a proposition which, it is suggested, is clearly correct. It therefore follows, it would seem, that the truth of the admission will become relevant to its admissibility to be determined wherever its untruth is relevant. No decisions appear to have been given on that issue.

In *R v Braun* (unrep, 24/10/1997, NSWSC), Hidden J took into account the defendant's personality disorder giving rise to a tendency to confabulate to reject the evidence of admissions made pursuant to s 85(2). This decision was followed by Higgins J in *R v Taylor* [1999] ACTSC 47 at [31]–[32], to exclude admissions made by the defendant because his brain damage rendered him unlikely to be able to recall accurately what had happened or to state accurately or reliably what he did recall.

In *R v Munce* [2001] NSWSC 1072, McClellan J acknowledged the discussion of *R v Rooke* in Odgers and the decisions in *Braun* and *Taylor*, but (at [26]–[28]) applied the Court of Criminal Appeal decision in *Rooke* to exclude from his consideration under s 85 the doubts raised as to the accuracy of the account given by the defendant to the police when interviewed by reason of his "undoubted" psychiatric problems, notwithstanding the judge's "real doubt" that the defendant was giving an accurate account of the events, because "there is nothing arising from the objective circumstances of the interview which would impact upon the truth of the admission". It is suggested, with respect, that this restriction to the objective circumstances is contrary to the express terms of s 85(3)(a). Psychiatric problems constitute a mental or intellectual disability. Once a question legitimately arises as to whether the truth of the defendant's admissions may have been adversely affected by such a disability, and before the admission can be admitted into evidence, the Crown bears the onus of establishing on the balance of probabilities that it was unlikely that the truth of the admissions made was adversely affected by that disability.

Where an issue arises under s 189(3) where the defendant has introduced evidence tending to suggest that the truth of the admission has been adversely affected, the Crown must establish on the balance of probabilities that it is unlikely that this is the case: *R v Esposito*, above, at 460; *R v Moffatt*, above, at [46].

Reliable because adverse to interests of defendant

In determining whether the admissions are reliable because they are adverse to the interests of the defendant, an argument that the defendant believed that they were inadmissible against him because they were not recorded, and therefore not against interest, was rejected because, though inadmissible, such admissions would be known to be likely to excite police interest and provoke other police endeavours to prove the case against him (in this case by obtaining a warrant to use a listening device covertly), and thus remained adverse to interest: *Em v R* [2006] NSWCCA 336 at [69]–[70]; *Em v The Queen* (2007) 232 CLR 67 at [84].

Obligation to caution

Section 356M(1)(a) *Crimes Act 1900*, which provided that a detained person must be cautioned orally and in writing, was repealed when Pt 10A of that Act was replaced by Pt 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. Section 122 in Pt 9 of that Act requires the police officer having the responsibility for the care, control and safety of a person detained at a police station or other place of detention (the "custody manager") to caution the detained person that he or she does not have to say or do anything but that anything the person does say or do may be used in evidence.

There is nothing else in Pt 9 of that Act that requires an investigating official to give a caution to a person who is being questioned, whether before or after that person is detained or before the custody manager's obligation arises. The *Law Enforcement (Powers and Responsibilities) Regulation 2016* provides, by reg 38, that, if a caution is given to a vulnerable person, the person giving the caution must ensure that it is understood by that vulnerable person and that, if a support person attends during a person's detention, the caution is given in the presence of that support person. Schedule 2, Pt 1, provides specific guidelines for the custody manager in relation to the caution to be given in accordance with s 122.

An admission of guilt in private by a vulnerable person to his support person does not attract any privilege and, subject to the circumstances of its occurrence, may be admitted in evidence. Section 90 (see below at **[4-0900]**) will have a role to play, but there is nothing inherently unfair in allowing a private admission made to a support person to go before the jury. A support person is not in the same position as a lawyer, counsellor or priest: *JB v R* (2012) 83 NSWLR 153 at [29]–[40].

Section 113 in Pt 9 of the *Law Enforcement (Powers and Responsibilities) Act* provides that nothing in Pt 9 affects the operation of ss 84, 85, 90, 138 and 139 of the *Evidence Act*. Section 138(1)(a) of the *Evidence Act* provides that evidence obtained improperly is not to be admitted

unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which the evidence in question has been obtained, and s 139 provides that, for the purposes of s 138(1)(a), evidence of a statement made or act done by a person during questioning by an investigating official is taken to have been obtained improperly if the person was under arrest for an offence at the time and if the investigating officer did not caution that person that he or she did not have to say or do anything but that anything that person does say or do may be used in evidence.

Neither s 138 nor s 139 of the *Evidence Act* imposes a duty on an investigating officer to give a caution before questioning a suspect, and the consequence of the failure to do so (a finding of impropriety) is effective only if a balancing of public interests pursuant to s 138 denies the admissibility of the answers obtained without a caution. Section 113 of the *Law Enforcement (Powers and Responsibilities) Act* does not impose such a duty. There appears to be no statutory requirement other than the very limited statutory requirement of s 122 of the latter Act for an investigating officer to give a caution to a suspect before asking that suspect questions.

The NSW Police Code of Practice (the Code) for CRIME (Custody, Rights, Investigation, Management and Evidence) (known by the acronym CRIME) does deal with this subject, although perhaps incompletely. The Code is more fully described at [4-2010].

It is discussed in *Em v The Queen* (2007) 232 CLR 67 — a case that was concerned with the application of s 90 (Discretion to exclude admissions) in various but not always consistent ways: Gleeson CJ and Heydon J said (at [39]) that the Code *established* standards for questioning suspects, (at [76]) that it *reflects* the requirements of the *Evidence Act*, and (at [78]) that it *created* obligations. Gummow and Hayne JJ (at [106]) described it as a document intended to *record* rights and duties, not a *source* of those rights and duties. Kirby J described the Code (at [212]) as having *obliged* the police to caution a suspect. The precise legal effect of the Code was not an issue in that appeal.

It is suggested, with respect, that the apparent differences of opinion expressed in *Em v The Queen* may be explained by the fact that the *Evidence Act* does not *by itself* either establish the obligation to give a caution or require a caution to be given to a suspected person. The only limited statutory requirement that the police caution a suspect appears in s 122 of the *Law Enforcement (Powers and Responsibilities) Act*. The obligation otherwise appears only in the Code.

A defendant's lack of awareness of his right to silence does not, of course, by itself render his admission inadmissible; the issue is whether the admission was made voluntarily: *R v Azar* (1991) 56 A Crim R 414 at 417–420; *Tofilau v R* (2007) 231 CLR 396; but the absence of a caution does enliven the discretion now stated in s 139. In *Em v The Queen*, the majority (Kirby J dissenting) held that the absence of a full caution (including the warning that anything the suspected person may say may be used in evidence) did not, in the circumstances of that case, render unfair the use of admissions made in the circumstances of that case: see [4-0900].

Effect of s 89A

A significant alteration in certain criminal proceedings has now been occasioned by the *Evidence Amendment (Evidence of Silence) Act 2013*. Section 89A(1) provides:

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

  (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and

  (b) that is relied on in his or her defence in that proceeding.

The subsection does not apply unless a special caution has been given to the defendant who has been provided with legal assistance concerning the caution, and has been allowed the opportunity, after the caution has been given, to consult with a lawyer, in the absence of the investigating official, concerning the general nature and effect of the caution: s 89A(2).

The subsection does not apply to a defendant who is under 18, or to a person who is incapable of understanding the caution and its effect: s 89A(5). It does not affect proceedings the hearing of which commenced before 1 September 2013: Sch 1(4) of the amending Act. For matters on indictment, it does not apply where the defendant has already been arraigned: see *GG v R* (2010) 79 NSWLR 194 at [68], [86].

The provision only applies to an offence carrying a maximum penalty of life imprisonment or a term of imprisonment of five years or more. An equivalent section has not, at present, been enacted in the Commonwealth *Evidence Act*.

The "special caution" is defined in the following terms:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and

(b) anything the person does say or do may be used in evidence.

Commentators have pointed out that the efficacy of the new provision may be seriously diminished by the fact that it is uncommon for a defendant to be able to secure the attendance of a legal practitioner at a police station prior to the interview, particularly where an arrest has taken place "out of hours": M Latham, "How will the new cognate legislation affect the conduct of criminal trials in NSW?", (2013) 25(7) *JOB* 1. See also Special Bulletin 31 of the *Criminal Trial Courts Bench Book*, "Right to silence — the effect of s 89A of the *Evidence Act 1995*", published August 2013.

Assuming, however, that the subsection applies, and that all its preconditions have been met, it will be a matter within the discretion of the trial judge as to whether a direction should be given to the jury as to whether an adverse inference may be drawn. Generally, the issue that such a direction will raise is whether the omission to refer to material facts in the interview, if they are later something to be relied on during the trial, suggests that those "facts" did not occur and that the account of their occurrence is untrue.

[4-0860] Exclusion of records of oral questioning — s 86

This section is limited in its operation to criminal proceedings. The terms "criminal proceedings", "official questioning", "investigating official" and "police officer" are defined in the Dictionary. Note that the definition of an "investigating official" excludes a police officer who is engaged in covert investigation under the orders of a superior. A "representation" is also defined in the Dictionary. The Dictionary meaning of a "document" is varied by s 86 to exclude electronic recordings.

Proceedings by way of a "Customs prosecution" pursuant to s 245 of the *Customs Act 1901* (Cth) are civil and not criminal proceedings: *Evans v Button* (1988) 13 NSWLR 57 at 74; they are not "criminal proceedings" for the purposes of the *Evidence Act*: *Wong v Kelly* [1999] NSWCA 439 at [63].

This provision becomes relevant only in cases to which the mandatory electronic recording requirements of the *Criminal Procedure Act 1986*, s 281 (Admissions by suspects) do not apply — that is, in relation to admissions made in the course of official questioning concerning non-indictable offences, or indictable offences that can be dealt with summarily, or other indictable offences where the prosecution establishes that there was a reasonable excuse as to why such an electronic recording could not be made. In all other cases, the provisions of s 281 must be complied with: *R v Schiavini* (1999) 108 A Crim R 161 at [16]; *R v Rowe* (2001) 50 NSWLR 510 at [19]. There is no discretion permitting the tender of admissions not complying with either s 281 of the *Criminal Procedure Act* or s 86 of the *Evidence Act*: *R v Hinton* (1999) 103 A Crim R 142 at [39].

Section 86 does not apply to admissions made otherwise than during official questioning. An example is to be found in *R v Mankotia* [1998] NSWSC 295 where the defendant informed the police at the crime scene that he was the one who killed the deceased without being asked any questions.

Answers which are *not* "in response to a question put" could cover a wide range, from answers by highly intelligent persons which wholly or partly deal with the question while containing some material which, though related to the subject of the question, was not sought by its terms, to answers bearing no rational relationship to any kind of question; the High Court declined to determine the precise meaning of the phrase in s 86 until a case arises in which the question is crucial: *Kelly v The Queen* (2004) 218 CLR 216 at [45], n 43.

[4-0870] Admissions made with authority — s 87

The expression "the court is to admit the evidence" does not exclude the application of the discretion given by s 135 to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (No 4)* [2006] NSWSC 90 at [28].

Section 87(1)(b) within scope of employment or authority

Section 87 looks at the general authority of the person who made the previous representation to make statements of the kind embodied in the particular representation, and not at an authority to make the particular representation sought to be tendered: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (No 4)*, above, at [19]; *Refina Pty Ltd v Binnie* [2009] NSWSC 311 at [7]–[8].

Membership of a group constituting a party to proceedings does not in itself provide authority to that member to make statements on behalf of that party: *South Sydney District Rugby League Football Club Ltd v News Ltd (No 4)* [2000] FCA 1211 at [10]–[11]; *Daniel v State of Western Australia* (2001) 186 ALR 369 at [9].

To the extent that there is any inconsistency between s 87 of the *Evidence Act* and s 15 of the *Partnership Act 1892*, the provisions of s 87 prevail: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (No 4)*, above, at [24]–[26].

In *Australian Competition & Consumer Commission v Mayo International Pty Ltd* (unrep, 10/7/98, FC) [reported on other issues at (1998) 85 FCR 327], the statement by Williams J in *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 134 — that some agents derive from their employment an implied authority of a sufficiently wide nature to make their admissions admissible against the principal even with respect to past transactions, provided that, at the time the admissions are made, they are still in the employment of their principal — was said (at 40) to be relevant to s 87(1)(b).

A trade union branch secretary, whose duties formally stated in the union's rules were limited to the administration of its financial affairs but who was also a member of the district branch executive, was held not to have authority to make statements about a pending industrial dispute which would otherwise constitute admissions by the union: *BHP Steel (AIS) Pty Ltd v CFMEU* [2000] FCA 1613 at [6]–[13].

"reasonably open to find"

The expression in s 87(1) "reasonably open to find" makes it clear that a finding that there was in fact authority to make such statements on behalf of the party against whom it is tendered is not required: *DPP v Brownlee* (1999) 105 A Crim R 214 at [20]; *Tim Barr Pty Ltd v Narui Gold Coast* [2008] NSWSC 1247 at [11]. A company secretary does not by virtue of that position alone have authority to do anything beyond the statutory functions of a company secretary: *Tim Barr Pty Ltd v Narui Gold Coast* [2008] NSWSC 657 at [10]–[13].

Section 87(1)(c) common purpose

At common law, evidence was admissible against defendant A of an admission made by a person B where there was "reasonable evidence" of pre-concert between A and B in relation to the offence

charged independently of the content of the admission made by person B: *Tripodi v The Queen* (1961) 104 CLR 1 at 7; *Ahern v The Queen* (1988) 165 CLR 87 at 100; *R v Masters* (1992) 26 NSWLR 450 at 375. The proposition stated in those two decisions of the High Court has been held to have been reproduced in s 87(1)(c): *R v Macraild* (unrep, 18/12/1997, NSWCCA), at 9; *R v Watt* [2000] NSWCCA 37 at [8], and to extend to evidence of directions, instructions, arrangements or utterances accompanying acts given or made by person B (although in the absence of the defendant A) in furtherance of their common purpose, and which constitute or form an element of the crime: *R v Sukkar* [2005] NSWCCA 54 at [39].

"reasonably open"

In *Jackson v TCN Channel 9 Pty Ltd* [2002] NSWSC 1229 at [40], Adams J suggested that the phrase "reasonably open" in s 87(1) had been deliberately chosen to distinguish the appropriate test from that applicable to the resolution of the ultimate issue, and that it was an adaptation of the phrase "reasonable evidence" adopted in *Ahern v The Queen*, above. The NSW Court of Criminal Appeal in *R v Sukkar*, above, having adopted the language of *Tripodi v The Queen*, above, appears to have proceeded on that assumption; see also *R v Watt*, above, at [1], [32]–[33].

In *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794, Gray J accepted *R v Sukkar* and *R v Watt* as authorities for the proposition that, so far as *Tripodi v The Queen* and *Ahern v The Queen* are consistent with the terms of s 87(1)(c) of the *Evidence Act*, they provide authority for the proper construction of that section, although he said that he did not necessarily accept that the "reasonable evidence" test propounded by those High Court decisions is identical with the formulation "reasonably open to find" preferred by the *Evidence Act*.

It is suggested that, until the NSWCCA or the High Court determines otherwise, the decisions in *R v Macraild*, above, *R v Watt*, above, and *Sukkar* apparently equating the phrase "reasonably open" in s 87(1) to the phrase "reasonable evidence" in *Tripodi* and *Ahern v The Queen* should be followed. That phrase is in any event to be contrasted with proof on "the balance of probabilities" stated in s 142 (Admissibility of evidence: standard of proof).

There is no distinction between what the trial judge may determine is reasonably open to find and what may be open to a jury to find: *R v Hall* [2001] NSWSC 827 (Greg James J) at [28]–[29]. In the same case, it was held that the test of "reasonably open" in s 88 refers not only to the issue of whether a particular person made the admission but also to whether what was done was an admission: at [28]; followed in *R v Olivieri* [2006] NSWSC 882 at [9]. The same approach was taken by Whealy J in *R v Lodhi* (2006) 163 A Crim R 526 at [22] (no relevant issue arose in the appeal against conviction: *Lodhi v R* (2007) 179 A Crim R 470).

Section 87(1) extends not only to a criminal conspiracy, but to a lawful common purpose as well. However, s 87(1)(c) is not concerned with the issue of evidence admissible against a number of conspirators, being evidence of a circumstantial kind directed to the establishment of the existence and scope of the particular conspiracy. The admissibility of evidence of that kind, admissible against all the conspirators, is completely untouched by s 87(1)(c): per Whealy, J in *R v Baladjam (No 38)* (2008) 270 ALR 187. Section 87(1)(c) reproduces, in part, the co-conspirator's rule as formulated in *Ahern v The Queen*.

Section 57(2) (Provisional relevance)

This section of the *Evidence Act* permits the evidence of person B's directions, instructions, arrangements or utterances accompanying acts given or made by that person (although in the absence of the defendant A) to establish also the existence of the common purpose alleged: *ALRC Report 26*, vol 1, par 646. This was the case at common law, and such evidence is direct, not hearsay, evidence of the common purpose: *Ahern v The Queen* at 93–94. Once admitted for that non-hearsay purpose, and provided that it is reasonably open to make a finding that person B was acting in furtherance of a common purpose with defendant A, the evidence of person B's activities is taken up by s 60 as establishing the truth of that evidence so far as it tends to demonstrate that defendant A participated

in that common purpose, as was the case at common law (*Tripodi v The Queen* at 7): *ALRC Report 26*, vol 1, par 755 (5th section, "Statements of Alleged Co-Conspirators"). See also *R v Chai* (1992) 27 NSWLR 153 at 189–190; *R v Brownlee* (1999) 105 A Crim R 214 at [20].

Hearsay evidence of a statement implicating defendant A, made by person B after the offence (of obtaining a financial advantage by deception) had been committed and describing how the crime had been committed, is not made in furtherance of a common purpose: *R v Brownlee* at [21].

[4-0880] Proof of admissions — s 88

Section 88 provides that, for the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is "reasonably open" to find that he or she made the admission. See the discussion of this phrase under s 87 (Admissions made with authority).

A finding that it is reasonably open to make such a finding is not a finding made for all purposes; it establishes only that the evidence is admissible, and it remains for the tribunal of fact to determine whether the admission was in fact made: *R v Lodhi* (2006) 163 A Crim R 526 at [22]–[23]; *ACCC v Pratt* (2008) 250 ALR 661 at [65]–[69]. Such an approach has also been adopted in relation to the issue as to whether a particular representation is capable of constituting an admission: *R v Hall* [2001] NSWSC 827 at [27]–[29]; *R v Olivieri* [2006] NSWSC 882 at [9].

Where there is such evidence that an admission was made, it is not appropriate to determine the weight to be given to that evidence by way of a voir dire hearing for the purposes of excluding it in the exercise of the discretion provided by the *Evidence Act*, as that discretion must be exercised on the basis that, taken at its highest, its probative value is outweighed by its prejudicial effect: *R v Singh-Bal* (1997) 92 A Crim R 397 at 403–404; *R v Shamouil* (2006) 66 NSWLR 228 at [50]–[65]; *Pavitt v R* (2007) 169 A Crim R 452 at [141], thus following the common law position: *R v Carusi* (1997) 92 A Crim R 52 at 65.

For all other issues relating to the admissibility of evidence, the standard of proof is that provided by s 142 — on the balance of probabilities, taking into account, inter alia, the importance of the evidence in the proceeding and the gravity of the matters alleged in relation to its admissibility: s 142(2).

[4-0890] Evidence of silence — s 89

This section is limited in its operation to criminal proceedings. The terms "criminal proceeding", "investigating official" and "police officer" are defined in the Dictionary. Note that the definition of an "investigating official" excludes a police officer who is engaged in covert investigation under the orders of a superior. See the discussion of these issues under s 85 (above). There is no longer any reference in the *Evidence Act* to or definition of "the course of official questioning", a phrase deleted from s 89 by the *Evidence Amendment Act*. That deletion was made in response to the decision of the High Court in *Kelly v The Queen* (2004) 218 CLR 216. That decision had no bearing on the interpretation of s 89.

This provision is restricted to the failure or refusal to answer one or more questions put, or to respond to a representation made, by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence. (For convenience, that situation will continue to be described as questions asked in the course of official questioning.)

The common law right to remain silent at the committal stage upheld by the High Court in *Petty v The Queen* (1991) 173 CLR 95 at 102 continues to apply by virtue of s 9 (Application of common law and equity) of the *Evidence Act*: *R v Anderson* [2002] NSWCCA 141 at [23]. *Petty* made it clear (at 99) that it should not be suggested that silence at any stage prior to the trial about a defence raised

at the trial provides any basis for an inference that the defence is a new invention or is rendered suspect or otherwise unacceptable: *Glennon v The Queen* (1994) 179 CLR 1 at 5–8; *R v Stavrinos* (2003) 140 A Crim R 594 at [12]; *Sanchez v R* (2009) 196 A Crim R 472 at [52]–[55], [71].

A shrug of the shoulders in response to official questioning is equivocal — it may be the exercise of the right of silence or it may be an admission that the defendant cannot provide any answer to the question consistent with his innocence. The judge should explain the possible meanings to the jury and give a direction that no adverse inference can be drawn if they accept that the first meaning was the intended one: *R v Astill* (unrep, 17/7/1992, NSWCCA), at 11–12 (the references in *Astill* to selective silence must read subject to what is said in **Selective silence**, below). A response by the defendant that he will not answer a question until he has spoken to his solicitor is an exercise of that right of silence: *Astill* at 9.

It has been held that evidence of a defendant's failure or refusal to answer questions put in the course of official questioning is not excluded where the Crown relies on that failure to confirm the evidence of a prosecution witness: *Cessnock City Council v Courtney (No 5)* [2004] NSWLEC 497 at [4]–[5]. The nature of the evidence given by the witness is not identified. It is suggested that, if the evidence of the witness tends to establish the defendant's guilt, this decision should be treated with great caution.

Selective silence

Odgers, *Uniform Evidence Law* (9th edn at [1.3.5680]) suggests that the section applies whether the claim to a right of silence is total or selective, pointing to the wording of s 89(1)(a) which refers to a failure or refusal to answer "one or more questions".

There is some confusion in the authorities as to whether s 89 is inconsistent with the common law. The decision in *Woon v The Queen* (1964) 109 CLR 529 has been interpreted as permitting the jury to have regard to the defendant's refusal to answer some questions and not others in determining whether he had a consciousness of guilt in relation to those matters: *Weissensteiner v The Queen* (1993) 178 CLR 217 at 231; and it has also been interpreted as *not* permitting the jury to do so: *R v Towers* (unrep, 7/6/93, NSWCCA) at 10–12.

Whatever the common law provided, however, the intention of the ALRC was that this provision would not permit an inference of consciousness of guilt to be drawn from selective answering of questions by the defendant: ALRC Report 38, *Evidence*, at par 165. The annotated Commonwealth *Evidence Act* (AGPS, 1995) states (at par 89.3) that "selective refusal to answer questions is a refusal to answer 'one or more questions', and therefore falls within the rule in s 89(1)".

The disagreement within the text-writers as to whether s 89 has been successful in effecting that intention appears now to have been resolved. Anderson, *The New Evidence Law* (at [89.05]), suggested in its first edition (2002) that, based on an argument put by Aronson and Hunter, *Litigation, Evidence and Procedure* at [9.28] and the decision in *R v Matthews* (unrep, 28/5/1996, NSWCCA), that decision is authority for the continuation of the decision in *Woon v The Queen*, and that the selective answering of questions by a defendant *is* relevant to his consciousness of guilt. However, the second edition of Anderson (2009) — now entitled *The New Law of Evidence* — does not repeat that suggestion.

The Australian Law Reform Commission does not appear to have been concerned about the interpretation of s 89, as there is no consideration given to it in *ALRC Report 102*. It is suggested that the interpretation of s 89(1)(a) by Odgers, that it applies whether the claim to a right of silence is total or selective, is correct.

Decisions given before the *Evidence Act* commenced — that the fact that the defendant exercised his right of silence when the case against him had been put to him by the investigating police officers was admissible in order to meet in advance possible criticism of the police at the trial (such as *R v Reeves* (1992) 29 NSWLR 109 at 115) — are no longer applicable since that statute commenced.

That is because such evidence is not relevant until the criticisms are raised in the trial: *Graham v The Queen* (1998) 195 CLR 606 at [40]. (That decision was not cited in *R v Naudi* [1999] NSWCCA 259 at [16] where *R v Reeves* was followed.) If the defendant does for the first time in his case raise some issue as to the fairness with which he had been treated by the investigating officers or the other issues discussed in *Reeves*, the Crown may be given the right to a case in reply on such issues: *Popescu v R* (1989) 39 A Crim R 137 at 139–141. The Crown should not lead evidence that, when charged, the defendant made no reply: *Petty v The Queen* (1991) 173 CLR 95 at 99.

Where relevant questions are asked by the Crown prosecutor which elicit the fact that the defendant did not identify matters supporting his innocence when questioned by the police, directions must be given making it clear that no inference adverse to the defendant may be drawn from that fact: *R v Anderson*, above, at [30]; *R v Coe* [2002] NSWCCA 385 at [42]–[46]. Such directions should be given in unambiguous terms at the time the question is asked and, if necessary, again in the summing-up; they should make it clear to the jury that the accused had a fundamental right to remain silent and that his exercise of that right must not lead to any conclusion by them that he is guilty; it would usually be appropriate also to remind the jury that (if it be the fact) the accused had specifically been cautioned by the police that he was not obliged to answer any questions, so as to avoid any suggestion of a familiarity by the accused with criminal investigation procedures: *R v Reeves* at 115. These directions would still be appropriate: *R v Tang* (2000) 113 A Crim R 393 at [100]; *R v Merlino* [2004] NSWCCA 104 at [75].

The fact that counsel for the accused has explained the law to the jury in the course of his or her final address is not a sufficient compliance with that obligation: *R v Matthews* (unrep, 28/5/1996, NSWCCA) at 3.

However, if the defendant raises a defence at the trial that is inconsistent with one raised by him at an earlier stage of the proceedings, the Crown may submit that an adverse inference should be drawn in relation to the genuineness of the new defence: *Petty v The Queen* at 101–103; *Jones v R* [2005] NSWCCA 443 at [75].

Where a witness gives evidence favourable to the accused, s 89 applies to prevent that witness being cross-examined to suggest that such a version was not given by that person in answer to a question or questions asked by in the course of official questioning (as described at the beginning of [4-0890]); s 89(1) specifically refers to the failure or refusal of "the party or another person" to answer such questions: *Jones v R*, above, at [90].

A witness who had not been questioned by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence in the course of official questioning may be cross-examined that his or her version given in evidence was not given when purporting to describe the relevant events to persons other than such an investigating official: *R v Coe*, above, at [49].

For the text of the new s 89A of the *Evidence Act* — special conditions and unfavourable inferences at trial — and commentary on the provision: see [4-0850].

[4-0900] Discretion to exclude admissions — s 90

The language of s 90 expresses the concept of unfairness in the widest possible form: *The Queen v Swaffield* (1998) 192 CLR 159 at [67]; *Em v The Queen* (2007) 232 CLR 67 at [50], [177].

The ALRC intended by s 90 to reflect the decision of the High Court in *The King v Lee* (1950) 82 CLR 133, to ensure that there was a discretion to exclude evidence of admissions that were obtained in such a way that it would be unfair to admit the evidence against the defendant who made them, and that the exercise of that discretion would not involve — as does the discretion under s 138 (Discretion to exclude improperly or illegally obtained evidence) — a balancing of public interests: *ALRC Report 38*, par 160.

The decision of the High Court in *The Queen v Swaffield*, above, was not concerned with the provisions of the *Evidence Act*, the two appeals being heard having come from Queensland and Victoria. It is suggested that — since the decision of the High Court in *Em v The Queen*, above, and other than the express acceptance in *Em* (at [50], [177]) of the statement concerning s 90 in *Swaffield* at [67] cited above — little reliable assistance can now be obtained from decisions such as *Swaffield* based on what has been described as the common law "*Lee* discretion" in resolving the parameters of the discretion afforded by s 90.

Em v The Queen

In *Em*, the High Court approached the issues arising under s 90 in different ways.

1. Gleeson CJ and Heydon J said (at [42]) that reliance on s 90 was possible whatever reliance the defendant may place on the other specified sections of the Act. Although Gleeson CJ and Heydon J considered the application of each of the other sections before they considered the application of s 90, they did not suggest that the relevance of those other sections to the circumstances of the case limited the interpretation of s 90.
2. Gummow and Hayne JJ said:
   (a) (at [97], [109]) that s 90 would fall to be considered only after considering and rejecting the application of the other, more specific, provisions of the *Evidence Act* excluding evidence — ss 84–85, 135, 137–139 — which deal with matters that otherwise might have loomed large in the determination of whether the use of evidence of an admission may be unfair to the defendant, and s 281 of the *Criminal Procedure Act 1986* (which requires the electronic recording of admissions); but
   (b) (at [122]) that the discretion given by s 90 is not to be understood as "unaffected" by the more particular provisions of the Act.
3. Kirby J made four general observations (three at [179] and the fourth at [196]) concerning the relationship between s 90 and those other sections:
   (a) that s 90 and "the general provisions for the exclusion of evidence concerned with prejudice [provided by the *Evidence Act*] necessarily overlap in some circumstances", that "[t]hey operate alternatively and cumulatively", that the defendant "is entitled to invoke any and all of the provisions that are alleged to be relevant to the proceedings in hand"; and
   (b) that the criterion for rejection of evidence pursuant to s 90 "is not the way in which it might later be used by the tribunal of fact", as that "would involve a concern with unfair prejudice to which other sections of the Act are directed"; but
   (c) that "the existence of differently expressed powers of exclusion … is not a reason for reading down the alternative grounds for exclusion provided by the Act, including s 90"; and
   (d) that it would be "a serious departure from the text, inimical to the purposes of s 90, to impose on its broad language restrictions imported from the language of other exclusionary provisions in the Act".

   The third of those statements is accompanied by a footnote: "cf reasons of Gummow and Hayne JJ at [122]". The double negative adopted by those two judges in [122] produces an interpretation of s 90 by them which is consistent with the third and fourth observations by Kirby J, although perhaps inconsistent with his second observation.

The NSW Court of Criminal Appeal has described the High Court's decision in *Em v The Queen* as one "without binding result": *R v GAC* (2007) 178 A Crim R 408 at [77]. In *R v Gilham* (2008) 190 A Crim R 341 at [46], Howie J interpreted *Em v The Queen* as deciding, on the basis of the judgment of Gummow and Hayne JJ, that s 90 focuses on the unfairness in the use of the evidence rather than unfairness in the obtaining of the evidence.

Otherwise, until some binding decision expresses a contrary view, it is suggested that *Em v The Queen* should be taken as holding that:

(a) s 90 may be relied on as an alternative to reliance on any of the other specified sections; and

(b) the interpretation of s 90 is not affected by the more particular or specific provisions of the *Evidence Act*.

Gleeson CJ and Heydon J said (at [56]) that the language of s 90 is so general that it would not be possible to mark out the full extent of its meaning, and that in any particular case the application of s 90 is likely to be highly fact-specific. They accepted (also at [56]) that admissions made by a defendant based on incorrect assumptions was no doubt one focus of the section. That was clearly intended by *ALRC Report 38*, par 160 and n 18. Gummow and Hayne JJ said (at [109]) that whether it is "unfair" to use evidence of an out-of-court admission at the trial cannot be described exhaustively. Kirby J said (at [178]) that the power afforded under s 90 must be exercised on a case-by-case basis, and not by a priori rules of universal application. He added (at [206]) that its exercise does not depend on any intention by the investigating officials to deprive the defendant a fair trial; it is whether their conduct had the effect of depriving him of such a trial.

As with the discretion to exclude evidence afforded by s 138 (Discretion to exclude improperly or illegally obtained evidence), the discretion afforded by s 90 requires findings of fact to be made by the trial judge, and there are well-known restrictions on an appellate court reviewing findings of fact and interfering with the exercise of that discretion at first instance, discussed in *House v The King* (1936) 55 CLR 499 at 504: *R v Ahmadi* [1999] NSWCCA 161 at [16]; *R v Walker* [2000] NSWCCA 130 at [28].

In *R v Cooney* [2013] NSWCCA 312 the respondent was charged with robbery and stealing. Conversations between the respondent and undercover police were lawfully recorded after he was taken into custody. During this period the respondent's barrister had sought to speak to the respondent on the police station telephone but was not permitted to do so.

The trial judge rejected the admissions contained in the surveillance conversations on the basis that it would be unfair to use the evidence pursuant to s 90.

The Court of Criminal Appeal held that the trial judge had erred in viewing the breach of s 127 of *Law Enforcement (Powers and Responsibilities) Act 2002* — not informing the respondent in a timely fashion that his barrister wished to speak to him — solely through the prism of s 90. The perceived contravention was highly relevant to s 138 of the *Evidence Act* but the trial judge had not considered this section in his reasons. Importantly, he had not undertaken the balancing exercise required by s 138 where contravention of Australian law had occurred. The Court of Criminal Appeal remitted the proceedings to the District Court for reconsideration.

Whether an admission made by a vulnerable person to a support person attracts s 90 so as to exclude the evidence will depend on the circumstances. Where the support person has pressured, cajoled or tricked the accused into making an admission s 90 will have work to do: *JB v R* (2012) 83 NSWLR 153 at [37] and [41].

Right to exercise a free choice to speak or to be silent

The decisions based on s 90 in many cases prior to the High Court's decision in *Em v The Queen* concerned admissions made to the police in the absence of a caution and/or in the belief that they were not being recorded, as was *Em v The Queen* itself. One recurrent submission has been that, where the defendant was not made aware of his right to refuse to answer questions asked of him (his right to silence), the way in which the admission was obtained makes it unfair to use that admission against him. That is the principal basis on which Kirby J decided, in his dissenting judgment in *Em v The Queen* at [193], that s 90 should have been applied to reject the admissions made by the appellant in that case, because, even in the case of covertly obtained confessions, "the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police …

in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent" — a principle he saw (at [194]) in the majority judgment in *Swaffield*. The phrase "unfair derogation" appears only in the judgment of Kirby J in *Swaffield* (at [155]), and follows from his agreement with a decision of the Supreme Court of Canada (*R v Broyles* [1991] 3 SCR 595 at 611) which he did not consider had been derived from the Canadian Charter of Rights and Freedoms in the first part of the *Constitution Act 1982*. There was no discussion in the judgment of Kirby J in *Swaffield* as to how a suspect's right to exercise that free choice could have been brought to his attention where the admissions occurred during covertly recorded conversations with a police officer posing as the purchaser of illegal drugs (at [2]).

Swaffield was based on the common law "*Lee* discretion" (*The King v Lee* (1950) 82 CLR 133 at 149–150), derived as that was from *McDermott v The King* (1948) 76 CLR 501 at 512, not on s 90 of the *Evidence Act*. *Swaffield* has nevertheless been described as providing "useful guidance" in the application of s 90: *R v Nelson* [2004] NSWCCA 231 at [19]. In that case, reliance was placed on the joint judgment of Toohey, Gaudron and Gummow JJ in *Swaffield*, which made the point (at [66]) that the "unfairness discretion" would achieve nothing beyond what is already required by the general law if it were concerned solely to ensure a fair trial. Reference was also placed on the adoption by that judgment (at [68]) of a statement by the Law Reform Commission of Canada that the judicial discretion to exclude relevant evidence:

> … keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities.

Moreover, the common law has moved on in relation to admissions "informally" obtained by the police (or by those acting at the behest of the police), even since *Swaffield*. In *Tofilau v The Queen* (2007) 231 CLR 396, an appeal from Victoria to which the *Evidence Act* did not then apply, it was held (Kirby J dissenting) that confessions made by the defendants to undercover police officers whom the defendants were tricked into believing were criminal gangsters were held to be admissible despite the subterfuge and deception adopted by the police officers (though subject to their exclusion in the exercise of discretions in the nature of those afforded by ss 135, 137 and 138 of the *Evidence Act*), and the argument that they had been denied the opportunity to choose to refuse to answer questions was rejected (at [5] ff, [20]–[21], [63]–[64], [310], [358]–[359], [362]–[363], [412]–[413]).

The "basal principle" that to be admissible a confession must be voluntary, stated by Dixon J in *McDermott v The King* (1948) 76 CLR 501 at 512, and elaborated at 515, was held in *Tofilau v The Queen* to refer to factors external to the person questioned causing the will of that person to be overborne — duress, intimidation, persistent importunity, or sustained or undue insistence or pressure: at [6], [22], [55]–[63], [330]–[340], not on the deception by the police officers that they were criminal gangsters. Reliance was also placed (at [326]) on *Cornelius v The King* (1936) 55 CLR 235 at 246–252.

It is suggested that pre-*Tofilau* decisions on the application of s 90 to the circumstances in which admissions were "informally" obtained by the police (or by those acting at the behest of the police) should be carefully scrutinised before being followed.

For the text of the new s 89A of the *Evidence Act* — special conditions and unfavourable inferences at trial — and commentary on the provision: see [4-0850].

Legislation

- *Criminal Procedure Act 1986*, s 281
- *Customs Act 1901*, s 245
- *Evidence Act 1995* (NSW), ss 9, 69, 81–90, 135, 137, 138, 139, 142, 165, 189

- *Evidence Act* (Cth), s 9
- *Evidence Amendment Act 2007* ss 82, 85, 89
- *Evidence Amendment (Evidence of Silence) Act 2013*
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 47, Schs 2, 3, 4, 5
- *Law Enforcement (Powers and Responsibilities) Act 2002*, Pt 9
- *Law Enforcement (Powers and Responsibilities) Regulation 2016*, reg 38

Further references

- *ALRC Report 26*, vol 1, Australian Government Publishing Service, Canberra, 1985
- *ALRC Report 38*, Australian Government Publishing Service, Canberra
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005
- J Anderson, N Williams and L Clegg, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts*, 2nd edn, LexisNexis Butterworths, Sydney, 2009
- M Aronson and J Hunter, *Litigation, Evidence and Procedure*, 6th edn, 1998, Butterworths, Sydney
- M Latham, "How will the new cognate legislation affect the conduct of criminal trials in NSW?", (2013) 25(7) *JOB* 1
- Convention on the Rights of the Child
- Convention for the Protection of Human Rights and Fundamental Freedoms
- Declaration on the Rights of Disabled Persons
- Declaration on the Rights of Mentally Retarded Persons
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
- *NSW Police Code of Practice for CRIME* (Custody, Rights, Investigation, Management and Evidence)
- S Odgers, *Uniform Evidence Law*, 9th edn, Thomson Reuters, Sydney, 2010
- Special Bulletin 31, *Criminal Trial Courts Bench Book*, "Right to silence — the effect of s 89A of the *Evidence Act 1995*", published August 2013
- UN International Covenant on Civil and Political Rights

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Evidence of judgments and convictions

Evidence Act 1995, Pt 3.5 (ss 91–93)

[4-1000] Background

Hollington v F Hewthorn and Co Ltd

One purpose of Pt 3.5 was to overrule in most cases the "rule" in *Hollington v F Hewthorn and Co Ltd* [1943] KB 587, in which the English Court of Appeal held (at 594–595, 601–602) that a conviction of the driver of a motor vehicle for negligent driving was inadmissible in an action by a passenger in that vehicle to recover damages for injuries received as a result of the driver's negligence.

This purpose has been effected, first, by s 91, which excludes evidence of a decision in another proceeding, or of a finding of fact in that other proceeding, in order to prove the existence of a fact that was in issue in that proceeding. Secondly, s 92(2) excepts from the operation of s 91 the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, and excludes the application to such evidence of both the hearsay rule in s 59 (evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation) and the opinion rule 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). Section 92(1) similarly excepts from the operation of s 91 the admission or use in evidence of the grant of probate, letters of administration or a similar order of a court to prove the death, or date of death, of a person or the due execution of a testamentary document.

The theory of this scheme is described by Campbell J, in *Gonzales v Claridades* (2003) 58 NSWLR 188 at [66]:

> It was the hearsay rule, and possibly the opinion rule, which underlay *Hollington v F Hewthorn and Co Ltd*. That the accused was guilty of whatever crime he had been held to have committed was a representation made otherwise than in the course of giving evidence in the civil proceedings in which evidence of the conviction was sought to be adduced, and which the appropriate participants in the criminal trial (judge and/or jury) intended to assert by that representation, and hence, were it not for s 92(2)(c), the hearsay rule, as defined in s 59 *Evidence Act 1995* and as expanded by the definition of "previous representation" in the Dictionary to that Act, would apply to it. Further, that the person was guilty of the crime of which he had been convicted is, at least arguably, an opinion of the relevant participants in the criminal trial, and so, were it not for s 92(2)(c), might possibly fall within the opinion rule as defined by s 76 *Evidence Act 1995*. Section 92(3) thus removes the basis for continuing to apply *Hollington v F Hewthorn and Co Ltd* in this State in civil proceedings where the person convicted is a party, or a party through or under whom a party claims, and where none of the exceptions in s 92(2)(a)–(c) applies. The effect of s 92(2) is to impose an evidentiary onus on anyone who disputed the correctness of the conviction to produce evidence that it is incorrect, but s 92(2) does not alter the legal onus of proof of the facts underlying the conviction — see Australian Law Reform Commission Interim Report on Evidence (*ALRC No 26*, 1985), vol 1 pars 773–778.

Hence, once the evidence of a conviction becomes admissible in accordance with s 92, it does not have the effect of an estoppel, but the party disputing the facts established by the conviction has an *evidentiary* onus in relation to that issue.

[4-1010] Applications of ss 91–93

A civil judgment in a superior court of record may nevertheless be used to prove the identity of the parties to the litigation and of the issues raised in that litigation as disclosed in that document, as those facts were not issues in the other proceedings: *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* (2001) 183 ALR 700 at [46]–[51].

A conviction in other proceedings may be established by a certificate stating the fact of the conviction, given pursuant to s 178 of the *Evidence Act* which proves that fact, but s 91 prevents that certificate providing evidence of the truth of the facts on which the conviction was based: *Antoniadis v TCN Channel Nine Pty Ltd* (unrep, 12/3/97, NSWSC) at 2–4; *Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341 at [9].

Where, however, the content of a judgment in another proceeding is relevant to a fact in the litigation in which it is tendered other than proving the truth of that material (for example, to show knowledge on the part of a person who has read the judgment of the findings made in that judgment), the judgment is admissible for that non-hearsay purpose, but s 91 prevents the operation of s 60 to make the document evidence of the truth of those contents: *Ainsworth v Burden* [2005] NSWCA 174 at [109]; *ALRC No 38*, par 171.

In proceedings by a gaming machine manufacturer for an injunction against a former employee to prevent him using confidential information gained in the course of his employment, the defendant's conviction for having used such information unlawfully to obtain payments from its machines installed in clubs was admitted as proof that he had done so: *Ainsworth Game Technology Ltd v Michkoroudny* [2006] NSWSC 280 (Young CJ in Eq) at [4].

Bass v TCN Channel Nine Pty Ltd [2006] NSWCA 343 was concerned with defamation proceedings arising out of a program telecast by the defendant which included allegations made by the plaintiff, a building subcontractor, against the union to which the plaintiff's employees belonged, and the response to those allegations by the union which conveyed imputations that the plaintiff was a "shonk" (that is, a dishonest person) and that he could not be relied on to pay his employees. The jury at the first trial found that the first imputation was true but that the second imputation was not true. The judge at that trial upheld a defence of qualified privilege to the second imputation, based on the right of the union to defend itself against the plaintiff's attack and of the defendant's right to publish both sides of the dispute, but ruled that the plaintiff could not rely in reply on an allegation of malice by the defendant, based on its knowledge that the allegations made by the union were untrue. On appeal, the last of those rulings was reversed, and a new trial was ordered, limited to the issues of malice and damages. At the limited new trial, the judge allowed evidence of the jury's verdict in the first trial that the plaintiff was a shonk (that is, a dishonest person). It was argued by the plaintiff on appeal that, as the trial was limited to the separate cause of action arising out of the second imputation, that finding was irrelevant to the limited new trial based on the cause of action arising out of the second imputation. The Court of Appeal held (at [21]–[24]) that the jury's finding in the first trial that the plaintiff was dishonest was relevant to his credit in relation to factual issues relating to the cause of action based on the second imputation, and that the plaintiff was estopped by that finding from denying that he was dishonest. Reliance was also placed on s 93, which saves the operation of the law relating to res judicata and issue estoppel.

In proceedings to establish whether a defendant was precluded by the forfeiture rule from obtaining a benefit from the death of the person which he had caused by malicious wounding, evidence that a verdict of not guilty by reason of the defendant's mental illness had been entered to the charge of malicious wounding was held to be inadmissible to establish an estoppel relating to the defendant's mental illness: *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220 at [38]–[41]. See also *Batey v Potts* (2004) 61 NSWLR 274 (Gzell J) at [8]–[13].

In proceedings seeking an order that the solicitor should pay the costs that were ordered against his client, s 91 of the *Evidence Act 1995* (NSW) does not prevent a court, exercising the jurisdiction that s 99 of the *Civil Procedure Act 2005* (NSW) confers, from having regard to findings in its principal judgment: *King v Muriniti* (2018) 97 NSWLR 991 at [44]–[46], [49].

Odgers, *Uniform Evidence Law* (13th edn at [EA.92.150]) suggests that s 167 of the *Evidence Act* may be utilised by the party against whom the judgment or conviction is to be tendered to apply for an order requiring the attendance for cross-examination of any witness in the earlier proceedings, in accordance with the explanation for the proposal leading to Pt 3.5 given in *ALRC No 26*, vol 1,

par 779. Odgers points out that a request for such an order is defined in s 166(g) as including the determination of questions in relation to a conviction, being evidence to which s 92(2) applies, but draws attention also to s 169(5)(g), which enables the court considering the issues under s 167 to take into account whether another person is available to give evidence about the facts that were in issue in the proceedings in which the conviction was obtained.

[4-1020] Acquittals

The general effect of *Hollington v F Hewthorn and Co Ltd* on evidence of an acquittal has not been altered by the *Evidence Act*. In *Helton v Allen* (1940) 63 CLR 691, the High Court held (at 710) that such an acquittal does not operate as an estoppel in subsequent proceedings, nor would the fact of the acquittal be admissible in evidence in those proceedings. In *Pringle v Everingham* [2006] NSWCA 195, the Court of Appeal held (at [34]) that Pt 3.5 did not alter the common law concerning acquittals, following *Gonzales v Claridades*, above, at [62]–[68]. The issue did not arise in the appeal from that decision, reported as *Gonzales v Claridades* (2003) 58 NSWLR 211.

Legislation

- *Evidence Act 1995*, ss 59, 76, 91–93, 166, 167, 169, 178

Further References

- S Odgers, *Uniform Evidence Law*, 13th edn, Thomson Reuters, Sydney, 2018
- *ALRC No 26*, vol 1, 1985, Australian Government Publishing Service Canberra
- *ALRC No 38*, Australian Government Publishing Service Canberra

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Tendency and coincidence

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

[4-1100] General

Relevant definitions

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

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

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

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

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

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

Relevance of common law

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

Issues in relation to tendency evidence arising under Pt 3.6

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

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

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

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

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

[4-1110] Application — s 94

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

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

Examples where such evidence is itself a fact in issue

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

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

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

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

New s 94(4) is consistent with the approach taken by the High Court in *The Queen v Denis Bauer (a pseudonym)* (2018) 266 CLR 56 at [70]. In a single judgment, the court said, "[a]t common law, there is a need for separate judicial consideration of the risk of contamination, concoction or collusion, and a requirement that evidence be excluded if there is a reasonable possibility of it being affected by contamination, concoction or collusion. That requirement exists because of the common law rule of exclusion that, because tendency evidence is inadmissible unless there is no reasonable view of it consistent with innocence, tendency evidence is not admissible if there is a realistic possibility of it being affected by contamination, concoction or collusion. Under the *Evidence Act* the position is different. The replacement of the *Hoch* test (*Hoch v The Queen* (1998) 165 CLR 292) with the less demanding s 97 criteria of significant probative value means that the common law rule of exclusion has no application. Under the *Evidence Act*, provided evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence."

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

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

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

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

HML v The Queen

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

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

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

Relevance

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

Such evidence "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding" (s 55): *R v Adam*, above, at [26]. It is not tendency evidence within Pt 3.6, as it would be tendered for non-tendency purpose: ibid at [27]. Such evidence, together with other evidence of conduct sufficiently proximate to the time of the crime charged as to permit an inference to be drawn that the defendant had the same continuing state of mind at that time, would be admissible, as it is not evidence of conduct by the defendant "in the past" (*Makin v Attorney-General (NSW)* [1894] AC 57 (PC) at 65), nor is it evidence of "disposition" or "propensity" or "inclination" (*Markby v The Queen* (1978) 140 CLR 108 at 116): *R v Adam* at [28]–[30]. If, however, such evidence is tendered for a tendency purpose or involves tendency reasoning, its use will be caught by s 97: *R v Mostyn* (2004) 145 A Crim R 304 at [116]–[118]. See also **Context evidence**, below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Effect of s 95

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

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

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

Direction to be given

Where tendency evidence has been admitted for a purpose other than to establish tendency, the judge should give a direction to the jury identifying the specific issue to which it is said to be relevant and to warn the jury, in stringent terms, that it is not to be used by them as demonstrating that the defendant is the sort of person who, having acted in the way (or had the state of mind) demonstrated in this evidence, acted in the same way (or had the same state of mind) as alleged against him in the instant case. Such a direction should be given as soon as the evidence has been given and again in the summing-up: *R v Beserick* (1993) 30 NSWLR 510 at 516; *R v Greenham* [1999] NSWCCA 8 at [28]–[29]; *R v ATM* [2000] NSWCCA 475 at [76]–[77]; *R v Chan* (2002) 131 A Crim R 66 at [50]. A judge hearing a civil case without a jury must also make it clear the use to which such evidence is being put in that case: *Redpath v Hadid* (2004) 41 MVR 382 at [43], [65]–[70].

The failure to give such a direction has led to a conviction being set aside even where the direction had not been sought at the trial, where there was a real risk that the jury would have used the evidence for the impermissible purpose: *R v Cornelissen* [2004] NSWCCA 449 at [72]–[74].

Evidence of a lie told by the accused to the police in relation to an issue quite discrete from the issues in a sexual assault case was held to have been wrongly left by the trial judge as supporting the Crown case that the accused had deceived the complainant into accepting his invitation to join him: *R v Skaf* [2004] NSWCCA 37 (reported on other issues at (2004) 60 NSWLR 86) at [159]–[164]).

State of mind

In *R v Walters* [2002] NSWCCA 291, a case involving multiple charges of defrauding the Commonwealth of group tax payable by a number of companies of which the accused was the principal, and in which the issue of the accused's intention was common to each charge, the trial judge commented that the accused's accumulating knowledge and experience over the time to which the charges related made it logically more difficult for him to say that he did not understand what the situation was. It was argued on appeal that separate trials should have been ordered to avoid any tendency reasoning as to the accused's state of mind, but it was held (at [48]–[50]) that the

evidence in relation to the early counts was highly relevant and highly probative of the intention of the accused in relation to the later counts, and that a trial in which the Crown was deprived of the opportunity to rely on that evidence would have been unfair to the prosecution (on behalf of the community). Special leave to appeal was refused: *Walters v The Queen* [2002] HCATrans S277.

[4-1125] Context evidence

In sexual assault cases, evidence of the accused's sexual interest or attraction for the complainant (previously described as "guilty passion", a term derived from *R v Beserick* (1993) 30 NSWLR 510, for the complainant) may be admitted: *R v AN* (2000) 117 A Crim R 176 at [36]–[53]] ff. The *Evidence Act* does not specifically deal with evidence of this nature. Odgers observes that it will be necessary to identify with "some precision" what the tendering party proposes to establish by the evidence to avoid the application of s 97 (Odgers, 13th edn, [EA.97.60]).

The prosecution may lead evidence of the relationship between the complainant and the accused for the non-tendency purpose of placing the evidence of the specific act charged into its true and realistic context — in order to assist the jury to appreciate the full significance of what would appear to be an isolated act occurring without any apparent reason and to establish a sexual relationship that makes the complainant's evidence of that specific act charged more likely to be true. In such a case, a direction must make it clear that such evidence may only be taken into account if the jury is satisfied that the conduct to which that evidence refers did take place, and that it may be put to that limited use only; it must not be used as establishing tendency: *R v Hagerty* (2004) 145 A Crim R 138 at [23]; *Qualtieri v R*, above, at [73]–[81], [123]; *Rodden v R* (2008) 182 A Crim R 227 at [123]–[125]; *RG v R* [2010] NSWCCA 173 at [38].

See also *Johnson v The Queen* (2018) 92 ALJR 1018 at [2], decided under s 34P, *Evidence Act 1929*, SA, which permits the admission of "discreditable conduct evidence" where its probative value outweighs its prejudicial effect on the accused. For non-Evidence Act cases, see *BRS v The Queen* (1997) 191 CLR 275 at 293–295, 301–302, 308, 326–328 and *Gipp v The Queen* (1998) 194 CLR 106 at [10], [77], [81], [142], [174] ff, which similarly require such directions to be given in relation to propensity and similar fact evidence — the common law concepts which tendency and coincidence evidence have replaced.

What was originally called "relationship" evidence should now be called "context evidence" in sexual assault cases: *Qualtieri v R* (2006) 171 A Crim R 463 at [80]–[81], [112]–[113], [124]; *DJV v R* (2008) 200 A Crim R 206 at [3].

The judge should avoid using the term "uncharged acts" in relation to evidence of this nature for whatever purpose it is being admitted: *HML v The Queen* (2008) 235 CLR 334 at [1], [129], [251], [399], [492]; *KSC v R* [2012] NSWCCA 179 at [64].

[4-1130] Failure to act — s 96

The tendency rule, which is the subject of s 97, refers to a person's tendency "to act in a particular way, or to have a particular state of mind". Similarly, the coincidence rule, which is the subject of s 98, refers to proof that a person "did a particular act or had a particular state of mind". That is the context in which s 96 should be considered. It provides:

> A reference in this Part to doing an act includes a reference to failing to do that act.

Section 96 does not, however, refer to the negative of having a particular state of mind, yet the presence or absence of foresight of the consequences of a person's conduct (that is, the absence of a particular state of mind) may be relevant to prove that person committed an offence, and tendency or coincidence evidence could become relevant to that issue.

Anderson et al, *The New Law of Evidence*, 2009, LexisNexis Butterworths, Australia, notes the omission of any reference in the section to a negative state of mind, but draws no conclusions from that omission. Odgers, in *Uniform Evidence Law* (13th edn at [EA.96.60]), asserts that, despite the limited language of the section, "it is also intended that evidence of the absence of a particular state

of mind … will be subject to this Part". Section 96 is not the subject of any discussion in either of the reports of the Australian Law Reform Commission on Evidence (*ALRC 26* and *ALRC 38*). There does not appear to have been any judicial consideration given to its terms.

Pt 3.6 covers the field

The Court of Criminal Appeal (a bench of five judges) has held that Pt 3.6 prescribes a regime for tendency and coincidence evidence which lays down a set of principles to cover the field to the exclusion of common law principles previously applicable, and that s 101(2) (which provides further restrictions on tendency and coincidence evidence in criminal cases by precluding such evidence where its probative value does not substantially outweigh any prejudicial effect it may have) must be interpreted according to its terms: *R v Ellis* (2003) 58 NSWLR 700 at [72], [83]–[84], [90], [95]; the High Court has expressly agreed with that construction: *Ellis v The Queen* [2004] HCATrans 488.

Section 96 (which falls within the same Part of the *Evidence Act* as s 101), if similarly strictly interpreted only in accordance with its terms, would appear to leave an inexplicable omission in the otherwise clear intention for Pt 3.6 to cover the field. It is suggested that, until a binding decision is given in relation to s 96, some weight should be accorded to the participation of Mr Odgers in the Australian Law Reform Commission Evidence Reference (as a Senior Law Reform Officer) over almost the whole of the period the reference was before it, and to his view that, in its context, s 96 should be interpreted as including the absence of a particular state of mind.

[4-1140] The tendency rule — s 97

Last reviewed: May 2023

Tendency evidence is tendered to prove (by inference) that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in that particular way (or had that particular state of mind): *R v Cittadini* (2008) 189 A Crim R 492 at [23], following *Gardiner v R* (2006) 162 A Crim R 233 at [124].

In *Cittadini*, it was held (at [26]–[35]) that, where the case of a party is that an injury occurred because of an inadequate and negligent supervision and quality control in the construction of an object, proof that the other party failed to institute an adequate and safe system of supervision and quality control in operation in relation to defects in the construction of that object other than the defect that caused the injury is admissible to ground an inference that such an inadequate and negligent system of supervision and quality control existed also in relation to the defect that did cause the injury. Such a case does not involve tendency reasoning, and the evidence in relation to the other defects is admissible for a use other than to prove a tendency to supervise or exercise quality control inadequately or negligently. The distinction is that such evidence is adduced in order to establish, by inference, the *fact* of the inadequate and negligent system, and not the *tendency* to have such a system.

Similarly, evidence that customers in a nightclub tended to take glasses on to the dance floor establishes a frequent, if not constant, danger created by the presence of the glass on the dance floor which should have alerted the owner of the nightclub to the need to consider whether precautions should have been taken to prevent injury to customers, and it is not tendency evidence: *Caftor Pty Ltd t/as Mooseheads Bar & Cafe v Kook* (2007) Aust Torts Reports 81-914 at [38].

Bauer v The Queen: admissibility of uncharged acts as tendency evidence

In *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at [48] the High Court determined that a complainant's evidence of an accused's acts of sexual misconduct not charged on the indictment in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant, whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* (*IMM v*

The Queen (2016) 257 CLR 300: see below under "significant probative value") or exhibit a special, particular or unusual feature of the kind described in *Hughes* (*Hughes v The Queen* (2017) 263 CLR 338).

The juridical basis of cross-admissibility of evidence of charged acts and uncharged acts in cases where the conduct is not too far separated in time and the conduct is of a similar nature, rests on the "very high probative value" of that kind of evidence resulting from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, s/he will seek to gratify his or her sexual attraction by engaging in sexual acts of various kinds with that person: at [50]–[51], [60]; *HML v The Queen* (2008) 235 CLR 334 at [109]. The fact the evidence of uncharged acts is given by a complainant does not, of itself, mean it lacks significant probative value. Once the evidence is admitted, and assuming it is accepted, it adds a further element to the process of reasoning to guilt and so, therefore, may be seen as significantly probative of the accused's guilt of the offences: *Bauer* at [51].

The plurality's reasoning in *IMM* was limited to the case under consideration. *IMM* should not be regarded as implying any departure from the majority opinions expressed in *HML* as to the high probative value which is ordinarily to be attributed to a complainant's evidence of uncharged sexual acts for the purposes of s 97: at [52], [55].

The majority's conclusion in *Hughes*, that particular features of offending imbued the subject tendency evidence with significant probative value, reflected the process of probability reasoning applying to cases involving multiple sexual offences and multiple complainants. The reference in *IMM* to "special features" of an alleged uncharged act with respect to a single complainant is a different process of reasoning: at [57]. In cases involving multiple complainants, where the question is whether evidence of a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that there must ordinarily be some feature of, or about, the offending linking the two together. If there is some common feature, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true: at [58]. By contrast, in a single complainant sexual offences case, there is ordinarily no need for a particular feature of the offending to render evidence of one offence significantly probative of the other: at [60].

The High Court set out at [86] the following directions which should ordinarily be given to a jury in a single complainant sexual offences case where the Crown is permitted to adduce evidence of "uncharged acts" as evidence the accused had a sexual interest in the complainant and a tendency to act upon it:

- The trial judge should direct the jury that the Crown argues the evidence establishes the accused had a sexual interest in the complainant and a tendency to act upon it which the Crown contends makes it more likely the accused committed the charged offence/s.
- If the Crown also relies on the evidence as putting the charged offence/s in context in some other identified fashion or respects, the jury should be further directed that the Crown contends the evidence also serves to put the charged offence/s in context and identify the manner or respects in which the Crown contends it does so.
- The trial judge should stress the evidence of uncharged acts has been admitted for those purposes and, if the jury are persuaded by it, that it is open to them to use the evidence in those ways but no other.
- However, the trial judge should further stress that it is not enough to convict the accused that the jury may be satisfied of the commission of the uncharged acts or that they establish the accused had a sexual interest in the complainant on which the accused had acted in the past; it remains that the jury cannot find the accused guilty of any charged offence unless upon their consideration of all the evidence relevant to the charge they are satisfied of the accused's guilt of that offence beyond reasonable doubt.

Trial judges should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt: *Bauer* at [86]. Contrary to the practice in NSW, trial judges in NSW should no longer follow *DJV v The Queen* (2008) 200 A Crim R 206 at [30]; *FDP v R* (2008) 74 NSWLR 645 at [38] and *DJS v R* [2010] NSWCCA 200 at [54]–[55].

Notice and significant probative value

Where, however, evidence of the character, reputation or conduct of a person, or of a tendency that person has or had (whether or not because of that person's character) is adduced in order to prove those matters, it is not admissible if (a) reasonable notice of an intention to adduce it has not been given, or (b) the court thinks that such evidence would not (either alone or having regard to other evidence adduced or to be adduced by the party by whom this evidence is tendered) have significant probative value. The section applies to both civil and criminal proceedings.

The three Law Reform Commissions, in their Reports (*ALRC 102*, NSWLR *112*), gave consideration to the suggestions that s 97 goes either too far or not far enough in allowing this type of evidence, and acknowledged that such evidence can be highly prejudicial and productive of the very grave risk of wrongful conviction (par 11.15 et seq). They emphasised that the admission of such evidence was not simply to prove the relevant tendency; the admissibility of such evidence in all proceedings is allowed only where it satisfies s 97(1)(b) — that the judge is satisfied that the evidence, either by itself or having regard to other evidence, has significant probative value. In criminal proceedings, the judge must also be satisfied that the probative value of the evidence substantially outweighs any prejudicial effect on the defendant: s 101. Moreover, all such evidence is subject to the discretionary and mandatory exclusions in Pt 3.11 (ss 135–139).

This emphasis has been effected by expressing those requirements as a condition of admissibility to be satisfied by the party tendering the evidence rather than as a basis for its exclusion. Section 135 is discussed later: see **[4-1180]**.

Notice is not required where the evidence is adduced to explain or contradict tendency evidence adduced by another party (s 97(2)(b)), but the evidence must still have significant probative value in accordance with s 97(1)(b): *Bective Station Pty Ltd v AWB (Australia) Ltd* [2006] FCA 1596 at [85].

"if the court thinks" (s 97(1)(b))

There appears to have been no judicial consideration given to the degree of persuasion nominated by s 97(1)(b) — the evidence is not admissible unless the court "thinks" that the evidence "will" have significant probative value.

There is clearly a difference between "substantial" and "significant", an issue discussed at **Significant probative value**, below. Odgers (13th edn [EA.55.390]) suggests that the onus of persuasion in relation to the probative value of the evidence remains on the party tendering it to persuade the court that "reasonable notice" has been given and the evidence has "significant probative value". What is not so clear is the extent of the burden of that persuasion.

The open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions: *Hughes v The Queen* (2017) 263 CLR 338 at [42].

The phrase "if the court thinks" (or similar phrases) when used in relation to the exercise of a power may be found in a variety of settings. The Court of Criminal Appeal may, if it thinks fit, award such compensation as appears just to an appellant where the execution of its order quashing a conviction has been postponed on the Crown's application and where the Crown has failed to prosecute a further appeal diligently: *Criminal Appeal Act 1912*, ss 24–25. The tribunal may allow a forensic patient to be absent from a mental health facility, correctional centre, detention centre or other place for a period and subject to any terms and conditions that the tribunal thinks fit: *Mental*

Health and Cognitive Impairment Forensic Provisions Act 2020, s 94(1). The High Court may, at any stage in proceedings before it, make such amendment "as it thinks necessary" to correct any defect or error in the proceeding: *Judiciary Act 1903* (Cth), s 77J(1). Any court before which proceedings are brought for the administration of a company's affairs may make such order "as it thinks appropriate" as to how Pt 5.3A of the *Corporations Act 2001* (Cth) is to operate in relation to that particular company: s 447A. In each of those settings, the particular phrase appears to mean that the power may be exercised if the relevant court (or the Director-General) "considers it to be appropriate to do so".

In its setting in s 97, however, the verb "thinks" is not used in relation to the exercise of a power; it is used in relation to the burden of persuasion for the admissibility of evidence. An accepted synonym for the verb "to think" is "to be of the opinion that", but that phrase, too, does not indicate the burden of persuasion required. It is suggested that, until some binding decision is given in relation to the matter, s 97(1)(b) should be interpreted as requiring the judge to form the opinion that, on the balance of probabilities (in accordance with s 142), the evidence has significant probative value.

Significant probative value

This is not defined in Pt 1 of the Dictionary, although "probative value" is defined as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". The evidence must be of such a nature that it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent — that is, more than is required by s 55 to establish relevance — *Hughes v The Queen* (2017) 263 CLR 33 at [16]; *McPhillamy v The Queen* (2018) HCA 52 at [27]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 at [72]–[73].

What is involved is, first, an assessment by the trial judge as to whether the evidence has the capacity rationally to affect the probability of the existence of the fact in issue (s 55) and, second, an assessment by the trial judge of the probative value that the jury might ascribe to the evidence (s 97). At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility: *IMM v The Queen* (2016) 257 CLR 300 at [51]. The evidence will usually be tendered before the full picture can be seen. If that assessment is that the jury might ascribe to the evidence a significance of more than mere relevance although something less than substantial relevance, the tendency evidence is admissible, and that assessment will depend on the nature of the fact in issue to which it is relevant and the significance (or importance) which that evidence may have in establishing that fact: *R v Fletcher* (2005) 156 A Crim R 308 at [33] (Special leave to appeal refused: *Fletcher v The Queen* [2006] HCATrans 127); *R v Zhang* (2005) 158 A Crim R 504 at [139] (Special leave to appeal refused: [2006] HCATrans 423; although the interpretation given to the section by the Court of Criminal Appeal was not necessarily endorsed). The evidence must be of importance or of consequence: *R v Martin* [2000] NSWCCA 332 at [67]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd*, above, at [73]–[74]. Where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: *Hughes v The Queen* at [40].

When determining the **probative value of evidence** under s 97(1)(b), no account should be taken of issues of credibility or reliability, except where those issues are such that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of a fact in issue: *R v Shamouil* (2006) 66 NSWLR 228 at [51]–[65]; *Lodhi v R* (2007) 179 A Crim R 470 at [174].

In *Hughes v R* (2015) 93 NSWLR 474, the CCA reiterated emphatically the approach to be taken in assessing whether tendency evidence should be admitted. Importantly, it reinforced that the NSW approach to the assessment of "probative value" remains fundamentally opposed to that taken in Victoria: see *Dupas v R* (2012) 218 A Crim R 507; see also *Velkoski v R* [2014] 45 VR 680.

The difference of opinion between the two jurisdictions was resolved by a majority of the High Court in *IMM v The Queen* (2016) 257 CLR 300. The view of the NSW Court of Criminal Appeal

(NSWCCA) has prevailed. Questions of credibility are, generally speaking, matters for the jury not the judge. See further discussion at [4-1630] "Exclusion of prejudicial evidence in criminal proceedings — s 137".

In *Hughes v The Queen* (2017) 263 CLR 338 the majority of the High Court approved the NSWCCA's decision not to follow the Victorian Court of Appeal's statements in *Velkoski v R*, above. The Victorian Court had stated at [3]:

> that tendency evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct.

The plurality in the High Court rejected this approach. First, it was not warranted by the language of s 97(1)(b). Secondly, it was redolent of the restoration of common law principles which had been abandoned in Pt 3.6. Thirdly, it did not match the language of the section which required a focus on whether the evidence displayed the defendant acting in a particular way, or having a particular state of mind. The test was, as stated in *R v Ford* (2010) 201 A Crim R 451 at [125], affirmed in *Hughes* at [40], whether the evidence, either by itself or together with other evidence adduced or to be adduced:

> should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

Where the tendency evidence relates to sexual misconduct with a person other than the complainant, it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending linking the two together: *McPhillamy v The Queen* at [31]; *Hughes v The Queen* at [64]; *The Queen v Bauer (a pseudonym)* at [58].

In a criminal trial, s 101(2) imposes a further restriction on admissibility. Since 1 July 2020, the test in s 101(2) is whether the probative value of the evidence outweighs the danger of unfair prejudice — the word "substantially" was removed.

Evidence that does not qualify for admissibility to establish that a person has acted in a particular way or had a particular state of mind in relation to the offence charged under the tendency rule may still qualify for admissibility for that purpose under the coincidence rule: *R v WRC* (2002) 130 A Crim R 89 at [33].

Odgers, *Uniform Evidence Law* (13th edn at [EA.97.120]) has suggested that the assessment of the strength of the tendency inference will normally turn on such factors as:

- the nature of the proceedings, ie civil or criminal: *Hughes v The Queen* (2017) 263 CLR 338 at [16]
- the issue to which the evidence is relevant: *Hughes v The Queen* at [42]
- the number of occasions of particular conduct relied on: *RHB v The Queen* [2011] VSCA 295 at [20]
- the time gap or gaps between them: *McPhillamy v The Queen* at [30]–[32]; *R v Watkins* [2005] NSWCCA 164 at [36]
- the degree of similarity between the conduct on the various occasions: *R v Fletcher* at [58]
- the degree of similarity of the circumstances in which the conduct took place, particularly if it is possible to establish a pattern of behaviour, or even a modus operandi, in those circumstances: *R v Milton* [2004] NSWCCA 195 at [31]; *R v Fletcher* at [57], [67]–[68]
- whether the tendency evidence is disputed: *AE v R* [2008] NSWCCA 52 at [44]; *Ibrahim v Pham* [2004] NSWSC 650 at [31] (it is suggested that this factor played little part in that decision), and
- whether the evidence is adduced to explain or contradict tendency evidence adduced by another party, because the probative value of such evidence may be greater where it is used for that purpose than when it is considered in isolation.

No authority is cited for the last suggested factor. It should be noted that the degree of similarity referred to in points 5 and 6 need not reach the level required for coincidence evidence: *KJR v R* (2007) 173 A Crim R 226 at [51]–[54].

As well as an assessment of the strength of the tendency inference, the extent to which the tendency makes more likely the elements of the offence charged must also be assessed. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant: *Hughes v The Queen* at [64]. In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: *Hughes v The Queen* at [41].

General

The evidence need not demonstrate a tendency to commit a particular crime; the tendency rule applies in relation to evidence showing a tendency "to act or think in a particular way" — for example, to use violence with a person in order to achieve what is wanted: *R v Li* [2003] NSWCCA 407 at [11].

Other bases on which judges have determined that tendency evidence has significant probative value include a pattern of behaviour, even a modus operandi, in the behaviour of the accused in establishing a relationship with the complainants, or the similarity in the particular surrounding circumstances in which the offences occurred, rather than the specific sexual behaviour in which the accused engaged with each of them: *R v Milton* at [31]; *R v Harker* [2004] NSWCCA 427 at [51]; *R v Fletcher* at [67]; *R v Smith* (2008) 190 A Crim R 8 at [13]–[19]. However, for evidence to be admissible as tendency under s 97(1)(b) it is not necessary that it exhibits an "underlying unity", "a modus operandi" or a "pattern of conduct": *Hughes v The Queen* at [34] approving the approach in *R v Ford* (2009) 201 A Crim R 451, *R v PWD* (2010) 205 A Crim R 75, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

An example of tendency evidence held to be admissible, notwithstanding that it involved a very long time frame is *R v Cakovski* (2004) 149 A Crim R 21, discussed in [4-1610] Discretions to exclude evidence (s 135), under "Unfair prejudice".

BC v R [2015] NSWCCA 327 is another decision which shows the reach of tendency evidence. The applicant (seeking relief under *Criminal Appeal Act* s 5F) was charged with 20 counts of sexual assault involving four complainants. These were alleged to have been committed over many years, the applicant being between 11 and 13 years old at the beginning of the assaults and being 28 at the last of them. The applicant sought separate trials. This was opposed by the Crown on the basis that the totality of the evidence was admissible on each count because of its intention to rely on the tendency rule. The trial judge refused to sever the counts in the indictment and refused separate trials. The majority (Beech-Jones J and Simpson JA) dismissed the application.

Beech-Jones J held that in some cases it is not improper, and thus not prejudicial, for a jury to reason that if the accused is a particular "sort of person" (namely a person who has demonstrated the asserted tendency), then he is more likely to have committed the alleged offence. At [81] his Honour held:

> To the contrary, that is the very reasoning that the tendency evidence supports and is the very basis upon which it is admitted.

The risk that the jury would be "emotionally affected" can be accommodated by suitable directions.

Adams J did not agree. He held that the behaviour of the applicant when he was 11 could not throw any light on his behaviour as an adult. Second, he held that the jury's reaction to the totality of the evidence would be so extreme that directions would not eliminate the prejudice.

See also *Aravena v R* (2015) 91 NSWLR 258, where the NSWCCA observed that it was not necessary that the conduct occur on a number of occasions for evidence to be admitted as tendency evidence. Even a single incident, in a particular case, may be significant.

The processes by which the tender of tendency evidence is to be determined

have been described as follows:

- tendency evidence is not to be admitted if the court thinks that evidence would not, either by itself, or having regard to other evidence already adduced or anticipated, have significant probative value
- probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the *Evidence Act*)
- the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact — in a jury trial, for the jury
- the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete, and
- the task of the judge in determining whether to admit evidence tendered as tendency evidence is therefore essentially an evaluative and predictive one.

The judge is required, first, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; and second (if that determination is affirmative) to evaluate, in the light of any evidence already adduced and evidence that is anticipated, the likelihood that the jury would assign the evidence significant probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s 97 mandates that the evidence is not to be admitted: *R v Fletcher* at [32]–[35] (Special leave to appeal refused; *Fletcher v The Queen* [2006] HCATrans 127); *R v Zhang* (2005) 158 A Crim R 504 at [139] (Special leave to appeal refused: [2006] HCATrans 423).

In *McPhillamy v The Queen* (2018) 92 ALJR 1045, the High Court held that the tendency evidence did not meet the threshold requirement of s 97(1)(b). While proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, it was not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual assault cases its probative value. The tendency evidence in this case was confined to evidence of events in 1985: at [27]. In the absence of evidence the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade before the alleged offending against A, the inference that at the dates of the offences against B and C he possessed the tendency is weak: at [27], [30]; *R v Cox* [2007] EWCA Crim 3365 distinguished

An illustration of the need for care to be taken in the use of tendency evidence in civil proceedings is the decision of the NSW Court of Appeal in *White v Johnston* (2015) NSWLR 779. The respondent, who succeeded at first instance, had sued for damages for assault and battery against a dentist. Her case was that there had been no therapeutic purpose in the performance of the work with the consequence that her consent to the dental procedures had been invalidly given. An important part of her case was the tender of evidence showing that the appellant had fraudulently obtained payments from health authorities for services never rendered. This evidence was admitted by the primary judge on the basis that it was relevant to an unpleaded case that the appellant had a tendency to perform work that was unnecessary, and to make claims for services not rendered. The Court of Appeal held that the evidence of previous malpractice had been wrongly admitted. This was because it lacked significant probative value for the different purpose of establishing that none of the work carried out on the appellant had a therapeutic purpose. The tendency evidence showed that the respondent had in the past charged for work he had not done. Here, he had done a significant

amount of work, but the issue was whether it was for a therapeutic purpose. The evidence did not address this issue in a significant way. The appeal was allowed and sent back for retrial (confined to the issues of negligence).

Circumstantial evidence

In *Jacara v Perpetual Trustees WA Ltd* (2000) 106 FCR 51, it was suggested (at [56]–[57]) that, although there is no requirement that circumstantial evidence tendered to establish any particular fact comply with s 97, where such evidence is tendered so as to enable a conclusion to be drawn that a person had a tendency to act or to think in a particular way, s 97 will apply.

[4-1145] Admissibility of tendency evidence in proceedings involving child sexual offences — s 97A

Royal Commission recommendations

Substantial amendments were made to Pt 3.6 of the *Evidence Act* in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report,* 2017, and in particular recommendations 44 to 51. The amendments are intended to facilitate greater admissibility of tendency and coincidence evidence, particularly in criminal proceedings for child sexual offences. The amendments create two classes of defendants with different regimes: one for criminal proceedings for non-child sex offences (s 97), and the other for those charged with child sex offences (s 97A).

Section 97A

This creates a presumption in favour of the admissibility of tendency evidence about a sexual interest in children that the defendant has or had, or has or had acted on, in proceedings in which the commission of a *child sexual offence* (defined in s 97A(6)) is in issue. The court may rule against the presumption "if it is satisfied that there are sufficient grounds to do so": s 97A(4), but a wide range of matters are deemed to be irrelevant to that consideration by s 97A(5).

"Sufficient grounds"

This phrase in s 97A(4) is not defined, but the Second Reading Speech says that "sufficient grounds" should be considered in light of the objective of the amendments to facilitate greater admissibility in child sexual offence cases (NSW, Legislative Assembly, *Debates*, 4 February 2020, p 1915). As to "exceptional circumstances" found in s 97A(5), the Second Reading Speech says these are meant to be a "high bar", but the expression was inserted in recognition that there may be rare circumstances.

Subsections 97A(5)(a)–(g) were included in the Royal Commission's recommendations. The Second Reading Speech refers to these matters as "myths and misconceptions", which are directed to raising judicial awareness of the findings of the Royal Commission.

[4-1148] Tendency and coincidence directions in criminal trials — s 161A Criminal Procedure Act 1986

Section 161A, *Criminal Procedure Act 1986* provides that a jury must not be directed that evidence adduced as tendency or coincidence evidence needs to be proved beyond reasonable doubt (s 161A(1)). However the judge may direct on the standard of proof where there is a significant possibility the jury will rely upon the evidence as essential to its reasoning in reaching a finding of guilt (s 161A(3)). Further, if the evidence is also adduced as an element or essential fact of a charge, a jury may be directed the evidence needs to be proved beyond reasonable doubt.

Section 161A commenced 1 March 2021. The section was enacted to respond to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice Report* (Pts III–VI, pp 409 and ff). The enactment of s 161A complements amendments to the *Evidence Act* 1995 described above: the amendments to s 94 and insertion of s 97A.

See further P Mizzi and RA Hulme, "Reforming the admissibility of tendency and coincidence evidence in criminal trials" (2020) 32 *JOB* 113 and *Criminal Trial Courts Bench Book* at **[4-200]**.

[4-1150] The coincidence rule — s 98

This rule relates to evidence of two or more substantially and relevantly similar events occurring in substantially similar circumstances. Such evidence is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind, unless:

- reasonable notice of an intention to adduce it has been given (unless the court has dispensed with the notice requirement or if it is adduced to explain or contradict coincidence evidence adduced by another party), and
- the court thinks that the evidence will, either alone or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

The section applies to both civil and criminal proceedings.

The amendments made by the *Evidence Amendment Act* to s 98 were to remove the previous dual requirements that the "related acts" must be substantially and relevantly similar *and* that the circumstances in which they occurred are substantially similar, and to make them admissible if one or the other condition is fulfilled. The intention of the Law Reform Commissions was that s 98 will apply where the party tendering the evidence argues that it is relevant to the issues in the case on the basis of improbability reasoning and where that reasoning turns on the similarities between the events or in the circumstances surrounding those events, or both (*ALRC 102*, *NSWLRC 112*, par 11.25).

In relation to criminal proceedings, new subs 1A, inserted by the *Evidence Amendment (Tendency and Coincidence) Act 2020*, clarifies the position, ("to avoid doubt"), that s 98(1) applies to the evidence of two or more witnesses claiming to be victims of offences committed by the defendant to prove, on the basis of similarities in the acts or circumstances, that the defendant did an act in issue in the proceeding. The basis for the perceived lack of clarity surrounding this issue is not clear from the explanatory material or the Second Reading Speech (at p 1917), where the Attorney-General said that this is consistent with the current position in NSW.

If reasonable notice of the intention to adduce the evidence has been given in civil proceedings, and if the court thinks that the evidence does have significant probative value, the evidence is admissible and it may be used to establish the relevant similarities of the conduct or state of mind involved, subject to its discretionary exclusion pursuant to s 135. In criminal proceedings, before such evidence may be used for that purpose, the court must also be satisfied that the probative value of the coincidence evidence substantially outweighs any prejudicial effect it may have on the defendant: s 101. That section is discussed later: see [4-1180].

The assessment as to whether the two or more events were substantially similar and whether they occurred in substantially similar circumstances is to be made by the judge, and it is essentially an evaluative and predictive one; the first issue is whether the evidence is relevant (s 55): *R v Zhang* (2005) 158 A Crim R 504 at [139]–[140] (Special leave to appeal refused: [2006] HCATrans 423; although the interpretation given to the section was not necessarily endorsed); *Stevens v R* [2007] NSWCCA 252 at [46]–[50].

In *R v Zhang*, the appellant had been convicted of attempting to import prohibited drugs found in packets purporting to contain food and addressed to her foodstuff importing business, and of possession of prohibited drugs in a package inside a bag in her apartment which she claimed she had been asked to mind. The only issue in the trial was whether she was aware that the packets attempted to be imported and the package inside her apartment contained prohibited drugs. The Crown sought

to establish that fact by the improbability of the coincidental presence, on two occasions and close in time, of large quantities of prohibited drugs without her knowledge. The Crown had argued that the appellant's knowledge that the container on one occasion contained prohibited drugs strengthened its case that she knew that the container on the other occasion also contained prohibited drugs.

As the evidence relating to each occasion was admissible in any event to prove the charge relating to that occasion, this was coincidence reasoning rather than coincidence evidence (see [137]). The issues for the trial judge to consider were whether:

- the two events and the circumstances in which they occurred had the relevant similarities required by s 98, and
- in relation to each event, the evidence as to the appellant's state of mind in relation to that event had significant probative value in establishing her state of mind in relation to the other event and that the jury would assign significant probative value to that evidence (at [145]).

The issue for the jury was, in the end, whether the Crown had eliminated the reasonable possibility that the drugs had come into the appellant's possession without her knowledge (at [151]). In a dissenting judgment, Basten JA held (at [63]) that, whereas knowledge by the appellant of the prohibited drugs inside the bag in her apartment may have given rise to a powerful inference that she was knowingly involved in the importation, the reverse did not apply, and that in any case the events were not related within the meaning of s 98 (at [64]).

"unless the court thinks"

It is suggested that — for the reasons given under the identical sub-heading under **The tendency rule** (s 97) — that, until some binding decision is given in relation to the matter, s 98(1)(b) should be interpreted as requiring the judge to form the opinion that, on the balance of probabilities (in accordance with s 142), the evidence has significant probative value.

In an application for there to be separate trials of charges involving the coincidence rule, only the trial judge can make rulings as to the admissibility of coincidence evidence, so that an application heard before a joint trial by a judge who is not to be the trial judge, and who cannot rule on the admissibility of that evidence, can proceed only on the admissibility of the coincidence evidence in a separate trial; if the assessment is that such evidence would render that trial unfair, then separate trials should be ordered: *R v Nassif* [2004] NSWCCA 433 at [36]–[41].

Significant probative value

The judge must assess whether the evidence has the capacity rationally to affect the probability of the existence of the fact in issue (s 55). If the assessment is that the jury might ascribe to the evidence a significance of more than mere relevance, although something less than substantial relevance, the coincidence evidence is admissible. This is discussed under the identical subheading under [4-1140] (The tendency rule).

Such matters as the striking similarities, underlying unity, system or pattern may guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value: *R v Fletcher* (2005) 156 A Crim R 308 at [33], [60] (Special leave to appeal refused: *Fletcher v The Queen* [2006] HCATrans 127). Those phrases are taken from the common law case of *Hoch v The Queen* (1989) 165 CLR 292 at 294–295. See also *Harriman v The Queen* (1989) 167 CLR 590 at 600, 609.

The issue

Although each of a number of similar features involved in more than one event might be explained away as not being uncommon, the issue must be whether the combination of all those similar features in each event is sufficiently striking as to give them significant probative value: *R v Mason* (2003) 140 A Crim R 274 at [40].

Examples

In *R v Milenkovic* (2005) 158 A Crim R 4, the accused was charged with the armed robbery of a Westpac Bank, and the Crown sought to tender evidence that he was shortly afterwards involved in another armed robbery of a Westpac Bank in which the men involved were similarly wearing dark clothing including hoods or balaclavas, armed with a shotgun and carrying sledgehammers and driving in a stolen motor vehicle. In the second armed robbery, DNA attributed to the accused was found on a wrench in the vehicle stolen for the second armed robbery. In each robbery, the men had a changeover vehicle waiting for them that was owned by the father of one of the other men involved. The trial judge had dismissed the similarities as being "really stock in trade" of armed robbers, but made no reference to the fact that the same vehicle was to be used as a changeover vehicle. The Court of Criminal Appeal dismissed the Crown appeal against the rejection of this evidence (at [21]–[23]) on the basis that, although the common changeover vehicle gave the fact that the accused had been involved in the second armed robbery "some" probative value, it did not give that evidence "significant" probative value.

In *Boniface v SMEC Holdings Ltd* [2006] NSWCA 351, Hodgson JA held (at [12]) that, in a civil case, the requirement of "significant probative value" probably did not change the general law that conclusions of fact based on similarities of events be reached by way of reasonable inference and not mere speculation. There is no support for that conclusion in the other judgments of the Court of Appeal; nor is there any record of a decision that has adopted the interpretation given. Mere speculation would not establish that the evidence was relevant in accordance with s 55, which requires the evidence to be capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of the fact in issue. That would appear to require the evidence to give rise to a reasonable inference in order to be relevant. Significant probative value requires more than mere relevance although something less than substantial relevance. See the discussion at [4-1140] (the tendency rule).

In *R v Zhang* (2005) 158 A Crim R 504 it was held by majority (at [145]–[148]) that the evidence relating to each event in question was capable of supporting the significant probative value of the evidence relating to the other event, although it was conceded that such evidence was peripheral where the remaining issue was the accused's knowledge that the substance in each case was a narcotic. The dissenting judgment pointed out (at [70]) that such a direction in relation to significant probative value would only be appropriate where the jury was not in doubt in relation to the evidence relating to both events. (It is unclear whether this was one of the interpretations which was not necessarily endorsed by the refusal of special leave to appeal by the High Court.)

Determination of the issue

In *R v Zhang* (2005) 158 A Crim R 504, the processes by which the tender of coincidence evidence is to be determined have been described (at [139]–[140]) as follows:

(1) coincidence evidence is not to be admitted unless the trial judge is satisfied that:

   (a) the two or more events (the subject of the tendered evidence) are substantially and relevantly similar and that the circumstances in which they are alleged to have occurred are substantially similar, and

   (b) the evidence would, either by itself, or having regard to other evidence already adduced or anticipated, have significant probative value,

   Note: that (a) must be read as "relevantly similar or that the circumstances" in relation to cases to which the *Evidence Amendment Act* applies.

(2) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the *Evidence Act*),

(3) the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact — in a jury trial, for the jury,

(4) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete, and

(5) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one.

The judge is required, first, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; and secondly (if that determination is affirmative) to evaluate, in the light of any evidence already adduced and evidence that is anticipated, the likelihood that the jury would assign the evidence significant probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s 98 mandates that the evidence is not to be admitted.

A determination under s 98 is essentially evaluative and predictive, and requires an assessment on which reasonable minds may differ: *Zhang* at [141]; *Samadi v R* (2008) 192 A Crim R 251 at [68].

In *DSJ v R* (2012) 215 A Crim R 349, a five-judge bench of the Court of Appeal has recently considered a challenge to the formulation of the approach stated by Simpson, J relating to the admissibility of coincidence evidence. (In *Zhang v R* [2011] NSWCCA 233, Simpson J and Buddin J had been in agreement as to the correct approach. Basten JA did not agree.) There were two principal questions of challenge. First, whether Simpson J's approach in *Zhang*, above, had abrogated the proper function of the trial judge. Second, whether the exercise required by s 98 required the trial judge to assess the respective probabilities arising from any alternative theories available in the evidence and the likely evidence to be adduced. A corollary of this second question was the proposition that the trial judge, in determining to allow the coincidence evidence and in ordering a joint trial, disregarded the possibility of an alternate explanation for the evidence, consistent with innocence.

The facts were briefly these: the two accused had been charged with insider trading offences under the *Corporations Act 2001* (Cth). Essentially DSJ was alleged to be an insider. He had procured NS, his co-accused, to apply for and dispose of shares or securities by passing insider information to him. Shares and securities were purchased and sold over a relatively long period of time. According to the Crown case, there was a powerful inference to suggest that there was a deliberate scheme or arrangement in place between the two men. The trial judge, in a pre-trial ruling, held that the coincidence evidence was admissible pursuant to s 98(1)(b), ie it had significant probative value; and that there should be a joint trial of the majority of counts in the indictment.

The court held—Whealy JA with Bathurst CJ, Allsop P, McClellan CJ at CL and McCallum J in agreement that:

1. The formulation of the process by Simpson J was, subject to qualifications, correct. There was no justification or warrant for overruling *Zhang*: Whealy JA at [66].

2. It is the function of the trial judge to evaluate the capacity of the coincidence evidence, together with other evidence to be tendered by the prosecution, to reach the level of "significant probative value". By contrast, it is the function of the jury, upon the completion of all the evidence, to evaluate the actual weight of the co-incidence evidence and indeed the evidence as a whole.

3. In performing the task under s 98, the trial judge may have regard to an alternative innocent explanation arising on the evidence. In such a circumstance, the trial judge will ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the otherwise significant capacity of the Crown evidence, if accepted, to establish the fact or facts in issue: Whealy JA at [78]–[82].

Examples of the practical application of these principles are to be found in *Bangaru v R* [2012] NSWCCA 204 (tendency evidence) and *R v Gale* (2012) 217 A Crim R 487 (co-incidence evidence).

In *R v Matonwal* (2016) 94 NSWLR 1, two men (the respondents) had been arrested during the commission of an armed robbery at a service station. At their trial, the Crown sought to introduce tendency and coincidence evidence in relation to a series of other armed robberies in the Sydney region. The coincidence evidence was based on features of the robberies relating to the weapons used, the clothing worn, and description of the offenders, escape vehicle and general modus operandi. It was argued that these features were sufficiently similar such that it was improbable that robberies with those features were committed by persons other than the respondents. The trial judge refused to admit the evidence as either tendency or coincidence evidence on the basis that each of the features pointed to were "common features of robberies of that type". The Court of Criminal Appeal agreed that the tendency evidence was insufficient but held that the trial judge was in error in rejecting the majority of the evidence as sufficient coincidence evidence. The court held that it is necessary to give consideration to evidence sought to be tendered as coincidence evidence as a whole, rather than giving separate consideration to each particular circumstance relied upon. Secondly, the task is to be performed having regard to all the evidence sought to be relied upon by the party seeking to tender coincidence evidence.

[4-1160] Requirements for notices — s 99

The *Evidence Regulation 2020* (NSW), clauses 5 and 6, requires a s 97 notice in relation to tendency evidence and a s 98 notice in relation to coincidence evidence:

(1) in relation to tendency evidence:

  (a) to state the substance of the evidence intended to be adduced,

  (b) to provide particulars of:

    (i) the date, time, place and circumstances at which the conduct occurred, and

    (ii) the names of each person who saw, heard or otherwise perceived the conduct, and

    (iii) in a civil proceeding — the address of each named person (so far as they are known to the notifying party)

(2) in relation to coincidence evidence:

  (a) to state the substance of the evidence of the occurrence of two or more events intended to be adduced, and

  (b) to provide particulars of:

    (i) the date, time, place and circumstances at which the conduct occurred, and

    (ii) the names and addresses of each person who saw, heard or otherwise perceived each of those events, and

    (iii) in a civil proceeding — the address of each named person (so far as they are known to the notifying party)

The notice required by the section must identify each event which is to be the subject of evidence, and the person whose conduct or state of mind will be the subject of that evidence, and it must state whether the evidence is tendered to prove that that person did a particular act (identifying that act) or had a particular state of mind (identifying that state of mind): *R v Zhang* [2005] NNSWCCA 437 at [131]. The notice may comply with those obligations by reference to other readily identifiable documents: *R v AB* [2001] NSWCCA 496 at [15].

A general reference to the "brief of evidence and evidence at committal" is not sufficient notice, and the absence of complaint at the trial is not itself evidence of a waiver of the requirements unless it is demonstrated that the accused had been apprised of his rights and had been advised by his legal representative to waive those rights, and that the accused understood the consequences of consenting

to the evidence being given without notice; the provisions of the regulation are mandatory, and failure to comply with its terms renders the evidence inadmissible: *R v AN* [2000] 1NSWCCA 372 at [60]–[62]; *R v Zhang* at [49].

There may be no unfairness created where appropriate particulars have been given by way of a tendency notice rather than a coincidence notice: *R v Teys* (2001) 119 A Crim R 398 at [66].

[4-1170] Court may dispense with notice requirements — s 100

Section 192 (Leave, permission or direction may be given on terms) identifies a number of factors to be taken into account in an application under s 99, without limiting such matters: *R v Harker* [2004] NSWCCA 427 at [34]. Other important matters relevant to the making of a direction are the probative value of the evidence and the prejudice caused by the failure to give notice: at [35]. Such prejudice is limited to that caused by the failure to give notice, such as not being in a position to meet the evidence; prejudice caused to the defendant by the admission of such evidence is irrelevant to s 100: at [41], [44]–[47]. The length of time that had elapsed since the events with which the evidence is concerned is not prejudice caused by the failure of the Crown to give a s 100 notice, as it would have arisen in any event: at [44].

Affidavits served during the proceedings are relevant in considering whether the other party had been put on notice of the tendency evidence on which reliance was to be placed and thus whether the lack of a formal notice should be waived in accordance with s 192 of the *Evidence Act*: *Cantarella Bros Pty Ltd v Andreasen* [2005] NSWSC 579 at [19]; *Toben v Jones* (2003) 129 FCR 515 at [168].

A direction that either the tendency rule or the coincidence rule not apply to particular evidence would be made where the other party does not claim prejudice: *R v Davidson* [2000] NSWSC 197 at [2]. A refusal to make a direction pursuant to s 100 is a "decision … on the admissibility of evidence", and thus within the scope of s 5F(3A) of the *Criminal Appeal Act 1912*: *R v Harker*, above, at [30]–[32].

A direction has been given where cross-examination of a Crown witness on behalf of the accused was based on material served on the accused by the Crown: *R v Christos Podaras* [2009] NSWDC 276.

A direction given pursuant to s 100 does not mean that the evidence is admissible, as s 101 (Further restrictions on tendency evidence and coincidence evidence adduced by prosecution) remains to be considered: *R v Harker* at [35], [46].

[4-1180] Further restrictions on tendency evidence and coincidence evidence adduced by prosecution — s 101

Terminology

Prior to the 2020 amendments made by the *Evidence Amendment (Tendency and Coincidence) Act*, s 101(2) was expressed in unusual terms, in that it states that tendency or coincidence evidence about the defendant "that is adduced by the prosecution cannot be *used* against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant" (emphasis added). The word "adduced" does not mean "admitted"; in its context, it means "tendered": *R v Zhang* (2005) 158 A Crim R 504 at [38]–[39], [125].

The new s 101(2) appears to reduce the heavy burden on the prosecution in the former s 101(2): see *Taylor v R* [2020] NSWCCA 355 at [122]. The amendment replaces the words "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant" with "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant". The Second Reading Speech (p 1916) says that this removes the requirement for the probative value

to "substantially" outweigh the prejudicial effect, and is intended to "address the asymmetry in the assessment of whether evidence with significant probative value should be admissible under the current test, which is disproportionately weighted toward the exclusion of such evidence".

The amendment appears to increase the minimum consideration of prejudice from "any prejudicial effect" to "the danger of unfair prejudice". The intention is to align the language of s 101 with s 137 (which also uses "danger of unfair prejudice") in circumstances in which the High Court has held that the expressions of "prejudicial effect" and "unfair prejudice" convey essentially the same idea: see *The Queen v Dennis Bauer (a pseudonym)* at [73]. There the High Court said "despite textual differences between the expressions "prejudicial effect" in s 101, "unfairly prejudicial" in s 135 and "unfair prejudice" in s 137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way. Nonetheless it may be that the change from "any" to "danger of" will be thought to increase the demonstrable prejudice necessary to outweigh the probative value.

Both the tendency rule in s 97 and the coincidence rule in s 98 states that such evidence "is not admissible to prove" either the tendency or the coincidence, whereas s 95 (Use of evidence for other purposes) excludes a particular use of evidence already admitted. In *R v Nassif* [2004] NSWCCA 433, it was held (at [47]) that unproductive debate concerning the non-exclusionary terminology of s 101 should be put to one side, and that it should be construed as a rule with respect to admissibility. See also *R v Fletcher* (2005) 156 A Crim R 308 at [46]–[48], discussed more fully under **Appellate approach** below.

Interpretation

In *R v Ellis* (2003) 58 NSWLR 700 at [74]–[84], [90]–[95], the Court of Criminal Appeal (a bench of five judges) held conclusively that the statutory provisions and the common law relating to the issues arising under Pt 3.6 (in which s 101 is found) are not necessarily the same and that s 101 must be interpreted strictly in accordance with its terms. When revoking the previous grant of special leave to appeal in that case, the High Court expressly agreed with the construction of the *Evidence Act* adopted by the Court of Criminal Appeal: *Ellis v The Queen* [2004] HCATrans 488 (a bench of seven judges).

In particular, the Court of Criminal Appeal held that the common law requirement — that, before this type of circumstantial evidence could be admitted, there must be no rational explanation for the evidence other than the guilt of the accused (*Pfennig v The Queen* (1995) 182 CLR 461 at 482–483) — leaves nothing to be weighed under s 101, whereas the statutory requirement that the probative value of the evidence substantially outweighs any prejudicial effect on the accused permits evidence to be admitted in the appropriate case despite that prejudicial effect. It was nevertheless said that there may be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighed its prejudicial effect unless the "no rational explanation" test was satisfied.

Previous decisions such as *R v Colby* [1999] NSWCCA 261 at [92], [97]; *R v OGD (No 2)* (2000) 50 NSWLR 433 at [77] should now be regarded as having been overruled in relation to this particular issue, but they remain of assistance in relation to the continuing relevance of the possibility of concoction: see **Possibility of concoction** below.

In *HML v The Queen* (2008) 235 CLR 334, Heydon J held (at [228], fn 227) that *Pfennig v The Queen*, above, "does not apply" under the *Evidence Act*.

The judicial process

Where tendency evidence is tendered, the judicial process involves:

(1) identifying the fact in issue to which the tendency evidence is said to be relevant;

(2) determining whether the tendency evidence is capable rationally of affecting the assessment (by the tribunal of fact) of the probability that the fact in issue exists (that is, that the evidence has probative value in that assessment);

(3) if the tendency evidence has probative value in that assessment, determining whether that probative value is capable of being perceived by the tribunal of fact as "significant" (in the sense that it has something more than mere relevance but something less than a "substantial" degree of relevance); and

(4) (in a criminal case) if the evidence is capable of being perceived by the tribunal of fact in that way, determining whether the probative value of the evidence substantially outweighs any prejudicial effect it will have on the defendant: *Gardiner v R* (2006) 162 A Crim R 233 at [119]–[125].

After the application of ss 97 and 101 to tendency evidence, there is no room for the operation of either ss 135 or 137: *R v Ngatikaura* (2006) 161 A Crim R 329 at [70]–[71], [74] (although Rothman J, having agreed with Simpson J, goes on to tread a slightly different path to that followed by Simpson J; Beazley J dissented only on the basis that the evidence was not tendency evidence). Subsequent decisions, such as *R v Ford* (2010) 201 A Crim R 451 at [59], have made it clear (in accordance with the view expressed by Simpson J in *Ngatikaura*) that, once evidence has passed the test imposed by s 101(2), it was not possible to think of circumstances in which the evidence could be rejected pursuant to s 137.

Significance should not be given to minor variations of the language used in s 101 ("the probative value of the evidence substantially outweighs any prejudicial effect it may have") on the one hand and "unfairly prejudicial to a party" in s 135 and "the danger of unfair prejudice to the defendant" in s 137 on the other hand; what is to be compared in the case of all three sections is "probative value" and "prejudicial effect", and prejudicial effect will generally be unfair if it outweighs probative value: *R v Chan* (2002) 131 A Crim R 66 at [49].

Possibility of concoction

The ruling in *Pfennig v The Queen* was based on what was said in *Hoch v The Queen* (1988) 165 CLR 292 at 296, where that proposition was itself based on the acceptance that the possibility of concoction (not a probability or real chance of concoction) between different witnesses of "similar fact" evidence served to render that evidence inadmissible. The test was stated (at 297) as "the admissibility of similar fact evidence … depends on that evidence having the quality [of probative value] that is not reasonably explicable on the basis of concoction".

Although *Pfennig* is not applicable to s 101, the possibility of joint concoction has been held to be nevertheless still relevant to the assessment of the probative value of the evidence: *AE v R* [2008] NSWCCA 52 at [44]. There is no discussion in that case as to how it remains relevant, but no suggestion is made that the "no rational view" reasoning remains appropriate. In *R v Harker* [2004] NSWCCA 427 at [50]–[51], the absence of any opportunity for the complainant and the proposed witness to give propensity evidence of concocting their versions of events together was taken into account in the assessment of the probative value of the evidence to be given by the proposed witness, without reference to the "no rational view" reasoning.

The possibility of concoction has also been considered relevant in three Tasmanian decisions based on that State's *Evidence Act 2001* (in which s 101(2) is expressed in the same terms as in the NSW statute), where the views expressed in *R v Ellis* concerning the "no rational view" were accepted. In *Tasmania v S* [2004] TASSC 84, Underwood J said (at [8]) that the potential untruthfulness of tendency evidence is relevant to the probative force of tendency evidence, and he followed the pre-*Ellis* case of *R v Colby*, above, to state (at [11]) that, where there is a reasonable possibility of concoction, then the prejudicial effect will "ordinarily" outweigh the probative value of the tendency or coincidence evidence. In *Tasmania v B* [2006] TASSC 110, Crawford J considered (at [43]) whether there was a "real chance of concoction or contamination between the two complainants" in determining whether the probative value of the evidence of each of them substantially outweighed the prejudicial effect of their evidence of similar facts. The same judge also applied that test in *Tasmania v Y* (2007) 178 A Crim R 481 at [40].

Objective improbability

The reasoning in *Hoch v The Queen*, above, (at 294–295, 305) as to the criterion of the admissibility of "similar fact" evidence has also continued to be applied to the application of s 101 as to the consideration of the strength of the probative force of both tendency evidence and coincidence evidence by reference to its revelation of striking similarities, unusual features, underlying unity, system or pattern such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution: *R v Fletcher* (2005) 156 A Crim R 308 at 338 [59]–[60]. It was held that the evidence was admissible to prove a pattern of behaviour of sexual misconduct with adolescent males to whom access had been gained by the accused (a parish priest) as a result of their position as altar boys, whose families the appellant had befriended, and the similar conversations of a sexual nature which had led up to the sexual acts that then took place. See also *R v Milton* [2004] NSWCCA 195 at [31].

The circumstance that, on one interpretation of the evidence, there exists an alternative and innocent explanation of the accused's conduct does not require its rejection if there is also an interpretation of the evidence that potentially has probative value as tendency evidence: *Rodden v R* (2008) 182 A Crim R 227 at [36]–[37]. However, if the only probative value of the evidence is to invite the reasoning that, as the accused has done this before, he has probably done it on this occasion also, the evidence does not pass the test stated in s 101(2): *R v Li* [2003] NSWCCA 407 at [13].

Motive

Evidence of previous similar sexual conduct towards the complainant by the accused may be admissible not as tendency evidence but as showing that the accused had an ordinary human motive to do something as a result of sexual attraction towards the complainant; however, although not admitted as tendency evidence (and therefore unrestricted by s 97), it is not practical to maintain that distinction in the case of the sexual interest of an adult in a child, because (a) the existence of that interest can be considered itself to manifest a tendency to have a particular state of mind, (b) the uncharged acts will generally ipso facto have manifested a tendency to act on that interest, and (c) the very powerful effect of tendency reasoning would be very likely to swamp any effect of motive reasoning: *ES v R (No 1)* [2010] NSWCCA 197 at [38]–[39].

If evidence of uncharged acts is to be used in such cases in any way other than context evidence, the requirements for tendency evidence need to be satisfied: *Qualtieri v R* (2006) 171 A Crim R 463 at [74]–[81]; *DJV v R* (2008) 200 A Crim R 206 at [28]–[31]; *ES v R (No 1)* at [40].

No discretion

However, the decision as to admissibility, once the weighing exercise has been performed, is not an exercise of a judicial discretion; and if the probative value of the evidence to be adduced does not substantially outweigh any prejudicial effect it may have on the defendant, there is no residual discretion and the evidence must be rejected. Section 137 (Exclusion of prejudicial evidence in criminal proceedings) plays no part in considering the admissibility of evidence pursuant to s 97 (tendency rule) and s 98 (coincidence rule) because it has no work to do once s 101 has been applied: *R v Blick* (2000) 111 A Crim R 326 at [19]–[20]; *R v Ellis* (2003) 58 NSWLR 700 at [95]; *R v Harker* [2004] NSWCCA 427 at [46]; *R v Nassif* [2004] NSWCCA 433 at [59]–[60]; *R v GAC* (2007) 178 A Crim R 408 at [70]–[78]; *R v Clarkson* (2007) 171 A Crim R 1 at [194]–[196].

General

When ruling that tendency or coincidence evidence is admissible, it is necessary to refer specifically to s 101 and to identify both the issue to which the proposed evidence is relevant and the nature of the prejudicial effect of that evidence being considered: *Gardiner v R* (2006) 162 A Crim R 233 at [56]–[62], [125]–[132].

In determining the issue raised by s 101, it is not sufficient to repeat the words of the section without explaining how the evidence is so prejudicial — what its risk is to a fair trial for the defendant — that it ought to be rejected as part of a balancing exercise between the competing statutory considerations: *R v Harker*, above, at [58]; *R v RN* [2005] NSWCCA 413 at [11]–[12].

Where the similarities amongst the various incidents charged are striking, and the probative value of their similarity substantially outweighs the possibility of prejudice, a direction that the jury is not entitled to reason that the number of counts meant that the accused must be guilty may be sufficient to overcome any unfair prejudice created: *Samadi v R* (2008) 192 A Crim R 251 at [100]–[102].

Once tendency evidence relating to the conduct charged passes through the tests for admissibility under both ss 97 and 101, it becomes available as evidence that the offence charged was committed: *Galvin v R* (2006) 161 A Crim R 449 at [19].

Appellate approach

Both *R v Milton* [2004] NSWCCA 195 at [31] and *R v Fletcher* (2005) 156 A Crim R 308 at [56] stress that the decision of the trial judge must be on the material produced, either by a voir dire examination or witness statements, prior to its admission into evidence, so that the issues in an appeal following a conviction must be first as to whether it was open to the trial judge to conclude that s 101 had been satisfied in relation to the admission of the evidence as disclosed to the judge, and secondly, in the event that there has been no such error, on the basis that the evidence, in the form and context in which it was in fact later given, has demonstrated a miscarriage of justice. *R v Fletcher* was followed on this point in *R v Zhang* (2005) 158 A Crim R 504 at [45].

In a dissenting judgment in *R v Zhang*, Basten JA (at [45]) held that an appeal against a trial judge's ruling pursuant to s 101 should be evaluated by way of rehearing. This view was preferred by the Tasmanian Court of Criminal Appeal in *L v Tasmania* (2006) Tas R 381 at [49]–[51], [86]. Special leave to appeal was refused in *Zhang v The Queen* [2006] HCATrans 423; although the interpretation given to Pt 3.6 by the majority was not necessarily endorsed. The High Court, in refusing special leave to appeal in *R v Fletcher* on the basis that the evidence was correctly admitted and there had been no miscarriage of justice, said that it would otherwise have referred the matter to the Full Court to consider "an interesting question of standing": *Fletcher v The Queen* HCATrans 127 (10 March 2006). It remains unclear whether that Delphic statement was directed to the issues raised in this or in the previous paragraph.

In *R v GAC*, above, Giles JA (at [77]–[78]) commented that "(t)he last word may not have been written" on this issue, when recording that the Crown had accepted in that appeal that the principles stated in *House v The King* (1936) 55 CLR 499 at 504–505 applied, as had been held in *R v Fletcher* (at [48]) and *R v Zhang* (at [45]).

Legislation

- *Criminal Appeal Act 1912*, ss 24–25
- *Corporations Act 2001* (Cth), Pt 5.3A
- *Evidence Act 1995*, ss 55, 59, Pt 3.6 (ss 94–101), Pt 3.7
- *Evidence Regulation 2020*, cll 5, 6
- *Judiciary Act 1903* (Cth), s 77J(1)
- *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, s 94(1)

Further references

- *ALRC Report 26*, Vol 1, 1985, Australian Government Publishing Service, Canberra
- *ALRC Report 38*, Australian Government Publishing Service, Canberra

- R Weinstein et al, *Uniform Evidence in Australia*, 3rd ed, LexisNexis, 2020
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Credibility — *Evidence Act 1995*, Pt 3.7 (ss 101A–108C)

General

[4-1185] Introduction

Part 3.7 has now been divided into Divisions, as follows:

- Div 1 — Credibility evidence (s 101A)
- Div 2 — Credibility of witnesses (ss 102–108)
- Div 3 — Credibility of persons who are not witnesses (ss 108A–108B)
- Div 4 — Persons with specialised knowledge (s 108C).

Part 3.7 has been substantially amended by the *Evidence Amendment Act*, largely as a result of the decision of the High Court in *Adam v The Queen* (2001) 207 CLR 96 which interpreted the credibility rule defined in the former s 102 ("Evidence that is relevant only to a witness's credibility is not admissible") very narrowly in accordance with its terms, thus precluding evidence as to the credibility of a witness where it was relevant to proof of a fact in issue or for some other purpose in accordance with the common law collateral evidence rule: *R v Rivkin* (2004) 59 NSWLR 284 at [332]–[333]; *Peacock v R* (2008) 190 A Crim R 454 at [44]. At common law, evidence as to the credit of a witness (rather than as to his or her credibility) was admissible where its nature was such as to tend rationally and logically to weaken confidence in the veracity of the witness or in his trustworthiness as a witness of truth: *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 494, followed by *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 at 408.

Odgers, *Uniform Evidence Law* (13th edn at [EA.101A.60]) explains that the effect of the amendments made to this Part is that the requirements of Pt 3.7 do not apply where the evidence is relevant not only to the credibility of a witness or person but is also relevant and admissible for another purpose. Once admitted for that other purpose, the evidence becomes relevant also to the witness's credibility despite its non-compliance with Pt 3.7 — subject to the discretions to exclude or limit the use of the evidence in Pt 3.11 (Discretionary and mandatory exclusions).

Credibility evidence — Div 1 (s 101A)

[4-1190] Credibility evidence — s 101A

Section 101A — a new definition inserted following the report Uniform Evidence Law (*ALRC Report 102*) — defines "credibility evidence" as including evidence relevant to the credibility of a witness or person that either:

- is relevant *only* because that evidence affects the assessment of that credibility; or
- is relevant because that evidence affects that assessment of credibility *and* is also relevant for some other purpose for which it is not admissible, or cannot be used, because of a provision in Pts 3.2–3.6 (Hearsay, Opinion, Admissions, Evidence of judgments and convictions or Tendency and coincidence).

Background

The Credibility Rule prior to the *Evidence Amendment Act* provided, in s 102, that "Evidence that is relevant only to a witness's credibility is not admissible". There was no definition of "credibility evidence".

In *Adam v The Queen* (2001) 207 CLR 96, the High Court held that the *Credibility Rule* did not apply if the evidence was relevant to both credibility and a fact in issue, even where the evidence

was not admissible for the purpose of proving that fact in issue. The ALRC considered that this decision removed the control which had been intended by the *Credibility Rule*: *ALRC Report 102*, at 12.5. Section 101A was intended by the ALRC to overcome that decision of the High Court.

The stated intention of the ALRC was to make evidence relevant to both credibility and a fact in issue (but not admissible for the latter purpose) subject to the same rules as other credibility evidence: *ALRC Report 102*, at 12.14. Recommendation 12–1 described its intention as being to ensure that the provisions of Pt 3.7 apply to *both*: (i) evidence relevant only to credibility *and*, (ii) evidence relevant to credibility and also for some other purpose, but not admissible or capable of being used for that purpose because of the provisions of Pts 3.2–3.6 inclusive.

There would therefore now appear to be three categories to be considered:

- Category A: the evidence is relevant *only* because it affects the assessment of the credibility of a witness or person
- Category B: the evidence is relevant *only* to the assessment of a fact in issue
- Category C: the evidence is relevant to the assessment of *both* issues, but is not admissible as proof of the fact in issue.

Application of Pt 3.7

Odgers, *Uniform Evidence Law* (13th edn at [EA.101A.60]), accepts that the requirements of Pt 3.7 in respect of credibility evidence applies to Category A, but asserts that they do not apply where the evidence is relevant not only because it affects the credibility of a witness or person but where it is also relevant and admissible for another purpose; in such a situation, he says, the evidence may (subject to discretionary considerations) also be used to affect the credibility of that witness or person even if it would not satisfy the requirements of Pt 3.7 if those requirements applied to it. That would appear to include Category C.

Anderson et al, *The New Law of Evidence*, says (at [101A.2]) that Pt 3.7 operates only in relation to evidence that is relevant to credibility and meets, or arguably meets, one of the alternative descriptions in s 101A — that is, to Categories A and C.

The textbooks would accordingly appear to be in agreement. Section 101A has been the subject of limited judicial comment, but see *Tieu v R* (2016) 92 NSWLR 94 at [26]–[36]; *Davis v R* [2017] NSWCCA 257 at [64]–[74].

The High Court has emphasised that the line between matters of credit and matters relevant to a fact in issue is often indistinct: *Goldsmith v Sandilands* (2002) 190 ALR 370 at [3], [32]–[41], [62]–[70], [82]–[83], [96]–[104]; *Nicholls v The Queen* (2005) 219 CLR 196 at [1], [37]–[56], [168]–[173], [202]–[207], [247]–[262], [285]–[286]. (Both cases are from Western Australia, a non-*Evidence Act* jurisdiction, but the statements made appear to be of general application.)

Credibility of witnesses — Div 2 (ss 102–108)

[4-1200] The credibility rule — s 102

The credibility rule now provides simply that "Credibility evidence about a witness is not admissible". It is no longer restricted to evidence "relevant only to a witness's credibility", and now includes evidence relevant to the assessment of a fact in issue where it is not admissible as proof of that fact in issue.

The Note to s 102 identifies the specific exceptions to the credibility rule, by reference to the following sections:

- ss 103 and 104 — evidence adduced in cross-examination
- s 106 — evidence in rebuttal of denials

- s 108 — evidence to re-establish credibility
- s 108C — evidence of persons with specialised knowledge
- s 110 — character of accused persons.

The Note also warns that other provisions of the *Evidence Act*, or other laws, may operate as further exceptions. Section 108C was inserted by the *Evidence Amendment Act*. Section 110 is to be found in Pt 3.8 (Character).

Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but who is not a witness.

Anderson et al, *The New Law of Evidence*, 2nd edn, have (at 406) collected with citations of authority a list of evidence relevant to the credibility of a witness or person as including:

- certain prior convictions and certain prior dishonest conduct by the witness
- the veracity of the witness, including bias, motive to lie, making false representations knowingly or recklessly whilst under a legal or moral obligation to tell the truth
- coaching of the witness
- the intellectual capacity, capacity to remember or know matters and inability to be aware of or recall matters due to age, illness or injury, or physical attributes
- prior inconsistent statements, and
- physical inability to observe or hear (lighting, obstructions, noise etc).

It should be noted that evidence of recent complaint in sexual assault cases is now admitted primarily not as being relevant to the complainant's credit, but as first-hand hearsay pursuant to s 66(2) of the *Evidence Act*, and thus also as evidence relevant to the complainant's credit because it is not then relevant only to that issue and therefore caught by the terms of s 102: *R v DBG* (2002) 133 A Crim R 227 at [55].

[4-1210] Exception: cross-examination as to credibility — s 103

The distinction required by the *Evidence Act* between evidence that is relevant only to credit and evidence that goes to the existence of a fact in issue can be difficult and it is an artificial one: *Palmer v The Queen* (1998) 193 CLR 1 at [51]–[57]; *SRA v Brown* (2006) 66 NSWLR 540 at [18] (Giles JA), [27] (Santow JA).

Section 103 (as amended by the *Evidence Amendment Act*) provides that the credibility rule in s 102 does not apply if the evidence established in cross-examination "could substantially affect the assessment of the credibility of the witness". This amendment was intended by the ALRC to define the expression "has substantial probative value" in s 103 as originally enacted in terms used by the courts — in particular, *R v RPS* (unrep, 13/8/1997, NSWCCA) at 29 — in construing that phrase: *ALRC 102*, pars 12.20–12.25. See **Substantially affect the credibility of the witness**, below.

Probative value

The phrase "probative value" is defined in the Dictionary to the *Evidence Act* as meaning "the extent to which the evidence could rationally affect the assessment of probability of the existence of a fact in issue". The focus in the definition on *capability* draws attention to what is *open* for the jury to conclude; it does not direct attention to what the jury is *likely* to conclude, and the test of rationality also directs attention to capability rather than weight; issues of credibility or reliability would require consideration only where they are such that it would not be open to the jury to accept the evidence as affecting the factual issue in question: *R v Shamouil* (2006) 66 NSWLR 228 at [47]–[65], following

R v AB [2001] NSWCCA 496 at [17]; *Adam v The Queen*, above, at [60]. The legislative overruling of another part of the decision in *Adam v The Queen* does not appear to affect this proposition stated in the comprehensive investigation of the issue in the judgment of Spigelman CJ in *Shamouil*.

The probative value of the evidence must be assessed by taking the evidence at its highest: *R v Sood* [2007] NSWCCA 214 at [38] (special leave to appeal refused [2007] HCATrans 703); *Lodhi v R* (2007) 179 A Crim R 470 at [174]–[177] (special leave to appeal refused [2008] HCATrans 225); *R v Mundine* (2008) 182 A Crim R 302 at [33]. It should be noted that special leave to appeal was refused in *Sood* on the basis that leave to appeal against rulings of the trial judge in a continuing trial will only be granted in exceptional circumstances: *Re Rozenes; Ex p Burd* (1994) 68 ALJR 372 at 373. The application for special leave to appeal in *Lodhi* was unrelated to the *Evidence Act* point.

The test imposed by s 103 is a somewhat higher one than that of relevance: *Jovanovski v R* (2008) 181 A Crim R 372 at [22]. It has been described as tightening the general law in relation to cross-examination on credit: *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [85]. Section 103(2) gives some guidance as to what matters regard may be had: whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth, and the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Substantially affect the credibility of the witness

This phrase was adopted by the *Evidence Amendment Act* in order to reflect the definition given by the courts to the expression "substantial probative value" previously adopted in s 103. There appears to have been no change in meaning. For evidence to have a substantial effect upon the creditability of a witness within the meaning of s 103(1), therefore, it must have had the potential to have a "real" or a "significant" bearing on the assessment of the accused's credibility, particularly that credibility in relation to the evidence he had given or would give at the trial: *R v El-Azzi* [2004] NSWCCA 455 at [183] (the refusal of special leave to appeal, [2005] HCATrans 781, was unrelated to this point). The pre-*Evidence Act* decision in *R v Saleam* (1989) 16 NSWLR 14 at 18 — that, once a legitimate forensic purpose for the production of documents has been established, it is not for the trial judge to be satisfied that they will assist an accused in his defence — is not applicable to a decision under s 103: *Jovanovski v R*, above, at [23].

In *ALRC 102* at 12.29, it was suggested that, if objection is taken to a line of cross-examination before its substantial effect upon the credibility of a witness has become apparent, it could be appropriate to conduct an examination pursuant to s 189 in the absence of the jury and the witness (the voir dire) to enable the value to be disclosed without prejudicing the forensic technique of the cross-examiner.

It is not sufficient that the cross-examination of a witness demonstrates only that the witness is a discreditable person; it must be directed as to whether the witness is to be believed on his oath: *R v Slack* (2003) 139 A Crim R 314 at [31]–[36], following *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 220–221; *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 494; *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 at 408. Indeed, cross-examination directed only to the character of the witness may not be asked unless the court gives leave: *Evidence Act*, Pt 3.8, s 112. Section 192 (Leave, permission or direction may be given on terms) elaborates some of the matters to be taken into account in deciding whether leave should be given: the extent to which the evidence would be likely to add unduly (or to shorten) the length of the hearing, or would be unfair to a party or a witness; the importance of the evidence; the nature of the proceeding; and the power of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

The interpretation of s 103 is discussed in *R v El-Azzi*, above, at [177]–[183], [198]–[199], somewhat inconclusively except to suggest that the High Court in *Stanoevski v The Queen* (2001) 202 CLR 115 had declined to "harmonize" Pt 3.7 (Credibility) and Pt 3.8 (Character): see *Stanoevski*

at [38]. Character is, however, relevant to credibility: *R v Murphy* (1985) 4 NSWLR 42 at 54; *Melbourne v The Queen* (1999) 198 CLR 1 at [30], [72]–[76], [120], [152], [200], and reference should be made to Pt 3.8 (Character). The differences between the two concepts was raised by the High Court, but not resolved, in *Stanoevski v The Queen* at [30].

Examples

In *R v Vawdrey* (1998) 100 A Crim R 488, the complainant in a prosecution for aggravated indecent assault (who was the defendant's step-daughter) gave evidence that such an assault had taken place in the presence of a friend of the defendant, who had remonstrated with the defendant, and that the defendant had then claimed that he was allowed to act that way because she was his daughter. The claim alleged to have been made by the defendant also implied that he had committed such an assault before. Evidence of the defendant's friend, denying that this had taken place in his presence as the complainant had alleged, was held (at 495) to have been wrongly rejected by the trial judge as being relevant only to the credit of the complainant, on the basis that it "probably" had substantial probative value and that, in any event, it was relevant not only to the credit of the complainant but also to "relationship": see **Use of evidence for other purposes — s 95** at **[4-1120]**, discussing s 95.

Evidence that a claimant for workers' compensation had been convicted for attempting to raise money from her bank on the basis of a forged document relating to the facts of her claim to be a worker was held to have had substantial probative value, thus admissible pursuant to s 103, and to have been wrongly rejected: *Commercial Union Workers' Compensation (NSW) Ltd v Clayton* [2000] NSWCA 283 at [27]. Conviction of a criminal offence involving serious dishonesty has substantial probative value in relation to a witness's credit: *R v El-Azzi* at [251].

Cross-examination of the plaintiff in a civil case to establish that he was a "shonk" was held to be admissible in *Bass v TCN Channel Nine Pty Ltd* [2006] NSWCA 343 at [18]–[25].

In *Kamm v R* [2008] NSWCCA 290, the Court of Criminal Appeal dismissed an appeal based in part on a complaint that cross-examination of a defence witness did not have substantial probative value. The court cited with apparent approval, at [37], a decision of the Victorian Court of Appeal rejecting an appeal based on a complaint that a defence witness had been cross-examined to suggest that he took an affirmation rather than an oath because he was telling lies, as the statutory availability of an affirmation did not preclude such a suggestion being made: *R v VN* (2006) 15 VR 113 at [104]–[106].

Fishing expeditions

An issue posed by s 103 often raised in relation to subpoenas directed to the keepers of criminal or financial records is whether they are mere fishing expeditions to provide ammunition for cross-examination of witnesses as to their credit. In *Fried v National Australia Bank Ltd* (2000) 175 ALR 194, Weinberg J (at [24]) accepted that it may be legitimate to issue a subpoena directed to a third party in order to obtain documents for the purpose of impeaching the credit of a witness (citing *R v Saleam* (1989) 16 NSWLR 14 at 19), but he cast doubt as to whether such a subpoena should be issued solely for that purpose (at [25]–[28]) and held (at [29]) that it was inappropriate to permit a subpoena which "does little more than trawl for documents" which may be used for that purpose. This narrow approach to the issue has not been followed in New South Wales. In *R v Saleam*, emphasis was placed (at 18) on the need for the identification of a legitimate forensic purpose for which the subpoena was issued — that it is "on the cards" that the documents sought would materially assist the party issuing the subpoena, see *Sankey v Whitlam* (1978) 142 CLR 1 at 414. In *Liristis v Gadelrabb* [2009] NSWSC 441, Brereton J accepted that "trawling" in this context was the same as "fishing", but made it clear (at [5]) that it is not "fishing" to seek such documents when there are reasonable grounds to think that fish of the relevant type are in the pond (*Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250 at 254) or that it is "on the cards" that the relevant documents (even though they are relevant only to credit) will be elicited by the challenged subpoena.

Prejudice arising from the nature of the evidence

Prejudice to a party from the nature of the evidence tendered itself, which is not caused by the failure to give reasonable notice, is not relevant to the issues arising out of s 103: *R v Harker* [2004] NSWCCA 427 at [44]; *Blomfield v Nationwide News Pty Ltd* [2009] NSWSC 977 (Harrison J) at [19].

[4-1220] Further protections: cross-examination of accused — s 104

Note: The heading to s 104 in the NSW *Evidence Act* is "Further protections: cross-examination as to credibility", but the section itself is in identical terms to the Commonwealth statute.

This section provides additional safeguards to those provided by s 103 where the accused gives evidence. The amendments made by the *Evidence Amendment Act* to this section follow on, and are additional to, the amendments made to s 103.

Leave required

Section 104 applies only to "credibility evidence" as defined in s 101A. The accused may not be cross-examined about a matter that is relevant to his credit unless the court gives leave. Prior to the *Evidence Amendment Act*, leave was required where the matter was relevant only to the issue of the credit of the accused; the admissibility of such evidence that went to an issue as well as to the credit did not require leave: see, for example, *R v Spiteri* (2004) 61 NSWLR 369 at [38] (which is reproduced only in [2004] NSWCCA 321, and is discussed below).

However, leave is not required for cross-examination about whether the accused is biased or has a motive to be untruthful, or is, or was, unable to be aware of or recall matters to which his evidence relates or has made an inconsistent statement: s 104(2)–(3).

The phrase "relevant only" in s 104(1) is not to be interpreted as meaning "admissible only" in relation to the issue of credit: *Adam v The Queen* (2001) 207 CLR 96 at [33]–[37]. This part of the decision in *Adam* does not appear to have been affected by the legislative overruling of another part of that decision. Odgers, *Uniform Evidence Law* (13th edn at [EA.104.60]) has emphasised that evidence affecting the credibility of a witness or person will not be "credibility evidence" as defined by s 101A if it is also relevant and admissible for another purpose.

Otherwise, leave for such cross-examination by the Crown will be given only where evidence has been adduced by the accused (other than concerning the events for which he is being prosecuted or the investigation of those events) that tends to prove that a Crown witness has a tendency to be untruthful and is relevant solely *or mainly* to the credibility of the Crown witness: s 104(4).

Examples

In *R v Houssein* [2003] NSWCCA 74, it was held (at [53]) that — in a prosecution of the appellant for maliciously inflicting grievous bodily harm upon his brother with such intent — cross-examination of the defendant by the Crown to establish that an Apprehended Violence Order had been granted to his mother against him on another occasion, "said nothing about [the] credibility" of the defendant.

In *R v Spiteri*, above, the complainant in an aggravated sexual assault case gave evidence that she had been pushed to the ground by the appellant who sat on her stomach holding her hands above her head on the ground with his left hand whilst he used his right hand to insert a bottle in her vagina; he subsequently released her hands and had penile intercourse with her while she remained on the ground. The appellant's DNA was identified in semen taken from her vagina, and his fingerprints were identified on a bottle found in the area. He asserted that the complainant had herself inserted the bottle in her vagina and had then invited him to have intercourse. However, he challenged the evidence that he had held the complainant's hands on the ground above her head with his left hand, and asserted that some three months earlier he had seriously injured his left hand and was still at

the time of the trial significantly disabled in his left arm, making it physically impossible for him to restrain the complainant in the way she described. His evidence was that he could still not at the time of the trial put pressure on his left wrist, and he made it plain to the jury that, even at the time of the trial (ten months after the intercourse), he was still so incapacitated. He was cross-examined by the Crown to suggest that he had a few days before the trial been doing press-ups in the cells, and he said that he had tried but had been unsuccessful in doing so. He said it was a complete lie to suggest that he had done forty push-ups in the cells. The Crown was granted leave to call evidence from a Corrective Services officer that he had seen the appellant using both hands and wrists. The videotape from a surveillance camera in the appellant's cell five days earlier was tendered showing him performing exercises as described by the officer.

A number of points were argued on appeal, one asserting that the Crown had failed to seek leave prior to this particular cross-examination. The Court of Criminal Appeal held (at [23] et seq) that the Crown had no obligation to disclose material relating only to the credibility of defence witnesses (including the accused) or material that would deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false. It was also held (at [38]) that leave to cross-examine the appellant concerning his claim of disability and to produce evidence as to his push-ups in the cells was not required, as the appellant had himself made his current incapacity relevant to his alleged disability at the time of the alleged sexual assault, and therefore the evidence was not relevant only to his credit.

Leave to cross-examine the defendant as to his credibility is not required where he has himself given evidence he was a person of good character: *R v Johnston* [2004] NSWCCA 58 at [230]–[231].

Raising character

Leave must not be given unless the accused has either raised his own good character or adduced evidence — other than evidence in relation to the events in relation to which he is being prosecuted or the investigation of the offence for which he is being prosecuted — that tends to prove that a prosecution witness has a tendency to be untruthful: s 104(4)–(5).

In *Gabriel v R* (1997) 76 FCR 279 at 294–298 (FCAFC), it was held that the common law cases in relation to "raising character", which required a deliberate decision by the accused to introduce his character as an issue, applies to s 104. Higgins J in that case placed some reliance on what he saw to be a significant difference between the Commonwealth and NSW statutes in relation to s 110(3) (Evidence about character of accused persons), but it has been suggested that the difference to which he refers is inconsequential: see *R v Bartle* [2003] NSWCCA 329, where *Gabriel* is discussed at [129]–[146]. However, in *Bartle*, it was held, consistently with *Gabriel*, that s 104(4)(a) should be interpreted as permitting leave to adduce evidence relevant to the credibility of the accused only where he has deliberately raised his character as an issue in the sense of asserting that, by reason of his good character, he is unlikely to have committed the crime charged, as was the common law: *R v Fuller* (1994) 34 NSWLR 233 at 237–238.

In *Gabriel*, there was a difference of opinion as to whether the accused had raised character; Gallop and Mathews JJ (at 281, 300) held that a protestation by the accused in answer to a provocative question by the prosecutor ("Do you need a reason to attack people?") — that he was not "the sort of person who would go around stabbing people" — was no more than an emphatic denial that he had done what was alleged against him.

Similarly, in *R v Bartle* (at [136], [144]), it was held that, where the prosecution cross-examines the accused to suggest that he had the opportunity and tendency to commit the type of crimes charged, it can hardly be surprised if the accused chooses to deny emphatically that the opportunity was taken or the opportunity was realised as regards the offence charged. It will generally be harder for it to persuade the judge that the accused's answer "adduced" good character where the accused had been placed in a position where he is concerned to address the perceived hint of guilt by making that emphatic denial.

In *R v Skaf* [2004] NSWCCA 74 at [223]–[226], following *Bartle*, it was held that there needed to be a **subjective intent to raise good character** before it could be held that the accused had adduced evidence to prove his good character, whether or not he had blurted out his answer without much thought. See also *R v El-Kheir* [2004] NSWCCA 461 at [50]; *PGM v R* (2006) 164 A Crim R 426 at [35].

In some cases, the accused may be obliged to answer a question from the prosecutor in a way that does inferentially raise his character. An example is to be found in *PGM v R*, above, where the accused was standing trial on charges of child indecent assault. The complainant had said that the accused had shown her an image on a computer which was described as a pornographic one. The accused had in his possession a compact disc which had such an image on it. The Crown had unsuccessfully sought to rely on the whole disc as tendency evidence, and the disc was not at that stage in evidence. In his evidence, the accused accepted that he had one such image on his computer, and that he had seen it when he had first received the compact disc. He said that he had been unsuccessful in deleting it. He denied having looked at that image again. In answer to the question "Why not?", he said "I don't like that sort of image on my computer", and he repeated that answer when asked to explain what he had meant. The Crown was granted leave to ask the accused whether his computer contained a large number of prepubescent girls engaged in sexual activities with adult males. The accused said that it did in fact, but that he had only seen five or six and that they did not involve adult males. He was then asked whether he was shocked to think that he had in his possession a CD with a large number of child pornographic images, and he replied "I'd be dismayed sir if that's in fact true". The Court of Criminal Appeal held that, although the accused could perhaps have answered the questions in a way which did not raise his character, it was not immediately apparent what those answers might have been. It was held (at [40]) that the trial judge had not been entitled to conclude that the accused had raised character.

Section 192 elaborates some of the **matters to be taken into account in deciding whether leave should be given**: see **[4-1210] Exception: cross-examination as to credibility — s 103**. In *Stanoevski v The Queen* (2002) 202 CLR 115 at [41], the High Court made it clear that the judge is also to take into account, beyond the matters listed in s 192, any matters that may be relevant in the particular case.

Not every attack on the credibility of a Crown witness warrants the exercise of the s 104(2) discretion to grant leave to cross-examine the accused: *R v El-Azzi* [2004] NSWCCA 455 at [200] (Simpson J), with whom Santow JA agreed at [12]. The accused's legal representative must be given substantial flexibility in the approach taken to cross-examining Crown witnesses without fear that attacks on those witnesses, if made within proper limits, will expose their clients to the potential disclosure of their criminal histories, or will alternatively operate as a disincentive to exercising the option to give evidence: at [12]. At [192], again with the agreement of Santow JA, Simpson J said that the issue of leave to cross-examine the accused was based essentially on the issue of fairness, having regard to ss 135, 137 and 192, and determined by balancing unfair prejudice against probative value, taking into account the conduct of the cross-examination of the Crown witnesses in accordance with Pt 3.8 (Character).

Section 104(6) provides that leave to cross-examine a defendant will not be granted to another defendant unless the first defendant has given evidence adverse to the defendant seeking leave to cross-examination. This provision is limited to cross-examination directed to the issue of credibility, and the common law, which permits defendant A to cross-examine defendant B on any issue even if defendant B had not given evidence adverse to defendant A, continues to apply in relation to all other issues: *R v Fernando* [1999] NSWCCA 66 at [287]–[290], referring to *Murdoch v Taylor* [1965] AC 574 at 585.

Character is dealt with more fully in Pt 3.8 (ss 109–112). Reference should be made to s 110 (Evidence about character of accused persons). The exclusionary provisions in Pt 3.11 (ss 135–139) are directly relevant.

The prosecution's duty of disclosure does not extend to the disclosure of material relevant only to the credibility of the accused or where it is relevant only because it might deter the accused from giving false evidence or raising an issue of fact which might be shown to be false or where its disclosure would prevent the accused from creating a trap for himself by giving false evidence: *R v Spiteri* (2004) 61 NSWLR 369 at [23], [30].

Section 104 must be distinguished from s 106

Section 104 applies to cross-examination of the accused; s 106 applies to the introduction of evidence contradicting the evidence of a witness (including the accused): *R v PLV* (2001) 51 NSWLR 736 at [91].

[4-1230] Further protections: defendants making unsworn statements — s 105

This section, which was never applicable in New South Wales, has now been repealed.

[4-1240] Exception: rebutting denials by other evidence — s 106

The provision as it stood before the *Evidence Amendment Act* replaced the common law "collateral facts" rule whereby cross-examination relating to a collateral issue is "final" and cannot be contradicted by other evidence.

The ALRC was, however, concerned with the limitations the former s 106 imposed on the flexibility required to avoid miscarriages of justice, and the section has now been recast by the *Evidence Amendment Act* in order:

- to impose the requirement of **leave** to adduce the evidence where it falls within the five categories enumerated in the former s 106,
- to extend the requirement that its admissibility depends on the evidence being put to the witness, and
- to expand the previous requirement that, when the evidence is put to the witness, the witness must have denied its substance to include a failure by the witness to admit or agree to its substance.

To some extent, the amendments reflect a dissatisfaction by the ALRC with the past strict literal interpretations given (by the High Court) of a number of other sections (*ALRC 102* at [12.81]), but they do not appear to alter the substance of the previous s 106 except the three matters already referred to.

Whether or not the substance of the evidence has been by the witness may be determined by the judge by reference to his observations of the manner in which the witness gave evidence: *Copmanhurst Shire Council v Watt* [2005] NSWCA 245 at [39].

Requirement of leave

The ALRC (*ALRC 102* at [12.68]–[12.69]) adopted the reasoning of McHugh J in *Nicholls v The Queen* (2005) 219 CLR 196 at [53]–[56], which had not been supported by the majority in that case, where he suggested that the collateral evidence rule — that, subject to certain exceptions, an answer given by a witness in cross-examination relating solely to a collateral issue, such as credit, is final, and cannot be met by evidence from other sources — should be regarded as a flexible rule of convenience that can and should be relaxed when the interests of justice require it, but not where the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. It is suggested that s 106(2) should be interpreted in this way.

The five categories of evidence for which leave is not required

(a) **Biased or motive for being untruthful (s 106(2)(a)):** This evidence was admissible at common law: *R v Uhrig* (unrep, 24/10/1996, NSWCCA) at 22–23; approved in *Palmer v The Queen*

(1998) 193 CLR 1 at [6], [10], [67], [97]. A motive to lie will almost inevitably have substantial probative value in relation to credit, and so will pass the test posed by s 103: *R v Uhrig* at 22–23; *Palmer v The Queen* at [7].

(b) **Convicted of a criminal offence (s 106(2)(b)):** This is admissible under the *Evidence Act* only where the conviction complies with s 103, that the conviction could substantially affect the assessment of the witness's credibility. Factors to be taken into account include whether the nature of the crime of which the witness has been convicted is "indicative of a disregard of the law designed and calculated to reduce harmful conduct within the community" or "clearly one which in almost all cases bespeaks dishonesty": *R v Lumsden* [2003] NSWCCA 83 at [56].

(c) **Prior inconsistent statement (s 106(2)(c)):** This was admissible at common law. Once admitted, but subject to s 136 (General discretion to limit use of evidence), the prior statement becomes evidence of the truth of the facts stated in accordance with s 60.

Section 43(2) of the *Evidence Act* imposes a condition on the admissibility of a such a statement otherwise than from the witness, that the cross-examiner had informed the witness of enough of the circumstances of the making of that statement to enable the witness to identify the statement, and drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence. Section 43(1) expressly provides that "complete" particulars of the statement need not have been given, nor does a document containing a record of that statement need to have been shown to the witness.

In *R v Siulai* [2004] NSWCCA 152, the appellant was charged with his brother with breaking and entering the victim's home, stealing and assaulting him. The appellant gave an alibi notice that he was at the relevant time at his home and that he would call a witness to that effect. The Crown tendered the notice in its case (see [68]) as a deliberate lie demonstrating a consciousness of guilt. However, although it was stated at the commencement of the trial that he would give evidence, he did not do so and he formally admitted that he was present at the victim's home: at [75]. The appeal in relation to the admissibility of the alibi notice as consciousness of guilt was dismissed: at [78]. However, there was some discussion in the Court of Criminal Appeal as to its admissibility pursuant to s 106(2)(c) also because, in the appellant's videoed interview by the police that was in evidence, the appellant had said that he had no involvement in the matter, and the alibi notice went to his credit: at [81]. It was held (at [84]) that, although admissible on that basis, it should have been rejected on that basis because there was a real risk that the jury would misuse it on the issue of credibility as evidence also from which guilt may be inferred.

(d) **Unable to be aware of matters to which his or her evidence relates (s 106(2)(d)):** This evidence as to the awareness of the witness was permitted at common law as demonstrating the objective unreliability of the witness's evidence: *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607–608; *R v Rivkin* [2004] NSWCCA 7 at [337] (reported on other issues at (2004) 59 NSWLR 284). Section 106 does not, however, permit rebuttal evidence as to the witness's inability to recall the evidence, an issue which s 104(3)(b) expressly permits as a subject of cross-examination where it could substantially affect the assessment of the witness's credibility. The Court of Criminal Appeal has declined to read s 106(d) in a way that would include an inability to recall as well as an inability to be aware: *R v PLV* (2001) 51 NSWLR 736 at [79]–[91]; *R v Galea* (2004) 148 A Crim R 220 at [98].

Section 106(2)(d) has been interpreted broadly as extending to many aspects of reliability or credibility, including psychiatric, psychological or neurological considerations: *R v Rivkin*, above, at [335].

(e) **Knowingly or recklessly made a false representation while under legal obligation to tell the truth (s 106(2)(e)):** The distinction between this category of evidence and that provided by s 106(2)(a) is that here there must be a legal obligation to tell the truth at the time the representation is made. Odgers, *Uniform Evidence Law* (13th edn at [EA.106.270]) has raised the issue as to whether this category would allow evidence to be admitted to show that the

witness had lied in the same proceedings (as well as other proceedings) as long as the substance of the evidence has been put to the witness in cross-examination and the witness has denied it. The ALRC has made it clear that such an interpretation was not intended, as it would render pars (a)–(e) unnecessary, and that the rules of statutory interpretation would prevent such an interpretation being accepted: *ALRC 102* at [12.80–12.81]. This issue does not appear to have been resolved in any judicial decision.

A mere denial of an allegation put to a witness in cross-examination is not sufficient to satisfy the requirements of s 106(2)(e): *R v Gregory* [2002] NSWCCA 199 at [26].

Note: Section 107 has been repealed.

[4-1250] Exception: re-establishing credibility — s 108

The previous difference between the Commonwealth and the NSW versions of s 108 of the *Evidence Act* — dealing with unsworn statements by the accused — has now disappeared with the abolition of such statements in trials to which the Commonwealth *Evidence Act 1995* applies.

Section 108(1), excluding the application of the credibility rule to evidence adduced in re-examination, broadly accords with the common law rule permitting re-examination directed to explaining away or qualifying facts elicited in cross-examination which were prejudicial to the witness's credit or from which prejudicial inferences could be drawn: *R v Rivkin* at [339], referring to *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 (see at 409B).

Section 108(3) does not permit the witness in re-examination to merely reiterate his evidence-in-chief: *Clarkson v R* (2007) 171 A Crim R 1 at [106].

Section 108(3)(b) — that a prior consistent statement of complaint is, with leave, admissible where it "will be suggested" that the evidence of a witness has been fabricated — is not available merely because it is known that the subject matter of the complaint will be denied: *R v Whitmore* (1999) 109 A Crim R 51 at [38]. Section 192 deals with some of the matters to be taken into account when granting or refusing leave.

Where evidence of complaint is inadmissible because the complaint was not made when it was fresh in the memory of the complainant (as s 66 requires), s 108(3)(b) will nevertheless permit the evidence to be admitted where it is or will be suggested that the complaint has been fabricated: *Pavitt v R* (2007) 169 A Crim R 452 at [97]. It is open to the trial judge to conclude that fabrication will be suggested where counsel for the accused, in his opening address pursuant to s 159 of the *Criminal Procedure Act 1986*, told the jury that they will develop "significant and grave concerns" for the reliability of the complainant by reason of his history of mental illness, dug abuse and criminal conduct: at [100]–[105]. A submission that leave could not be granted until it was directly or clearly or explicitly put to the complainant that he is fabricating or reconstructing was rejected: at [103]–[104]. It is suggested that care be exercised before taking mental illness into account in finding that it will be suggested that the complaint has been *fabricated*, rather than that it is merely *unreliable*.

Evidence of complaint, once admitted as first hand hearsay pursuant to s 66, becomes evidence of the truth of what is asserted in accordance with s 60, unless the general discretion to limit the use of the evidence given by s 136 is exercised. When evidence of complaint is not admissible pursuant to s 66 (because the complaint was not made when it was fresh in the memory of the complainant) and it is admitted pursuant to leave granted pursuant to s 108(3), its purpose is to restore the witness's credit, and s 60 again operates so that it becomes evidence of the truth of what is asserted unless its use is limited by s 136: *R v DBG* (2002) 133 A Crim R 227 at [57].

Whether the evidence of complaint becomes evidence of the truth of what is asserted is not relevant to the exercise of the discretion to grant leave pursuant to s 108 when the evidence is not

otherwise admissible: *Graham v The Queen* (1998) 195 CLR 606 at [8]; *R v DBG* at [50]. The exercise of the discretion depends on the effect of the evidence on the witness's credibility, here the suggestion of fabrication: *Graham v The Queen* at [8]. It is suggested that, if leave is granted pursuant to s 108, consideration should expressly be given to the general discretion given by s 136 to limit the use to be made of such evidence of complaint: *R v DBG* at [55]–[57].

In determining whether leave should be granted pursuant to s 108 to adduce evidence of a prior consistent statement, by the witness where it adds nothing to what was said in evidence, it has been suggested that it does not rationally answer the suggestion of fabrication, reconstruction made and therefore does nothing for the witness's credibility: *R v Ali* [2000] NSWCCA 177 at [46]. It is respectfully suggested that it will necessarily depend on the circumstances in which the prior consistent statement was made. If the statement was made in a situation where there had been no issue raised as to the circumstances alleged against the accused, the prior consistent statement may be of some value; if the allegations against the accused were already foreshadowed, it is unlikely that the prior consistent statement would be admissible under s 108; see, for example, *R v MDB* [2005] NSWCCA 354 at [23]. The facts of this case are discussed below.

In *R v Johnston* [2004] NSWCCA 58, following cross-examination clearly suggesting that his evidence had been fabricated, the accused had sought to tender two statements made by him consistent with his evidence. The statements had been made "several weeks" after he had been charged, during which time he was in custody and had the opportunity to fabricate or reconstruct a self-serving account; it was held (at [162]–[163]) that the trial judge had not erred in rejecting them on the basis that they had no probative value. The refusal by the High Court of special leave to appeal was unrelated to this issue: *Johnston v R* [2005] HCATrans 90. See also *R v DBG* at [51].

The ability of the prior consistent statement to answer the suggestion of fabrication is relevant in determining whether leave should be granted: *R v BD* (1997) 94 A Crim R 131 at 141; *Graham v The Queen* at [8]–[9]; *R v Abdulkader (No 1)* [2006] NSWSC 198 at [22]–[24]; *Abdul-Kader v R* (2007) 178 A Crim R 281 at [42]–[46]. The mere fact that a consistent out-of-court statement was made as part of the train of events leading to the trial does not rationally answer the suggestion of fabrication, reconstruction or suggestion in relation to the evidence given in court: *R v Ali*, above, at [46]; see also *R v Marsh* [2000] NSWCCA 370 at [52]. A police statement or a proof of evidence in civil proceedings would ordinarily be so devoid of value in answering an earlier inconsistent statement as not to be arguably probative at all: *R v Cassar* [1999] NSWSC 352 at [18].

A prior consistent statement is admissible if it tends to reinstate the witness's credibility by contradicting the inference the opposing party seeks to draw from the prior inconsistent statement: *KNP v R* (2006) 67 NSWLR 227 at [20]–[28].

A prior inconsistent statement may be inferred from conduct: *KNP v R* at [28].

The timing when the complaint is made may be more important than the circumstances in which it was made: *R v DBG* at [56]; although this is not a universal or absolute principle: *R v MDB*, above, at [21]. In the latter case, the complainant (aged 12) complained to his mother that the accused (the father of the complainant's school friend) had sexually assaulted him when he was camping with his school friend's family on a previous occasion, but he did not make the complaint until an invitation was received by him to go camping again. The boy first gave an excuse, but then (after discussing it with two other school friends) he disclosed the sexual assault to his mother as his real reason. It was held at [24]–[26], that the circumstances in which the complaint was made, when the prospect loomed that he would be expected to participate again in a camping trip with the accused, were capable of being very powerful in enabling the jury to understand why it was he had delayed his disclosure. See also *R v Abdul-Kader*, above, at [48]–[49].

The fact that evidence of complaint is itself disputed is relevant to the grant of leave pursuant to s 108(3), as the fact that the evidence is disputed affects its weight: *Pfennig v The Queen* (1995) 182 CLR 461 at 482; *R v DBG* at [45].

Section 108 recognises the "subtle distinction" between putting squarely to a witness that he has fabricated his evidence or has reconstructed it (whether deliberately or otherwise) and putting the proposition that certain events did not take place: *Wilson v R* [2006] NSWCCA 217 at [52]. Only the former enlivens the application of the section.

Credibility of persons who are not witnesses — Div 3 (ss 108A–108B)

[4-1260] Admissibility of evidence of credibility of person who has made a previous representation — s 108A; Further protections: previous representations of an accused who is not a witness — s 108B

This Division fills an important gap in procedural law arising from the extensive exceptions to the rule against hearsay where the maker of a representation admitted into evidence is not called to give evidence. The two sections are dealt with together. The authors of *The New Law of Evidence*, 2nd edn, 2009, point out (at 108A.2) that, as the credibility rule (s 101A) applies only to a witness who does give evidence, this section now permits evidence to be admitted where it is relevant to impeaching or bolstering or re-establishing the credit of the maker of the representation even though not a witness, but only where the evidence could substantially affect the assessment of that person's credibility (a formula that has replaced the previous description of the evidence as having substantial probative value).

Section 108B has been added to elaborate this provision, in accordance with the suggestions in *ALRC 102*, to apply the amended s 108A to a previous representation by the accused that has been admitted but where he has not been called to give evidence, and to impose a requirement that leave be obtained. Section 108B(5) excludes the operation of that section in relation to the conduct of the accused in relation to the events for which he is being prosecuted.

Limitations on the use to be made of this evidence can, of course, be imposed in accordance with ss 135–137.

There appears to have been no detailed consideration given to these provisions that is of assistance in their interpretation.

Persons with specialised knowledge — Div 4 (s 108C)

[4-1270] Persons with specialised knowledge — s 108C

This section was introduced in order to permit evidence to be given by persons with specialised knowledge where such evidence could bolster the evidence of another witness or where the specialised knowledge of such a witness could assist the assessment of the credibility of another witness — in particular a child witness or a witness with cognitive impairments, and to overcome what was perceived to be a reluctance of some judicial officers to accept that this is a relevant field of expertise and a matter beyond the common knowledge of the tribunal of fact.

Odgers, *Uniform Evidence Law* (13th edn at [EA.108C.60]), has made the valid point that s 108C is in substance an exception to the credibility rule in s 102.

Anderson et al, *The New Law of Evidence*, 2nd edn, 2009 (at 108C.2) summarises the requirements of the evidence to be admissible pursuant to s 108C as follows:

- The witness must have specialised knowledge which is based on their training, study or experience in accordance with s 79
- The evidence is of the witness's opinion concerning the credibility of another witness which must be wholly or substantially based on the first witness's specialised knowledge
- The witness's opinion must be capable of substantially affecting the assessment of the credibility of the witness to whom it relates

- The court's leave is required, having regard to the considerations identified in s 192(2), and any other relevant matters, and
- The evidence is not excluded pursuant to either s 135 or s 137.

If the evidence is admitted, consideration must be given to the need for limiting its use: s 136.

See also [4-0630] re: s 79 of the *Evidence Act* (Opinion, Exception: opinions based on specialised knowledge), in particular [4-0635] dealing with the term "specialised knowledge" in relation 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). See also *ALRC 102* at [9.138] et seq. There is little case law on the application of s 108C, however see two Victorian cases *MA v R* (2013) 40 VR 564 and *De Silva v DPP* (2013) 236 A Crim R 214. *De Silva* stated at [26] that the purpose of such evidence is "educative" in order to impart specialised knowledge the jury may not otherwise have, to help the jury understand the evidence of and about the complainant, and so as therefore to be better able to evaluate it. Such evidence bears on the complainant's credibility but reasons for patterns of parental behaviour will not ordinarily be relevant to the credibility of a child complainant: *MA v R* (2013) 40 VR 564 at [35].

In *Hoyle v The Queen* [2018] ACTCA 42, the ACT Court of Appeal held that expert evidence that a victim of sexual violence may experience a "freeze response" was admissible under this provision to prevent a complainant's credibility being undermined by her "counterintuitive behaviour … her admitted failure to protest the appellant's inappropriate conduct" (at [230]) and expert evidence "that delay or failure to report sexual violence was common among victims of sexual violence" was capable of "substantially affecting" the credibility of a complainant "who failed to make an early complaint. … [as i]t served to neutralise the intuitive view that a delay in complaint suggested that there is nothing to complain about" (at [242]).

Legislation

- *Criminal Procedure Act 1986*, s 159
- *Evidence Act 1995*, ss 43, 60, 66(2), 79, 95, Pt 3.7 (ss 101A–108C), Pt 3.8 (in particular ss 110–112), Pt 3.11 (in particular ss 135–137), s 192, Dictionary
- *Evidence Act 1995* (Cth), s 108(2)

Further references

- *ALRC Report 26*, vol 1, Australian Government Publishing Service, Canberra, 1985
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005
- J Anderson, N Williams and L Clegg, *The New Law of Evidence: annotation and commentary on the Uniform Evidence Acts*, 2nd edn, LexisNexis Butterworths, Sydney, 2009
- S Odgers, *Uniform Evidence Law*, 13th edn, Thomson Reuters, Sydney, 2018

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Character

Evidence Act 1995, Pt 3.8 (ss 109–112)

[4-1300] Application — s 109

This part applies only to criminal proceedings, but is associated closely with Pt 3.7 (Credibility) which applies to both civil and criminal proceedings.

If evidence is given of the accused's good character, the trial judge should raise with counsel the issue as to the direction to be given: *R v Soto-Sanchez* (2002) 129 A Crim R 279 at [27]–[29].

[4-1310] Evidence about character of accused persons — s 110

There is no statutory definition of character evidence, but a generally accepted description of it was given by Kirby J in *Melbourne v The Queen* (1999) 198 CLR 1 (although in dissent, the description is favourably regarded by the authors of *The New Law of Evidence* (2nd edn), at p 470):

> Character refers to the aggregate of qualities which distinguish one person from another, or the moral constitution of a person; it embodies the permanent and unchanging pattern of the nature of the individual concerned.

Section 110 provides that none of:

- the hearsay rule (see Pt 3.2 (Hearsay), s 59)
- the opinion rule (see Pt 3.3 (Opinion), s 76)
- the tendency rule (see Pt 3.6 (Tendency), s 97), or
- the credibility rule (see Pt 3.7 (Credibility), s 102),

applies to evidence adduced by the accused to establish that he is of good character either generally or in a particular respect, or to evidence adduced by the prosecution to meet that evidence.

Evidence of good character is not merely evidence as to credit. It is, in the terms of s 55, evidence that "could rationally affect (directly or indirectly) the assessment of the probability" that the accused committed the offences charged: *TKWJ v The Queen* (2002) 212 CLR 124 at [35] (Gleeson CJ), and [94] (McHugh J). Evidence of character is admitted as a matter making it unlikely that the accused has committed the crime charged and as supporting the credibility of his denial of guilt: *Attwood v The Queen* (1960) 102 CLR 353 at 359; *Eastman v R* (1997) 76 FCR 9 at 147; *TKWJ v The Queen* at [94]. The first is a common law case; the others are concerned with s 110 of the *Evidence Act*.

The raising of good character requires a conscious decision on the part of the accused: *Gabriel v R* (1997) 76 FCR 279; *R v Bartle* [2003] NSWCCA 329 at [129]–[136]; good character is not raised, for example, where a witness volunteers the evidence: *PGM v R* (2006) 164 A Crim R 426 at [35].

Once evidence has been deliberately adduced to prove (directly or indirectly) that the accused is a person of good character, either generally or in a particular respect, ss 110(2)–(3) permit the prosecution to adduce rebuttal evidence to meet it: *Gabriel v R* (1997) 76 FCR 279 at 294–298: *R v Bartle* at [126]–[146]. The suggestions by an accused that "I would not do that sort of thing", or "I have never been involved in any importation [of or] selling any drugs" are no more than emphatic denials of guilt, and do not satisfy that test: *R v Bartle* at [129]–[144]. See also *R v Skaf* [2004] NSWCCA 74 at [223]–[226], and *R v El-Kheir* [2004] NSWCCA 461 at [50]. These cases are discussed in Pt 3.7 (Credibility), **Raising character**, at **[4-1220]**.

Counsel for the accused may require the Crown to reveal precisely what evidence it might seek leave to adduce if good character were raised generally or in a particular respect: *R v Hamilton* (1993) 68 A Crim R 298 at 300; *R v Robinson* (2000) 111 A Crim R 388 at [38]–[40]; *R v TAB* [2002] NSWCCA 274 at [90].

An accused is not entitled to elicit evidence of general good character by cross-examining a police officer to the effect that he has no prior convictions merely because his previous convictions are "spent" within the meaning of the *Criminal Records Act 1991*, s 12, as this would involve a knowing deception of the jury as to the true facts: *R v PKS* (unrep, 1/10/1998, NSWCCA), at pp 10–11; *R v TAB*, above, at [97]–[98].

Where the accused, charged with aggravated sexual assault, seeks to raise his good character in respect of sexual assault only, evidence that he had criminal convictions for larceny was held to be inadmissible: *R v PKS* (unrep, 1/10/1998, NSWCCA), at 9–10; *R v Zurita* [2002] NSWCCA 22 at [7]–[19].

Evidence led by the prosecution to rebut evidence of good character is subject to the exclusionary provisions of Pt 3.11 (ss 135–137): *R v OGD (No 2)* (2000) 50 NSWLR 433 at [102]–[108]. In that case, the evidence of one complainant admitted against the accused in relation to evidence led by him concerning the evidence of another complainant was held to have been correctly admitted; see also *R v TAB* at [90].

Once evidence has been adduced (directly or by implication) that the accused is a person of good character in a particular respect, the prosecution is permitted to adduce evidence that he does not have that character, and s 110(3) provides that such evidence adduced by the Crown is not restricted by the hearsay rule (s 59), the opinion rule (s 76), the tendency rule (s 97) or the credibility rule (s 102).

If evidence of good character is adduced, it has been held that it is necessary to direct the jury that such evidence should be borne in mind as affecting the likelihood that the accused committed the crime charged and, if thought appropriate, that it is relevant as supporting any explanation given by the accused and his credibility as a witness: *R v RJC* (unrep, 1/10/1998, NSWCCA), at 27. See also *R v Lewis* [2001] NSWCCA 345 at [31]–[32]. These decisions may have been influenced by the previously repealed s 412 of the *Crimes Act 1900*, which made such a direction mandatory, and they must now be considered as incorrect in the light of the two High Court decisions referred to in the following paragraphs.

The High Court has held that there is no rule of law that the trial judge must give a direction as to the manner that the jury could use evidence of good character, although it added that, if asked for, it would be wise to give such a direction: *Simic v The Queen* (1980) 144 CLR 319 at 333–334 (an appeal from Victoria). That decision was followed in *Melbourne v The Queen* (1999) 198 CLR 1 (a Northern Territory case). The issue of good character had been deliberately raised in that case as being relevant to the improbability that the accused (who did not give evidence) had committed the crime charged (murder) and, to a lesser extent, as being relevant to the version he gave in the record of his interview by the police and to the doctors of the circumstances in which the killing occurred (raising an issue of diminished responsibility). Although the judge had intended to give directions as to its relevance to both issues, she did not mention its relevance to the credibility of the accused's evidence. The omission went unnoticed by counsel for the accused.

In *Melbourne v The Queen*, the High Court held (by majority) that the trial judge is not obliged to give any direction to the jury as to the use to be made of character evidence. McHugh J (at [30]–[52]) held that giving such a direction should remain a discretionary matter because the admissibility of such evidence was logically anomalous and because a mandatory direction would divert the jury from properly evaluating evidence which more logically and directly bore on the guilt of the accused. Hayne J (at [141]) held that the relevance of good character to the credibility of the accused's evidence had not been raised at the trial, and (at [157]) that in any event there was no reason to depart from the decision in *Simic v The Queen*, above. Gummow J (at [59]) agreed with Hayne J, adding (at [69]) that the admissibility of such evidence possessed a conceptual obscurity and a clouded historical origin. Kirby J dissented (at [112]–[117]), on the basis that the trend of overseas judicial authority supported the need for a direction, in part because the common law strives to avoid wrongful convictions by such protections in favour of the accused. Callinan J (at [198],

[211]) also dissented, holding that prima facie the direction should be given, and ordinarily strong contra-indicative factors would have to be present before a trial judge should decide that such a direction should not be given.

In *Stanoevski v The Queen* (2001) 202 CLR 115 at [21], the joint judgment (with which the other judges agreed) stated that, since the decision in *Melbourne v The Queen*, whether to give a direction at all in relation to character evidence, or the form of it, will require close attention to the relevance of the evidence to the offence, and to the issue or issues to which the evidence relates.

In *R v Makisi* (2004) 151 A Crim R 245 at [26], it held to be "ordinarily appropriate" for the trial judge to instruct the jury as to the use they may make of the evidence, but that, in the light of *Melbourne v The Queen*, the rule is not invariable. An illustration of the circumstances in which such a direction would not have significantly strengthened the accused's position in the eyes of the jury is to be found in *Gallant v R* [2006] NSWCCA 339 at [36]–[39], [48]–[49].

Good character in a particular respect:

The effect of s 110, by permitting the accused to raise character in a particular respect, has been to vary the common law that character was indivisible so that, if good character was claimed in relation to one aspect, then the whole of the accused's character was opened up (*Stirland v DPP* [1944] AC 315 at 326–327): *R v Hamilton*, above, at 299; *R v Zurita*, above, at [13]–[14].

In *R v Telfer* (2004) 142 A Crim R 132, the accused (charged with a serious offence) relied on evidence that he had no conviction for any serious offence as being relevant to the probability that he had committed the offence charged. The judge, who had accepted that such evidence did not raise the accused's character generally, directed the jury that they were to take this evidence into account when considering whether the charge had been established beyond reasonable doubt, but gave the additional direction that every offender commits his first offence, and that the evidence could not prevail over or provide a defence to evidence of guilt if, upon their consideration of all the evidence, they are satisfied that his guilt has been proved beyond reasonable doubt. The judge declined to direct the jury that the experience of the courts is that persons who have not previously committed serious criminal offences are unlikely to commit serious criminal offences. It was held (at [27]) that he was not required to do so. The judge also declined to direct the jury that the absence of convictions for serious offences should be borne in mind as a factor affecting the likelihood (or improbability) of him having committed the crime charged. It was submitted on appeal that additional directions given by the judge destroyed the beneficial effect of the direction that the jury had to take the character evidence into account. It was held (at [36]) that the only way the jury could have acted on the direction given was by reasoning that the fact that the accused had not previously been convicted of any serous offence may make it less likely that he was guilty of the serious offence with which he was charged. Although it was held (at [37]) that the additional direction given would preferably have been in terms "that evidence of previous good character cannot prevail against evidence of guilt which they find to be convincing notwithstanding the accused's previous character" (*R v Trimboli* (1979) 1 A Crim R 73 (SAFC) at 74), the injunction given on three occasions that the jury were to take the character evidence into account in considering whether the Crown had proved guilt made it strained to contend that the additional direction contradicted that injunction.

In a prosecution for an offence involving violence against a female, where the accused wishes to establish his good character in a particular respect concerning violence against women, there could be no rational or reasonable explanation for tendering a "fairly extensive record" for other offences in order to establish that negative fact: *Seymour v R* (2006) 162 A Crim R 576 at [50]–[53].

There is no distinction of any moment between a direction referring to the unlikelihood of guilt and a direction in terms of the improbability of a person of good character committing an offence: *Fung v R* (2007) 174 A Crim R 169 at [57]–[60].

[4-1320] Evidence about character of co-accused — s 111

There appears to have been no judicial exegesis in relation to this section.

Attention has been drawn by Anderson et al, *The New Law of Evidence* (2nd edn) at 111.2–3, to the decision of the Privy Council (sitting on appeal from the Supreme Court of Victoria) in *Lowery v The Queen* [1974] AC 85. The appellant was one of two men accused of the murder of a young girl, who had been killed for no apparent motive. The Crown case was that they acted in concert together. Each of the accused alleged that the other was the dominating person and that he had acted in fear of that other person. It was held that, in such a situation, evidence was admissible from a psychologist called by the co-accused who had performed tests on each man as to his general personality, and whose opinion was that Lowery had a strong aggressive drive with weak controls over the expression of aggressive impulses and showed a basic callousness and impulsiveness, whereas the co-accused was immature and emotionally shallow and was likely to be led and dominated by more aggressive or dominant men and was capable of acting aggressively to comply with the wishes of demands of another. Lowery's appeal was dismissed.

The decision in *Lowery v The Queen* was explained by the High Court in *Murphy v The Queen* (1989) 167 CLR 94 at 121 — that the evidence was relevant where the issue was one of sole responsibility between the two accused, so that a description of their respective personalities was within the witness's field of expertise. In *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at [34], McHugh J suggested that the evidence was admissible to show that the version of co-accused who called it was the more probable version.

[4-1330] Leave required to cross-examine about character of accused or co-accused — s 112

This section was amended to cure a "minor drafting inconsistency" in accordance with *ALRC 102* at 12.43, by changing "A defendant is not to be cross-examined about …" to "A defendant must not be cross-examined …" only to make its terms consistent with those of s 104(2) — "A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave".

There is some doubt as to the meaning of the phrase "matters arising out of evidence of a kind referred to in this Part", about which cross-examination is not permitted without leave. Two interpretations have been suggested — that leave to cross-examine is required:

- only in relation to evidence called on behalf of the accused to establish good character, and
- whether or not the accused has raised character:

R v El-Azzi [2004] NSWCCA 455 at [199] (Simpson J). The judge suggests that the first is probably the more obvious construction.

Odgers, *Uniform Evidence Law* (9th edn at [1.3.9160]), concludes that, as a result of the amendment, the view expressed by Simpson J is the most obvious construction of s 112, that the section only prohibits cross-examination of the defendant without leave about matters arising out of evidence called on his or her behalf to establish good character, and that it permits the court a broad discretion in regulating cross-examination of a defendant where the prosecution proposes to challenge that claim.

The raising of good character requires a conscious decision on the part of the accused: *Gabriel v R* (1997) 76 FCR 279; *R v Bartle* [2003] NSWCCA 329 at [129]–[136]; good character is not raised, for example, where a witness volunteers the evidence: *PGM v R* (2006) 164 A Crim R 426 at [35]. Nor is the issue raised where the accused is cross-examined by the Crown in a way which necessarily requires him to answer in a way that raises good character: *PGM v R* at [38]–[42].

Leave to cross-examine must be considered in accordance with s 192 (Leave, permission or direction may be given on terms). The need to consider s 192 was emphasised in *Stanoevski v The Queen* (2001) 202 CLR 115 at [37]–[44], [54]–[57]. Where the accused has deliberately adduced evidence of good character in his evidence in chief, the Crown could not reasonably be refused

leave to cross-examine: *R v Johnston* [2004] NSWCCA 58 at [233]. The discretionary exclusion provisions (ss 135 and 137) are also relevant to the application of s 112: *Eastman v R* (1997) 76 FCR 9 at 146.

Section 192 is discussed under s 104, in Pt 3.7 Credibility.

The need for leave to be granted is emphasised where the Crown prosecutor, without leave, asks a series of questions which would be rejected as irrelevant to the particular character in issue or in the exercise of discretion (although some of the questions asked, it is respectfully suggested, may well have been relevant to the credit of the accused): *R v Soto-Sanchez* (2002) 129 A Crim R 279 at [30]–[33].

The distinction between evidence relating to the credit of the accused and evidence relating to his character was emphasised in *Leung v R* (2003) 144 A Crim R 441 (NSWCCA) at [35], [46]–[47].

Evidence of similar sexual conduct with another person may be admissible to rebut the good character claimed by the accused, but it is not necessarily admissible as corroboration; where it is not so admissible the jury should be warned accordingly and, where it is so admissible, the jury should be given guidance as to how it may be so admissible: *BRS v The Queen* (1997) 191 CLR 275 at 289–291, 297–299, 303–305, 311, 326. Caution is required in relation to this case, as it was a pre-*Evidence Act* case, and issues of propensity overshadow its usefulness under the *Evidence Act*.

Legislation

- *Crimes Act 1900*, s 412
- *Evidence Act 1995*, s 55, Pt 3.7 (in particular ss 102, 104), Pt 3.8 (ss 109–112), Pt 3.11 (ss 135–137)
- *Evidence Act 1995* (Cth), s 110(4)

Further references

- J Anderson, N Williams and L Clegg, *The New Law of Evidence: annotation and commentary on the Uniform Evidence Acts*, 2nd edn, LexisNexis Butterworths, Sydney, 2009
- S Odgers, *Uniform Evidence Law*, 9th edn, Thomson Reuters, Sydney, 2010

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Privilege

Evidence Act 1995, Pt 3.10 (ss 117–131)

[4-1500] General

A judge is, sometimes at short notice, confronted with an issue about privilege. In a civil trial, more often than not, the privilege claimed will arise in connection with legal professional privilege, as it is known in the common law. Such a privilege has existed since Elizabethan times, although its derivation and nature altered during the 18th century: J D Heydon, *Cross on Evidence* at [25005].

This section of the Evidence chapter is principally concerned with "client legal privilege", the terminology by which legal professional privilege is described in the *Evidence Act 1995* (NSW) ("the Act"). The legislation, however, also concerns itself with other kinds of privilege: professional confidential relationships (Pt 3.10 Div 1A), sexual assault communications (Div 1B), religious confessions (s 127), self-incrimination (s 128), judicial and jury reasons (s 129), matters of state (s 130), and negotiations for settlement (s 131).

The confidential relationship between client and lawyer is central to the existence of the privilege. The common law of privilege concerning confidential communications passing between a client and a legal adviser is now largely absorbed by and reflected in the Act, ss 118 and 119: S Odgers, *Uniform Evidence Law*, 19th edn at [EA.118.60]. See also the decision of Campbell JA in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCA 430. This decision, although containing a useful and scholarly history of the development of legal professional privilege to "client legal privilege", did not survive the High Court's pragmatic and practical approach to a classic example of inadvertent disclosure of privileged material: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

A judge, facing such an issue, normally will need to address two fundamental questions:

1. Has the claim for privilege been established?
2. If so, has the privilege been waived?

The first question is dealt with by ss 118 and 119 of the Act (note: the important definition section s 117); the second question is resolved by the application of ss 122–126 of the Act.

Before these matters are addressed, however, the judge must take into account the proper procedure for production of the documents sought. The documents will be brought to court usually as a consequence of the subpoena process. What happens when a party or third party objects to production?

In *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, Brereton J refined the procedure to be adopted where a claim of legal professional privilege is taken to documents sought on subpoena. In so doing, his Honour re-examined the traditional common law authorities and the impact of the UCPR. At issue was the plaintiff's contention that she could simply tender the relevant documents and (absent their production to the other parties) ask the judge to inspect them and determine privilege. Brereton J rejected this proposition, and held:

1. Generally, the court must rule on the privilege objection before production can be compelled. This is so both at common law and pursuant to the UCPR. The privilege is a privilege against production. The claims should be made before the documents are produced to the court.
2. It is inconsistent with the maintenance of privilege for a party to voluntarily put them before the court, even for the limited purpose of inspection by the judge.
3. The claimant must establish the privilege by admissible direct evidence on oath. The claim may be tested by cross-examination. The court's power to inspect documents — and to require their production for that limited purpose — is not intended to detract from the requirement that a person claiming privilege prove, by admissible evidence, the grounds of the claim.

The NSWCA heard and dismissed an urgent application for leave to appeal from Brereton J's decision: *Rinehart v Rinehart* [2016] NSWCA 58. The court acknowledged that the primary judge recognised the existence of a discretionary power to inspect documents, and that there was no power on the part of a person claiming privilege to require the court to inspect documents in the course of the hearing of an application making a claim for privilege. The court thought it "neither necessary nor appropriate" to express views as to all the propositions enunciated by the primary judge. This should only occur, it said, where "something will turn on the outcome": [40]. The present case was "highly unusual" in that at issue was not the existence of privilege, but whether or not any privilege was maintainable by Mrs Reinhart in her personal capacity as opposed to her capacity as trustee. The primary judge's decision was made in the context of a claim unsupported by any evidence at all. His Honour has been correct to find, in that context, that the UCPR in question was not intended to subvert the ordinary obligation upon a party to support a contested claim for privilege by evidence.

Rule 1.9 UCPR has since been amended to clarify that when an objection is made to the production of a document on the ground of privilege, access to the document must not be granted unless and until the objection is overruled, and that the production of a document to the court under a claim for privilege does not constitute a waiver of privilege.

[4-1505] Client legal privilege

The general proposition has been stated as follows:

> In civil and criminal cases, confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal advisor if made either (1) to enable the client to obtain, or the advisor to give legal advice, or assistance, or (2) with reference to litigation that is actually taking place or was in the contemplation or anticipation of the client. … The relevant time for a assessing whether the conditions antecedent to a valid claim of privilege are satisfied is the time when the communication was made. …
>
> Documents prepared by or communications passing between the legal adviser or client and third parties need not be given in evidence or otherwise disclosed by the client and, without the consent of the client, may not be given in evidence or otherwise disclosed by the legal adviser if they come within (2) above: J D Heydon, *Cross on Evidence* at [25210].

The first aspect of client legal privilege (as described above) is often called "advice privilege". The second aspect is referred to as "litigation privilege". Section 118 deals with the first; s 119 is concerned with the second.

[4-1510] Advice privilege — s 118

Section 118 creates a privilege for, in general terms, confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice: S Odgers, *Uniform Evidence Law*, 19th edn at [EA.118.60]. As originally framed, the section did not permit the extension of "advice privilege" to third party communications made for the purpose of obtaining legal advice where litigation was not pending or anticipated. However, the 2007 amendments to the Act ensured that the privilege attached to any confidential document prepared for the dominant purpose of legal advice being provided. It did not extend, however, to all communications with a third party, (*ALRC Report 102* at 14.122) only those prepared with the relevant dominant purpose in mind.

Note: Evidence that must not be adduced in a proceeding (ss 118 and 119) is not admissible in the proceedings: s 134. Equally, a document to which the provision applies may not be tendered in evidence.

[4-1515] Observations on the operation of s 118

The common law in relation to legal professional privilege is complicated and highly technical. It may be said that the *Evidence Act's* attention to the subject (and to litigation privilege) brings with it its own range of technicalities and unresolved problems. However, the following broad propositions (emerging from relatively recent decisions) may be of assistance to trial judges faced with a claim for this type of privilege:

- "the purpose" referred to s 118 is the purpose which, at the time, led to the making of the communication or the preparation of the document: *Carnell v Mann* (1998) 159 ALR 647.
- It will not always or necessarily be the understanding or motive of the person who made the statement that determines the issue, although this will be relevant (*Esso Australia Resources Ltd v The Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at [39]) — and in some cases decisive: *Sydney Airport Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [6] per Spigelman CJ.
- It is important to recognise that particular communications may combine a number of different purposes. An in-house lawyer, for example, may provide in the one document legal advice to the client and, in addition, commercial advice. The former will attract privilege; the latter will not: *Kennedy v Wallace* (2004) 213 ALR 108 per Allsop J.
- A document created for two purposes, neither of which is dominant, it is not privileged from production: *Gibbins v Bayside Council* [2020] NSWSC 1975 at [41]–[45].
- The dominant purpose test has been suggested as involving these questions: "would the communication have been made or the document prepared even if the suggested dominant purpose had not existed? If the answer is 'yes', the test is not satisfied. If the answer is 'no', the test will be satisfied, notwithstanding that some ancillary use or purpose was contemplated at the time": S Odgers, *Uniform Evidence Law*, 19th edn at [EA.118.390] citing *Sparnon v Apand Pty Ltd* (1996) 138 ALR 735 at 741 per Branson J; *Australian Competition and Consumer Commission v Australian Safeways Stores Pty Ltd* (1998) 153 ALR 393; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 per Finn J.
- As to dominant purpose — "In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing or most influential purpose": *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416. In *Douglas v Morgan* [2019] SASCFC 76, the Full Court sets out a useful summary of the criteria for determination of the existence of the privilege: at [44]–[53].

A practical illustration of some of these principles is provided in the decision of Schmidt J in *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535. In that case, an in-house solicitor (who also had a private practice) provided an email advice to the plaintiff's risk manager concerning an application for a loan by the defendant. An issue in the proceedings was whether the contents of the email were privileged.

Schmidt J determined that the contents of the email were confidential; that the major portion of the document contained legal advice for the client; and that the in-house solicitor's role was not such as to suggest he lacked the necessary independence to prevent him providing an uncompromised legal opinion.

Consequently, her Honour held that the major portion of the email (with the exception of two paragraphs) attracted privilege.

[4-1520] Litigation privilege — s 119

This provision creates a privilege for confidential communications and confidential documents made or prepared for the dominant purpose of a lawyer providing professional legal services relating to existing or contemplated litigation: S Odgers, *Uniform Evidence Law*, 19th edn at [EA.119.60]; J D Heydon, *Cross on Evidence* at [25225]. As with s 118, the privilege is that of the client.

Note: the width of the definition of "Australian Court" in the Dictionary to the Act. It extends to certain tribunals that are not required to apply the rules of evidence; see also the definition of "foreign court".

The reference to "another person" in s 119(a), in contrast to its absence in s 118, indicates that communications between third parties and the lawyer or the client are protected only where the dominant purpose is the provision of professional legal services in litigation, as distinct from legal advice: J D Heydon, *Cross on Evidence* at [25300].

Examples of privilege within s 119 include:

- In *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mine Regulations* (1997) 42 NSWLR 351 at 389, a record of interview between a solicitor for the coal company and an employee about a mine accident was held to be within s 119.
- Similarly with communications between the party and an expert witness called by that party: *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 156 ALR 364 at 365.
- s 119 has been held to apply to documents recording communications between prosecution lawyers and prosecution witnesses for the dominant purpose of pending legal proceedings against the accused: *R v Petroulias (No 22)* [2007] NSWSC 692 per Johnson J.
- s 119 (and s 118) protect equally both original documents and copies of them: *Carnell v Mann*, above, at 254; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.
- A document prepared as an originating process of legal proceedings or pleadings (as distinct from a draft witness statement or affidavit) is not privileged because it was not made for the dominant purpose of providing legal services: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2004] NSWSC 40.

See also White J in *New Cap Reinsurance Corp Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, and also in *Buzzle Operations v Apple Computer Australia* (2009) 74 NSWLR 469 for the more complicated situation in relation to witness statements, affidavits and documents or reports prepared by experts. A finalised proof of evidence or affidavit created for the purpose of serving it on the opposing party may not be "confidential" and privilege may never have attached to it.

See also *Sexton v Homer* [2013] NSWCA 414. The NSW Court of Appeal analysed the circumstances in which a report concerning possible litigation furnished by an accident investigator to an insurance company attracted privilege. It also examined the circumstances in which such a report attracts the concept of confidentiality for the purposes of securing the protections of litigation privilege.

[4-1525] Litigants in person — s 120

Somewhat anomalously, s 120 of the Act protects from tender certain confidential communications and the contents of a confidential document where objection is taken by a party to litigation who is not represented in the proceedings by a lawyer. It was clearly considered that fairness should protect confidential communications prepared for the "dominant purpose of preparing for or conducting the proceedings". Trial judges dealing with unrepresented persons should be astute to draw this protection to the attention of the parties.

[4-1530] Loss of client legal privilege: consent — s 122

Section 122(1) provides that "this Division does not prevent the adducing of evidence given with the consent of the client or party concerned".

Odgers suggests that, in view of amendments to the Division in 2009, this apparently simple (but historically complex) provision "now appears otiose and a source of potential confusion": S Odgers, *Uniform Evidence Law*, 19th edn at [EA.122.60].

The reference is to amendments made following upon the High Court's decision in *Mann v Carnell* (1999) 201 CLR 1. In that case the High Court changed the focus of the common law (Odgers, above): the test for waiver at common law became whether the conduct of the client was, bearing in mind "considerations of fairness", "inconsistent with maintenance of the confidentiality of communications between lawyer and client".

ALRC Report 102 (published 2005, Recommendation 14-15) proposed that s 122(2) should be amended to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege. Attention thus focused on the behaviour of the holder of the privilege as opposed to his or her intention.

Section 122(2) now provides:

> Subject to subs (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

Section 122(3) provides:

> Without limiting subs (2), a client or party is taken to have so acted if:
>
> (a) The client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or
>
> (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

Subsection 5 outlines circumstances in which a client or party will not be taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence. He or she will not be taken to have so acted "merely because" of those circumstances. They include where:

> [T]he substance of the evidence has been disclosed:
>
> (i) In the course or making a confidential communication or preparing a confidential document; or
>
> (ii) As a result of duress or deception; or
>
> (iii) Under compulsion of law... : s 122(5)(a).

Similarly, a disclosure by a client to a person for whom a lawyer is providing professional legal services to both regarding the same matter (s 122(5)(b)); or to a person with whom the client or party had, at the time of the disclosure, a common interest in an existing, anticipated or pending proceeding: s 122(5)(c).

Section 122(6) provides that, notwithstanding a claim for privilege, a document that has been used to try to revive a witness's memory about a fact or opinion (or by a police officer under s 33) may be adduced in evidence.

[4-1535] The inconsistency test — s 122(2)

Last reviewed: June 2025

A useful example of the correct approach to the concept is provided for in *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275. (This case involved, however, the application of the common law, not the *Evidence Act*.)

In *Osland*, above, the Victorian Government had obtained confidential legal advice concerning a petition for mercy. The Attorney-General issued a press release which said that the advice had

recommended that the petition be refused. The High Court unanimously held that there was no inconsistency between disclosing the fact of, and the conclusions of, the advice for the purpose of informing the public that the Government's decision was based on independent legal advice, and its desire to maintain the confidentiality of the advice itself. It is necessary, the court said at [49], that the question of inconsistency should depend "upon the circumstances of the case ... questions of waiver are questions of fact and degree". S Odgers, *Uniform Evidence Law*, 19th edn at [EA.122.120], suggests this approach is likely to be adopted by the courts in application of s 122(2): *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333.

More recently, the NSW Court of Appeal considered waiver of privilege under the *Evidence Act*: *Cooper v Hobbs* [2013] NSWCA 70. This was a case where the issue before the District Court had been a simple one: had the respondents to the appeal lent $150,000 to the appellant (as they claimed); or had they invested that sum in a company recommended by the appellant (as he claimed)? The primary judge had found in favour of the respondents, preferring their version of the facts to the appellant's version. This was notwithstanding the existence of a letter from the respondent's then solicitor to a third party in which the transaction was plainly referred to as an investment not a loan.

The Court of Appeal held that there had been an error in the fact-finding process, particularly in light of the fact that the respondents had not called the solicitor to give evidence as to the circumstances in which he had written the letter.

A central issue in the appeal was whether the respondents, by giving evidence as to the solicitor's advice to them (as to why the letter was written referring to an investment rather than a loan) had effectively waived privilege. The Court of Appeal found that it was inconsistent for the respondents to "deploy the substance" of the solicitor's advice "for forensic purposes" while maintaining a claim for privilege. This was so whether the test in *Mann v Carnell* (1999) 201 CLR 1 was applied or that arising under s 122(2) *Evidence Act*.

See *Schmuelly v Elrob Construction Group Pty Ltd (waiver of privilege)* [2025] NSWSC 25 for an example in which client legal privilege was waived under s 122 due to an affidavit made by the defendants filed in support of a motion to vacate the hearing. In the affidavit, the defendants asserted that the solicitor failed to attend to particular tasks; the Court held that it would be inconsistent and unfair for the defendants to also maintain privilege over communications with the solicitor in respect of those tasks: at [8].

[4-1540] Loss of privilege: knowing and voluntary disclosure — s 122(3)(a), (4), (5)

These provisions result in the loss of the ss 118–120 privileges. Some illustrations of "disclosure" follow:

1. In general terms, a statement of a potential witness is protected by privilege. Delivery of it to the witness, provided its confidentiality is maintained, will not destroy the privilege. However, once it is filed and served, it loses its characteristic of confidentiality and no privilege remains for it: J D Heydon, *Cross on Evidence* at [25225].

2. In *Banksia Mortgages Ltd v Croker*, above, a second aspect of the litigation involved the plaintiff's claim that the defendant had waived privilege in relation to certain emails delivered by the defendants to their former solicitor. The documents were clearly privileged under s 119. The issue as to waiver arose because of the contents of an affidavit sworn by the solicitor in an earlier application where summary judgment had been sought by the plaintiff. The affidavit had referred directly to the emails and their content, stressing their importance to the defendant's rights to resist summary judgment. Schmidt J held that this earlier disclosure of part of the contents of the emails was inconsistent with the later attempt to maintain privilege. The disclosure was voluntary and the situation was governed by both ss 122(2) and (3). Production of the documents was ordered.

3. For privilege to be lost, the disclosure must be both "knowing" and "voluntary". However, a disclosure made under a mistaken belief as to what is being disclosed will not be one made "voluntarily" and will not necessarily result in the loss of privilege: *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at 22 per Rolfe J. Further, if the mistake is "obvious", and should have been appreciated by the party to whom the document is disclosed, privilege may not be lost: *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 at 405 per Goldberg J.
4. Counsel's failure to object to the disclosure of privileged material during a witness's cross-examination may satisfy the "knowing" and "voluntary" limbs of the disclosure test to waive privilege. For example, in *Divall v Mifsud* [2005] NSWCA 447, a witness called by a party was asked in cross-examination to reveal the substance of a privileged statement and counsel for the party who called the witness failed to object. The substance of the statement was subsequently disclosed in the witness's answers. Ipp JA (McColl JA agreeing) held at [10] that failure to object to those questions meant that the substance of the statement had been "knowingly and voluntarily disclosed to another person": S Odgers, *Uniform Evidence Law*, 19th edn at [EA.122.210].
5. Disclosure on the mistaken basis that privilege is unavailable has been held to be irrelevant to the assessment whether privilege has been lost: *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353 per White J at [35].

[4-1545] "the substance of the evidence" — s 122(3)

Whether disclosure amounts to disclosure of the substance of a privileged communication is a question of degree. The balance of authority suggests that, at the least, an express or implied summary of the subject legal advice is required. In this regard, the conclusions of the advice may not sufficiently be "the substance of the evidence", without disclosure of relevant factual bases and a reasoning process proceeding from those bases to the conclusions reached. For example, in *Fenwick v Wambo Coal Pty Ltd (No 2)*, above, after referring to authorities on the point, White J concluded that a draft letter disclosed the substance of the legal advice as it disclosed the reasoning. His Honour, at [24], appeared to consider the inclusion of reasoning to be determinative.

[4-1550] "in the course of making a confidential communication or preparing a confidential document" — s 122(5)(a)(i)

"[C]onfidential communication" and "confidential document" are defined in s 117 of the Act. Both incorporate a requirement of "an express or implied obligation not to disclose [the communication's or document's] contents, whether or not the obligation arises under law". There is a need to examine carefully the terms on which the communication is made. The Full Court of the Federal Court in *Carnell v Mann* (1998) 159 ALR 647 has observed (at 659, per Higgins, Lehane and Weinberg JJ) in relation to this phrase that it should not be read narrowly and should not be confined to "the type of obligation which arises in the course of a solicitor/client relationship". It is important to note that the provision is expressed in terms that a client or party objecting to the adducing of the evidence "merely because" the substance of the evidence has been disclosed on a confidential basis. It follows that circumstances may arise where privilege is lost notwithstanding disclosure of the substance of the evidence on a confidential basis: S Odgers, *Uniform Evidence Law*, 19th edn at [EA.122.300].

[4-1555] "under compulsion of law" — s 122(5)(iii)

The effect of this provision changed with amendments made following *ALRC Report 102*, and although the issue is yet to be tested before the NSW Court of Appeal, the preferable approach may prove to be that suggested by Garling J in *Gillies v Downer EDI Ltd* [2010] NSWSC 1323 at [46].

In that case, his Honour posited that if a party objects to the disclosure of a document on the basis of privilege in the pre-trial gathering of evidence — for example, during discovery, interrogatories, or the production of documents under a subpoena or Notice to Produce — the court is to apply forthwith the principles expressed in Pt 3.10 of the *Evidence Act 1995* (NSW): s 131A. (See, for the contrary view, Harrison J in *Actone Holdings Pty Ltd v Gridtek Pty Ltd* [2012] NSWSC 991.) There had been a line of authority suggesting such a determination was to be reserved until the document/evidence imputed to support the waiver was tendered at trial or otherwise used in such a way on the hearing of those proceedings as would make it unfair not to treat the privilege as having been waived: *Sevic v Roarty* (1998) 44 NSWLR 287; *Akins v Abigroup Ltd* [1998] 43 NSWLR 539. These cases however did not have the benefit of s 131A which was introduced by the *Evidence Amendment Act 2007* and only came into force on 1 January 2009. The effect of this provision, it is suggested, coheres with modern case-management practices, in particular, the more efficient running of trials.

[4-1560] Joint clients and "common interest" — s 122(5)(b), (c)

Section 122(5) does not itself confer privilege. Where applicable, it only prevents privilege being lost by a particular disclosure. Under s 122(5), a client is not taken to have acted in a manner inconsistent with the client objecting to the adducing of the evidence "merely because" of a disclosure by the client to "another person" concerning a matter in respect of which they are joint clients of the same lawyer (s 122(5)(b)) or the client and the other person share a "common interest" in current or anticipated legal proceedings (s 122(5)(c)): S Odgers, *Uniform Evidence Law*, 19th edn at [EA.122.360].

The concept of common interest for the purposes of s 122(5(c) is not rigidly defined. Examples of situations where the provision may apply include disclosure by insured to insurer, partner to partner, and co-tenant to co-tenant. Each case must be considered on its own facts. It has been suggested that a mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely upon it: *Marshall v Prescott (No 4)* [2012] NSWSC 992 per Bellew J at [61]. In that case, a deceased's de facto partner and workers' compensation insurer succeeded in establishing a common interest in relation to proceedings concerning the entitlement to damages from class action litigation in the United States against the manufacturer of the engine of a plane that crashed, killing the deceased. The de facto had succeeded against the insurer in prior proceedings in the Compensation Court. The common interest stemmed from s 151Z(1)(b) of the *Workers Compensation Act 1987* (NSW) which permitted the insurer to recover compensation already paid to the de facto from the damages. For another example, in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234, Bergin J (as her Honour then was) found at [57] that since a "litigation funder" had "an interest in the most advantageous conduct of [those] proceedings by the plaintiff" and that interest "[was] identical with that of the plaintiff", the "funder in [that] case [had] a 'common interest in relation to' the proceedings".

A further example is afforded by *Hamilton v State of NSW* [2017] NSWCA 112. The appeal concerned controversial proceedings following the death of the applicant's partner. In those proceedings, the applicant had sought production of documents from the DPP concerning the prosecution of her partner. The court at first instance had found that the claim for client legal privilege was valid. Although the DPP had voluntarily disclosed the documents to the Crown Solicitor, the disclosure did not result in a waiver or loss of client privilege. The Court of Appeal agreed with Beech-Jones J, that, as the possibility of the joinder of the DPP as a party to the proceedings was "realistic", there was an interest in common with the State in the common law proceedings. This was "more than a mere preference as to how the litigation should unfold". Leave to appeal was refused.

[4-1562] Discovery — documents mistakenly produced without a claim for privilege

In *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCA 430, the NSW Court of Appeal considered the situation where, in a

complicated and lengthy pre-trial discovery process, a number of documents (apparently privileged) were listed as non-privileged, produced (on compact disc), and inspected by the other side. Some three months later, a demand was made that the documents be returned and that an undertaking be given that they not be used. Both requests were refused. The primary judge issued an injunction on the parties who had received the privileged material from making any further use of it and ordered the delivery up of the documents.

The Court of Appeal granted leave on the principal issues and allowed the appeal. The principal judgment was given by Campbell JA (McFarlan JA agreeing). The third member of the court (Sackville AJA) agreed with the orders, reversing those made by the primary judge. However, his Honour reserved his position on several matters.

In the course of his reasons, Campbell JA made the following important points:

- There is at present no High Court decision that makes clear the principles to be applied when deciding whether privileged documents provided on discovery by an apparent mistake should be returned; or whether any restriction should be placed on the use of information contained within those documents.
- The claims in the present case for injunctions based upon the existence of legal professional privilege were misconceived. The primary judge had erred in treating the principal issue as one of waiver of privilege.
- Common law concerning legal professional privilege does no more than provide a ground on which a person entitled to the privilege may restrict or seek to restrict what would otherwise be a legal demand for the disclosure of the privileged material. It did not provide a foundation for injunctive relief in the present matter.
- Similarly, in so far as reliance had been placed on client legal privilege under ss 117 and 118 of the *Evidence Act*, this also could not provide a basis for the injunctions sought and granted at first instance. Sections 117 and 118 might provide a basis at an eventual trial for preventing the privileged documents going into evidence. They did not, however, give the party claiming that a mistake had been made any right to receive the documents back either at the discovery stage or at all.
- Further, s 131A did not advance the discovering party's case. The task of the court under s 131A is to determine whether an objection to the production of a document pursuant to a "disclosure requirement" is well founded. The court's task did not extend to the granting of injunctive relief.

In the course of his reasons, Campbell JA made an erudite and exhaustive analysis of a number of United Kingdom and Australian cases bearing on the one basis which might have sustained the injunctions granted by the primary charge. These were cases dealing with the law of confidential information and equity's protection of such information. His Honour paid particular attention to recent Australian decisions where the protection of confidential information had been considered in the context of the modern discovery process.

Campbell JA enunciated a simple proposition: in the circumstances of the present case, the question needed to be asked whether a reasonable solicitor (in the position of the solicitor who had received the documents) would have realised that the documents had been disclosed by an obvious mistake. If the answer to this question is yes, then, depending on the overall circumstances, equity might impose an obligation on the solicitor to return the documents in much the same way as the court might order the return of documents obtained by fraud. Of course, had the receiving solicitor in fact realised that the documents were confidential and that they had been disclosed by mistake, that also might suffice to impose an obligation.

His Honour made a detailed analysis of the facts surrounding the discovery process in the case before the court. His conclusion was that a reasonable solicitor in the position of the solicitor

receiving the documents would not have considered that the disclosure had been made as a result of an obvious mistake. Consequently, there was no basis on which the injunctions should have been made. Campbell JA stressed that the case had been wrongly decided at first instance on a waiver of privilege basis rather than by the correct consideration of the law of confidential information.

If, contrary to his views, the availability of the injunctions had depended upon whether privilege had been waived, his Honour said that he would hold, applying s 122 of the *Evidence Act*, that it had been waived on the basis of the inconsistency test. Once again, his Honour conducted a thorough analysis of the facts in coming to this conclusion. (Sackville AJA reserved his decision on this point on the basis that the matter had not been fully or adequately argued either at first instance or on appeal and that it was an issue that might arise, if at all, only at trial.)

During the course of his obiter analysis of the waiver issue, Campbell JA made an obvious but important point. Section 122 inhibited a finding a waiver where documents were produced under "compulsion of law". However, the solicitors were never compelled by the discovery process to produce privileged documents for inspection. The fact that they did so occurred at best as a result of their own mistake. Consequently, s 122(5)(a)(iii) did not assist their argument.

On appeal, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, the High Court, while not doubting Campbell JA's analysis, in relation to injunctive relief concerning confidential information, held in effect that the litigation in the courts below had missed the point. This was simply a case in which an inadvertent and unintentional mistake had been made. As such, it should have been promptly corrected either by the parties themselves or by a simple court order amending the discovery lists and directing the return of the documents listed by mistake as non-privileged material. Where disclosure has been inadvertent, then, absent a compelling reason, a court will ordinarily correct the mistake and make orders for the return of the documents. The ordinary case is one in which the party claiming privilege has acted promptly and the other party has not been placed, as a result of the disclosure, in a position which would make an order to return the documents unfair. In such a case, no issue of waiver arises.

The High Court reminded the Supreme Court and, in particular, practitioners that the purpose of the powers in the *Civil Procedure Act 2005* is to facilitate the overriding purpose of the legislation. A prompt direction and order to amend the list of documents in the present case would have satisfied the dictates of justice and avoided the complex and lengthy litigation which followed the discovery of the original mistake. There was a duty cast upon solicitors to support the objectives of the proper administration of justice by avoiding unnecessary and costly interlocutory applications.

For a case on "mistaken" production of privileged documents, see *Bendigo and Adelaide Bank Limited v Stamatis* [2013] NSWSC 248. It was held that the documents were not privileged; if they had been, their production to the respondent's solicitors would have been reasonably seen as intentional, and not as a mistake.

[4-1565] Loss of privilege: a document used to try to revive a witness's memory (or by a police officer under s 33) — s 122(6)

Privilege does not apply to a document that a witness has used to try to revive his or her memory about a fact or opinion under s 32 of the Act, or that a police officer has read or been led through under s 33 of the Act. The success of the attempt to revive memory is irrelevant to the operation of s 122(6).

By contrast, in *El-Zayet v R* (2014) 88 NSWLR 534 an undoubtedly privileged document (the Deputy DPP's advice as to why a prosecution should be discontinued) was inadvertently handed up to the court. The CCA unanimously held that the DPP's privilege had not been waived either expressly or by implication. The Crown Prosecutor, who had mistakenly handed up the document had no authority to waive privilege.

[4-1570] Loss of client legal privilege: defendants in a criminal trial — s 123

The general effect of this provision is that privilege is lost if evidence is adduced by a defendant in criminal proceedings, unless the evidence derives from an associated defendant.

An "associated defendant" is defined in the Dictionary to the Act as follows:

> "[A]ssociated defendant", in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:
>
> (a) An offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
>
> (b) An offence that relates to or is connected with the offence for which the defendant is being prosecuted.

The term "adducing evidence" as it appears in the provision does not encompass a "call" made by a defendant on the prosecution for production of documents during the hearing of a criminal proceeding: S Odgers, *Uniform Evidence Law*, 19th edn at [EA.123.90]. The provision would apply, for example, where the defendant, in actual possession of the documents, seeks to tender them in the proceedings: *R v Wilkie* [2008] NSWSC 885, per Grove J at [4].

[4-1575] Loss of client legal privilege: joint clients — s 124

The effect of this provision is that privilege under ss 118 or 119 is lost if, in civil proceedings where "2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter", evidence of a communication made by any of the parties to the lawyer, or a confidential document prepared by or for any of the parties, in relation to the same matter, is adduced by one of the parties. Whether there is a communication made to, or from, a solicitor in his or her joint capacity is decided by objective evidence about whether the occasion for the communication was one where the solicitor was being asked to advance the purpose for which he or she was jointly consulted: *Doran Constructions Pty Ltd (in liq), Re* [2002] NSWSC 215 at [72] per Campbell J.

In *Feridun Akcan v Cross* [2013] NSWSC 403, Rein J held that s 118 did not prevent a barrister giving evidence (said by the plaintiff to have been jointly retained by himself and the defendants) as to what the defendants said at a conference at which they all attended. The issue was whether the plaintiff was a silent partner with the defendants in a restaurant venture at the Drummoyne Sailing Club. The barrister's evidence was that the defendants, during the conference, confirmed that this was the situation.

Rein J first examined the position at common law. His Honour considered that the better view was not that there had been a waiver of privilege; rather the more coherent view was that no privilege arose as between the three persons in the first place.

Rein J found that s 124 operated in the same manner as the common law position notwithstanding its somewhat infelicitous expression.

[4-1580] Loss of client legal privilege: misconduct — s 125

In general terms, this provision results in loss of privilege if a communication or document was made or prepared by a client, lawyer or party in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty. Further, the privilege will be lost if the communication or document was known, or should reasonably have been known, by the client, lawyer or party, to have been made or prepared in furtherance of a deliberate abuse of statutory power: s 125(1)(a) and (b): S Odgers, *Uniform Evidence Law*, 19th edn at [EA.125.90]–[EA.125.120].

Section 125 relates only to the adducing of evidence. Where no question of adducing evidence has arisen and the matter is concerned with an order for access to documents produced on subpoena,

s 131A provides that the disclosure requirements under Div 1 (client legal privilege) apply to the production of documents pursuant to a subpoena: s 131(2)(a) *Evidence Act*; *DPP v Stanizzo* [2019] NSWCA 12 at [32].

In *Kang v Kwan* [2001] NSWSC 697, the plaintiff had carried out work on certain property at Castlecrag owned by the second and third defendants. There was evidence to show that the first defendant colluded with the others to create a false mortgage, participated in a sale of the property to a third party, received "payment" of the mortgage monies and dissipated the funds overseas. The privilege argument centred on legal advice and other confidential communications passing between various lawyers and the defendants. Santow J held that there were reasonable grounds to hold that both limbs of s 125 were established and that privilege had been lost.

Arising from *Kang v Kwan* at [37] and [40] and other decisions indicated, the following useful list of propositions relevant to the operation of "fraud" and "abuse of power" loss of privilege may be stated:

- a person asserting that legal professional privilege does not apply to a communication has the onus of proving it. Where fraud is asserted, there must be evidence to support the assertion: *Kang v Kwan*, above at [37]. In a case where there is a serious fraud allegation, the evidence tendered needs to properly be identified and addressed: *DPP v Stanizzo*, above at [37]–[38]. Simply referring to a document in the evidence does not mean it is "drawn in" and becomes part of the evidence: *DPP v Stanizzo* at [36], [38].
- the standard of proof is not required to the level of proof on the balance of probabilities. There must, however, be some evidence at a prima facie level — "something to give colour to the charge": *Kang v Kwan*, above at [37]. Note that while the court does not need to be satisfied on the balance of probabilities as to the existence of the fraud or abuse of power, to enliven the operation of s 125, such an allegation must be made in clear and definite terms, and there must be some evidence that it has some foundation in fact: at [30], [33]; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 521–522; *DPP v Stanizzo* [2019] NSWCA 12 at [30], [33].
- the court itself may inspect the documents: s 133. It may do so for the purpose of determining whether privilege has been lost: *Kang v Kwan,* above at [37].
- "fraud" in s 125, requires an element of dishonesty; some level of "sharp practice". Similarly with "abuse of power", especially because of the word "deliberate" in s 125(1)(b): s 125(1)(b): *Kang v Kwan*, above, at [37], [40].

[4-1585] Loss of client legal privilege: related communications and documents — s 126

This effect of this provision is to permit the adducing of "evidence of another communication or document" if it is reasonably necessary to do so to enable a prior understanding of a communication or document before the court. Sackville J made the following helpful observations about the operation of s 126 of the Act in *Towney v Minister for Land & Water Conservation (NSW)* (1997) 147 ALR 402:

1. Though s 126 does not specify whose understanding is to be considered when determining whether or not a source document is reasonably necessary "to enable a proper understanding" of a document in respect of which client legal privilege has been lost by reason of voluntary disclosure, an objective standard is contemplated: *Towney v Minister for Land & Water Conservation (NSW)*, above, at 412 per Sackville J; cited with approval in *Sugden v Sugden* (2007) 70 NSWLR 301 at [94] per McDougall J (Mason P and Ipp JA agreeing).
2. The meaning of "proper understanding" is not narrow. If a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character,

significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privileged, ordinarily the test laid down by s 126 of the Act will be satisfied: *Towney*, per Sackville J at 413–414.

3. Mere reference to a privileged source document, of itself, does not necessarily result in loss of the privilege attaching to the whole or even part of that document. It is plausible that a source document may be divided clearly into discrete parts, with only one part relevant to gaining a proper understanding of a document. In such circumstances, it could not be said that inspection of other portions of the source document is reasonably necessary to enable a proper understanding of the report: *Towney*, per Sackville J at 413–414.

[4-1588] Privilege in respect of self-incrimination — exception for certain orders — s 128A

The effect of this provision is that the privilege against self-incrimination under the *Evidence Act* applies to disclosure orders. The approach of s 128A to the protection of a person's privilege against self-incrimination in relation to disclosure of information that may tend to prove that the person has committed an offence under an Australian law or a law of a foreign country is in substance identical to that of s 128.

Section 128A(5) makes clear that the discretion to make or refuse to make an order under s 128A(6) arises for consideration by a court only where the person to whom a disclosure order is directed has taken an objection to disclosure of information under s 128A(2) and only where the court has found under s 128A(4) that there are reasonable grounds for the objection that has been taken. The party making a claim for self-incrimination privilege must set out the basis for the objection. Under s 128A(2)(c), the person must disclose so much of the information required to be disclosed to which no objection is taken and under s 128A(2)(d) the person must prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the privilege affidavit) and deliver it to the court in a sealed envelope. Section 128A(6) in that context operates to permit the court to make an order requiring information that the court is satisfied under s 128A(6)(a) may tend to prove that the person has committed an offence against Australian law to be filed and served on the parties only if the court is also satisfied that both of the propositions in s 128A(6)(b) and (c) apply to that information.

Making or refusing to make an order under s 128A(6) is a discretionary decision in respect of which the applicable standard of appellate review is that identified in *House v The King*.

Under s 128A(6), the court may order the privilege affidavit, in whole or in part, be disclosed if satisfied that (a) any information in it may tend to prove the person committed an offence under Australian law; and (b) the information does not tend to prove the person committed an offence under a foreign country's law; and (c) the interests of justice require disclosure.

Section 128A(6)(a) and (b) do not impose a standard or burden on the party claiming privilege against self-incrimination additional to or higher than that imposed by s 128A(2) and (4): *Deputy Commissioner of Taxation v Shi* [2021] HCA 22 at [70]. In that case, the majority of the High Court found there was an unchallenged finding that the information in the privilege affidavit may tend to prove that the respondent had committed an offence under an Australian law. The question for the court under s 128A(6) is whether it is satisfied the interests of justice require that the privilege affidavit be disclosed. In the circumstances of *Shi*, a failure to object on the grounds of foreign law meant that the question raised by s 128A(6)(b) did not arise.

[4-1589] Exclusion of evidence of matters of state — s 130

Last reviewed: June 2025

In *Ku-ring-gai Council v West* (2017) 95 NSWLR 1, the NSW Court of Appeal considered a claim for public interest immunity pressed on behalf of the NSW Government. The claim arose in the

context of the proposed merger of local government areas. It concerned an expert report by KPMG for submission to Cabinet regarding the proposed local government reforms. Production under s 130 had been refused at first instance. The majority of the Court allowed production on the basis that it would have little impact on the "frankness and candour" of the firm preparing the report. That it might do so was dismissed as "fanciful". The public interest in the production of the material outweighed any notion of preserving secrecy or confidentiality.

In *Monteiro v State of NSW* [2025] NSWSC 235, the NSW Supreme Court considered a claim for public interest immunity with respect to the redacted parts of documents in relation to an Extended Supervision Order (ESO) made pursuant to the *Crimes (High Risk Offenders) Act 2006*, which Community Corrections had responsibility for overseeing. The documents were ordered to be filed and served in relation to the plaintiff's application for revocation of the ESO he was subject to. The Court held that the public interest in admitting the information into evidence, or else making it available to the plaintiff for use more generally in the proceedings, was outweighed by a significant margin by the public interest in preserving the confidentiality of the information and the confidentiality of the personal details of any individual who provided that information. The revelation of such material would be likely to diminish cooperation by individuals, including members of the public, with Community Corrections: at [45]–[46].

[4-1590] Settlement negotiations are excluded from admission into evidence — s 131

In *Galafassi v Kelly* (2014) 87 NSWLR 119 the Court of Appeal analysed the section and its important "exception" in s 131(2)(g). The principal section (excluding settlement negotiations) does not apply where "the court would be likely to be misled as to the existence or contents of an excluded communication or document, where those matters are in issue in the proceedings."

In the instant case, an important issue was whether the purchasers of a Paddington property intended to continue to repudiate the contract for sale after equity proceedings had been commenced. The correspondence in question showed that this was plainly the case — the email from the purchasers made it clear that they would never be in a position to complete. Hence, even if the document were capable of being viewed as an attempt to negotiate a settlement, the exception provision in s 131(2)(g) made it essential that the documents be received into evidence.

Third parties

In *Dowling v Ultraceuticals Pty Ltd* (2016) 93 NSWLR 155, the court was faced with a claim for privilege where the relevant documents were brought into existence for the purpose of enabling settlement negotiations between third parties involved in a separate dispute. Justice Hammerschlag affirmed that the relevant privilege extended to "without prejudice" communications between parties to litigation from prosecution to other parties in the same litigation. What was the situation where, as here, the party seeking production was neither party to, nor concerned with, the earlier litigation? The rationale, the court held, was that the privilege extends to cover disclosure to a third party provided there is sufficient connection between the subject matter of the original dispute and the latter one. The extension of the privilege should be made by reference to whether the party resisting disclosure would have had a legitimate expectation that the material brought into existence to settle the earlier litigation would not be used against it in the later dispute. In the present case, the privilege claim was denied.

Legislation

- *Evidence Act 1995*, ss 32–33, Pt 3.10 (ss 117–126), ss 127–131A, 133–134, Dictionary
- *Evidence Amendment Act 2007*
- *Workers Compensation Act 1987*, s 151Z(1)(b)

Further references

- J D Heydon, *Cross on Evidence*, 12th edn, LexisNexis, 2020
- S Odgers, *Uniform Evidence Law*, 19th edn, Thomson Reuters, 2024
- *ALRC Report 102*, Australian Government Publishing Service, Canberra, 2005

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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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Inferences

The judicial task often requires the drawing of inferences from material before the court. There are two rules of practice and procedural fairness that commonly arise for consideration in litigation. These are:

- the rule in *Browne v Dunn* (1893) 6 R 67
- the rule in *Jones v Dunkel* (1959) 101 CLR 298 at 320.

[4-1900] The rule in Browne v Dunn

Under this rule of practice, if a witness gives evidence that is inconsistent with what the opposing party wants to lead in evidence, the opposing party should raise the contention with that witness during cross-examination. In general terms, the rule prevents a party from putting forward a case without first giving opposing witnesses the opportunity of responding to it.

The rule is essentially one of professional practice based on the notion of procedural fairness. It will be satisfied, however, where the opposing party (and his witnesses) plainly know (eg, through notice having been given) the nature of the opposition case to be met: *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 16.

The rule in *Browne v Dunn* was emphasised by the NSW Court of Appeal in *State of NSW v Hunt* (2014) 86 NSWLR 226. The trial judge, in an action for malicious arrest, assault and battery, and misfeasance in public office, found for the plaintiff. The defendant was vicariously liable for the conduct of its employee, a police officer. The officer, according to the trial judge, had completely fabricated his evidence in a number of material particulars. However, this had not been put to the officer when he gave his evidence. The Court of Appeal emphasised, at [32], that two conditions needed to be satisfied before such a finding could be made: first, reasons must be given for concluding that the truth has not been told; secondly, the witness (or party) must have been given an opportunity to answer the criticism. See also *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [67].

The Court of Appeal's decision in *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132 is a timely reminder that the parties to litigation cannot by agreement (even though the court may have acquiesced) authorise a course which denies elementary procedural fairness to a witness.

The precise issue in the proceedings concerned the events at a property auction. The dispute related to whether the purchase price included GST. The "decisive evidence" according to the primary judge was the evidence of the auctioneer. Counsel for the unsuccessful appellant failed to cross-examine the auctioneer, relying on an agreement between the parties that rendered it unnecessary for this course to be taken. The Court of Appeal were by no means satisfied as to the content of this asserted agreement. However, it was satisfied that there had been an obligation placed on counsel to put to the witness "the nature of the case upon which it was proposed to rely". The court emphasised that the rule in *Browne v Dunn* was not only concerned with procedural fairness. In addition, it facilitated the court's ability to assess reliability and credibility of the witness.

In *Oneflare Pty Ltd v Chernih* [2017] NSWCA 195 the primary judge had rejected the truthfulness of the evidence given by the appellant's directors, and held for the respondent. The appellants argued that they had been denied procedural fairness. The Court of Appeal rejected this submission, emphasising that the crux of the rule in *Browne v Dunn* is that the witness must have been given "full notice beforehand that it is intended to impeach the credibility of the story he is telling". In the instant case, the affidavit evidence exchanged before the hearing, the parties' opening statements and the cross-examination of each of the directors made plain that the truthfulness of their evidence was under challenge.

In *Lardis v Lakis* [2018] NSWCA 113 the central issue was whether a transfer of property was a voidable alienation of property with intent to defraud creditors. The primary judge held it was, thus rejecting the evidence of the appellant's solicitor as to the date when instructions had been received to effect the transfer. The primary judge said: "taking the most generous view of [the solicitor's] evidence, I am satisfied he was mistaken about the times when he said … he received instructions". Counsel for the respondent had cross-examined the solicitor at trial but had not specifically suggested his evidence was a fabrication. Rather it was suggested that he had been mistaken on the timing issue. This led to a submission on appeal that the primary judge had erred by making an adverse credibility finding absent cross-examination directed to the credibility of witnesses evidence. Meagher JA (with whom Macfarlan JA agreed) held that the rule in *Browne v Dunn* had not been infringed. Without trespassing into the realm of credibility, there was ample evidence justifying the primary judge's rejection of the solicitor's evidence. White JA agreed that there was ample evidence to justify finding that the solicitor was mistaken. He thought, however, that "further findings that cast doubt on the [solicitor's] veracity … were not open … having regard to the limited scope of cross-examination". This conclusion did not affect the fate of the appeal.

The *Evidence Act* s 46 overlaps with the rule. It permits a witness to be recalled where there has been a failure to cross-examine on a contested matter: see, *MWJ v The Queen* (2005) 222 ALR 436.

[4-1910] The rule in Jones v Dunkel

This rule operates where there is an unexplained failure by a party to give evidence, to call witneses or to tender documents or other evidence. In appropriate circumstances, this may lead to an inference that the uncalled evidence would not have assisted the party. However, the rule is complex and unless the appropriate circumstances are present, the court will not be bound to draw the adverse inference. Moreover, where the inference is drawn, the rule cannot be used to fill gaps in the evidence or to convert conjecture into suspicion: "[t]he failure [to call a witness] cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably": *Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61 at [49]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64]. See J D Heydon AC, *Cross on Evidence*, 12th edn, 2019, LexisNexis, Sydney at [1215].

The rule has application to criminal proceedings but is very restricted in operation.

In *Mamo v Surace* (2014) 86 NSWLR 275, the NSW Court of Appeal considered once again the scope of duty of care imposed on the driver of a motor vehicle. In the instant case, the passenger in a car was injured when the vehicle collided with a cow owned by the defendant. The animal had wandered onto the road at night. The defendant was not called at the hearing, raising the argument on appeal that a *Jones v Dunkel* inference should have been raised, namely that his evidence would not have assisted his case. The Court of Appeal firmly rejected this argument. The defendant's statement had been in evidence and was substantially consistent with the plaintiff's evidence. There was, in fact, no other evidence that called for an answer on the defendant's part. There had been sufficient evidence at trial to enable the court below to determine the primary issue. The appeal was dismissed.

By contrast, a decision where the *Jones v Dunkel* inference assumed significance is the Court of Appeal decision in *RHG Mortgage Ltd v Ianni* [2015] NSWCA 56. At trial, the Iannis' essential case had been that they were misled by their son Joseph when they entered into a loan agreement and mortgage with the appellant. Their case was that he had told them their liability would not exceed $100,000. The advance, which was not for their benefit, was for an amount in excess of $900,000. The critical point in the appeal was that neither party had called Joseph Ianni to give evidence. The trial judge regarded this as essentially neutral in the circumstances and failed to draw an adverse inference.

The court reiterated that the circumstances for drawing a *Jones v Dunkel* inference are found where an uncalled witness is a person presumably able to put the true complexion on the facts relied

on by a party as the ground for any inference favourable to that party. The three conditions to be applied are: first, whether the uncalled witness would be expected to be called by one party rather than the other; secondly, whether his or her evidence would elucidate the matter; thirdly, whether his or her absence is unexplained.

The court held that, even though the respondent's case was that the Iannis had been misled by Joseph, the better view was that Joseph was the obvious witness who could have corroborated their evidence. He was a person who could reasonably be expected they would call. There was no satisfactory evidence as to his absence as a witness. A retrial was ordered.

In *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, the NSW Court of Appeal extended by analogy the *Jones v Dunkel* rule to the situation where a party fails to ask questions of a witness in chief. In particular, Handley JA suggested that a court should not draw inferences favourable to a party where questions were not asked in chief.

In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, the High Court gave a limited degree of approval to Handley JA's proposition. See also *Nominal Defendant v Rooskov* [2012] NSWCA 43 which emphasised that the rule does not require that an inference be drawn. It is simply available where the appropriate circumstances exist.

Legislation

- *Evidence Act* s 46

Further references

- J D Heydon AC, *Cross on Evidence*, 12th edn, 2019, LexisNexis, Sydney

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Evidence Act: extrinsic material

[4-2000] Part 3.4 (Admissions), s 84 Exclusion of admissions influenced by violence and certain other conduct

The international instruments which Australia has either recognised, ratified or adopted as relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) are the UN International Covenant on Civil and Political Rights (ICCPR) (the terms of which are set out in Sch 2 of the HREOC Act), the Convention on the Rights of the Child (available at http://www.unhchr.ch/html/menu3/b/k2crc.htm — the earlier Declaration on the Rights of the Child set out in Sch 3 of the HREOC Act is no longer relevant), the Declaration on the Rights of Mentally Retarded Persons (set out in Sch 4 of the Act), the Declaration on the Rights of Disabled Persons (set out in Sch 5) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (available at http://www.unhchr.ch/html/menu3/b/d_intole.htm).

The text writers draw attention also to Article 3 of the European Convention on Human Rights, which provides: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment": http://www.echr.coe.int/Documents/Convention_ENG.pdf. One benefit of the European Convention is that it has a readily accessible body of case law produced by the European Court of Human Rights, which is available on the same link.

[4-2010] Part 3.4 (Admissions), s 85 Criminal proceedings: reliability of admissions by defendants; Obligation of police to caution suspect

The Bench Book deals with this subject at **[4-0850]**, **Obligation to caution**.

The NSW Police Code of Practice (the Code) for CRIME (Custody, Rights, Investigation, Management and Evidence) (known by the acronym CRIME), to which reference was made in *Em v The Queen* (2007) 232 CLR 67, also deals with this subject, although perhaps incompletely. It says (at p 10) that it "might be necessary to caution before arrest" but, once an arrest is made, an oral caution must be given "as soon as possible". The Code states (at p 49, under the heading "Questioning suspects") that all persons have the common law right to silence, except where the law requires persons to provide information (for example, pursuant to a *Road Transport Act*), and that before such questioning police officers must be satisfied that such persons understand the caution "and implications of actions following it". Greater detail of the time when a caution is to be given (at p 50): that is, when the police officer believes there is sufficient evidence to establish that an offence has been committed, or would not allow the person to leave if that person wanted to or has given the person reasonable grounds to believe that he or she would not be allowed to leave. The basic caution to be given is in the following terms:

> I am going to ask you some questions. You do not have to say or do anything if you do not want to. Do you understand that?
>
> We will record what you say or so. We can use this recording in court. Do you understand that?

The Code states (at p 51) that the police officer need not follow that as a formal script, but a record must be kept of what is said. The Code stresses (on the same page) that the police officer communicate to the person to be questioned that he or she does not have to say or do anything in response to the questions and that anything said or done may be used in evidence.

Status of CRIME:

The Foreword to the Code states that it provides "a succinct reference to the powers of the police when investigating offences", and it asserts that "[t]he Code is *not*, however, a comprehensive set

of requirements which must be followed by police in exercising the powers of their office" (the emphasis is supplied in the original); rather, the Foreword says, "[i]n exercising these powers and in their treatment of suspects and members of the public, police must be aware of the obligations and responsibilities imposed on them by legislation, NSW Police policies, procedures and other documents …".

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see *Local Court Bench Book*, Judicial Commission of New South Wales, 1988, at [32-000]ff; available online through JIRS and the Judicial Commission's website at <www.judcom.nsw.gov.au/publications>

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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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Removal and reference

[5-0400] Removal and reference of proceedings: terminology

The word "removal" is used in the UCPR in relation to the transfer of proceedings by a Division of the Supreme Court to the Court of Appeal. The word "reference" is used in the UCPR in relation to the transfer of proceedings from a lower to a higher level within the Supreme Court, District Court and Local Court respectively, by order of a judicial officer at the lower level. There appears to be no intended difference of meaning as between the words "removal" and "reference" as used in these contexts.

The word "removal" is again used in the UCPR in relation to the transfer of proceedings from a lower to a higher level within the Supreme Court, District Court and Local Court respectively but, in this instance, by order of a judicial officer at the higher level.

In order to retain consistency with the rules, the terminology used in the rules has been preserved in this review.

[5-0410] Removal of proceedings into the Court of Appeal by a judge of the Supreme Court

Rule 1.21 of the UCPR, Removal to Court of Appeal, provides that the Supreme Court in a Division may make an order that proceedings commenced in the Division be removed into the Court of Appeal.

The rule includes conditions for its operation, namely, that an order is made under r 28.2 for the decision of a question of law or that the judge, having stated the question to be decided, is satisfied that special circumstances make removal into the Court of Appeal desirable.

The rule may be utilised where there are conflicting authorities or where the matter is one of importance and there is no clear authority on the subject. However, the rule is not confined to questions of law. The term "question" is defined broadly by r 1.21(4) as including any question or issue of fact or of law or partly of fact and partly of law.

[5-0420] Sample orders

I order that proceedings (specifying them) be removed into the Court of Appeal

Costs.

[5-0430] Reference of proceedings within the Supreme Court, District Court and Local Court

Proceedings may be referred:

- by an associate judge of the Supreme Court to a judge of that court: r 49.2(1)
- by the judicial registrar of the District Court to a judge of that court: r 49.5,
- by a registrar of the Supreme Court, District Court or Local Court (other than the judicial registrar of the District Court) to a judge or magistrate of the respective court.

The procedure may be utilised where there is conflicting authority or the absence of clear authority, as in the case of removal of proceedings into the Court of Appeal by a judge of the Supreme Court (see above), or where there is doubt concerning power to hear and determine a matter in question in the proceedings.

There are not the same conditions for the operation of these rules as exist in relation to removal of proceedings into the Court of Appeal by a judge of the Supreme Court (see above). Avoiding the costs of an inevitable appeal would then seem to be an important consideration in the exercise of the discretion to refer.

[5-0440] Sample orders

I order that proceedings (specifying them) be referred to a judge/ magistrate of the court.

Costs

[5-0450] Removal of proceedings within the Supreme Court, District Court and Local Court

Proceedings may be removed:

- by order of a judge of the Supreme Court, from an associate judge of the Supreme Court to a judge of that court: r 49.2(2)
- by order of a judge of the District Court, from the judicial registrar of the District Court to a judge of that court: r 49.6,
- by order of a judge or magistrate of the Supreme Court, District Court or Local Court, from a registrar of the respective court (other than the judicial registrar of the District Court) to a judge or magistrate of the respective court: r 49.17.

The procedure may be utilised by a party who has been refused an application to refer.

[5-0460] Sample orders

I order that proceedings (specifying them) be removed to me/ a judge/ magistrate of the court.

Costs

[5-0470] Disposition of proceedings referred or removed within the Supreme Court, District Court and Local Court

In each case, the judicial officer to whom proceedings are referred or removed must determine the proceedings or, alternatively, determine any question arising in the proceedings and remit the proceedings back with such directions as are thought fit: respectively, rr 49.3, 49.7 and 49.18.

[5-0480] Sample orders

Orders as at a hearing at first instance, or

I determine the following question, namely, … , as follows … , and I remit the proceedings to the … with the following directions (if any) …

Costs

Rules

- UCPR r 1.21, r 28.2, Pt 49, Pt 50

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Costs assessment appeals

[5-0500] Introduction

Since the introduction in 1993 of the costs assessment scheme, providing for the assessment of legal costs — both between practitioner and client and between party and party — by legal practitioners appointed to act as costs assessors, in place of the former system of taxation of costs by taxing officers, the applicable legislation has included a right of appeal from determinations of costs assessors and review panels. The criteria for appeals, and the courts to which an appeal lies, has varied from time to time under the various iterations of the legislation. For the foreseeable future, at least three different regimes have potential application: that under *Legal Profession Act 2004* ("LPA04"), that introduced by *Legal Profession Uniform Law Application Act 2014* ("LPULAA") when it first came into operation with effect from 1 July 2015; and that substituted by the *Courts and Other Justice Portfolio Legislation Amendment Act 2015* with effect from 24 November 2015.[1]

[5-0510] Scope

This chapter is concerned with the law and procedure applicable in appeals to a court from a costs assessor or a costs assessment review panel.[2]

[5-0520] Summary of the appeal provisions

LPA04

Under LPA04, there is an appeal as of right from a decision of a costs assessor (and a review panel) as to a matter of law, to the District Court: LPA04 s 384. There is also an appeal by leave against the determination of the application by a costs assessor (including a review panel) (LPA04 s 385), which lies, in the case of a practitioner/client assessment, to the District Court (LPA04 s 385(1)), and in the case of a party/party assessment, to the court or tribunal that made the costs order: LPA04 s 385(2). If leave is granted, the appeal is a hearing de novo: LPA04 s 385(4).

LPULAA from 1 July 2015

Under LPULAA, as originally applicable,[3] there is an appeal as of right from a decision of a review panel as to a matter of law, to the District Court. There is also an appeal by leave from the decision of a review panel generally, to the District Court. If leave is granted, the appeal is by way of rehearing, with fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor being permissible with the leave of the court. The significant changes from the LPA04 arrangements are, first, that there is no longer a direct appeal to the District Court from a first instance assessor, but only from a review panel, so that parties are required to exhaust their review rights before appealing to a court; and secondly, that the appeal is now by way of rehearing, and not de novo.

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1 In addition, there may still be some matters in which first instructions were given (as between practitioner and client) or the proceedings in which the costs order was made were commenced (as between party and party) before 1 October 2005, which remain covered by the *Legal Profession Act 1987*.

2 Under current provisions this will be the Supreme Court or the District Court, but there is still potential, in party/party assessments of costs in proceedings which were commenced before 1 July 2015, for an appeal to the court or tribunal which made the costs order.

3 LPULAA, Historical version for 2 July 2015 to 23 November 2015, s 89.

LPULAA from 23 November 2015

Under the post-November 2015 LPULAA arrangements (LPULAA s 89), there is an appeal from a decision of a review panel to:

- the District Court, but only with the leave of the court if the amount of costs in dispute is less than $25,000, or
- the Supreme Court, but only with the leave of the court if the amount of costs in dispute is less than $100,000.

The Supreme Court may remit the matter to the District Court, and may remove proceedings from the District Court. The appeal is by way of rehearing, with fresh evidence permissible by leave of the court.

The significant additional changes are, first, that the discriminator for when leave to appeal is required, or where there is an appeal as of right, is now a quantum-based test, in substitution for the former law/fact distinction; and secondly, that the appellate and supervisory role of the Supreme Court is restored, consistent with its traditional responsibilities in this area.

[5-0530] Which legislation applies?

At the outset of any appeal, it will be important to establish which legislative regime applies.

The LPA04 arrangements continue to apply to practitioner/client (and third party) assessments and appeals where the client first instructed the law practice before 1 July 2015 (*Legal Profession Uniform Law* 2014, Sch 4, cl 18), and to party/party assessments and appeals where the proceedings to which the costs relate were commenced before 1 July 2015: *Legal Profession Uniform Law Application Regulation 2015*, reg 59.

The initial LPULAA arrangements apply to "uniform law" (formerly practitioner/client) assessments and appeals where the client first instructed the law practice on or after 1 July 2015 (*Legal Profession Uniform Law* 2014, Sch 4, cl 18), and to "ordered costs" (formerly known as party/party costs) assessments and appeals where the proceedings to which the costs relate were commenced on or after 1 July 2015: *Legal Profession Uniform Law Application Regulation 2015*, reg 59.

The revised LPULAA arrangements commenced on 24 November 2015. In the absence of any specific transitional provision, they should be considered to apply to appeals and applications for leave to appeal instituted on or after that date, in respect of assessments to which LPUL and/or LPULAA otherwise apply.

Appeals under LPA04

[5-0540] Appeal as of right on a matter of law

Under LPA04 there is a right of appeal to the District Court from a decision on a matter of law. Such an appeal lies from an assessor at first instance and from a review panel.

This is a "narrow" right of appeal, confined to a question of law: *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR(NSW) 304 at [31]; *Vumbucca v Sultana* (2012) 15 DCLR(NSW) 375 at [36]; *Sweeney & Vandeleur Pty Ltd v Angyal* [2006] NSWSC 246 at [5]. Questions of law include denial of procedural fairness (*Levy v Bergseng* (2008) 72 NSWLR 178; *Lange v Back* [2009] NSWDC 180; but cf *Madden v NSW IMC* [1999] NSWSC 196), failure to give adequate reasons (*Nassour v Malouf t/as Malouf Solicitors* [2011] NSWSC 356; *Bobb v Wombat Securities Pty Ltd* [2013] NSWSC 757 at [36]; *Frumar v Owners SP 36957* (2006) 67 NSWLR 321;

Wende v Horwath (NSW) Pty Ltd (2014) 86 NSWLR 674; *Randall Pty Ltd v Willoughby City Council* (2009) 9 DCLR(NSW) 31 at [56]), and whether there was a retainer (at least if the facts are not in dispute): *Mohareb v Horowitz & Bilinsky Solicitors* (2011) 13 DCLR(NSW) 245.[4]

In an appeal on a question of law alone, the court's function is limited to identifying an error of law; while the court can "correct" any such error and substitute its own decision (LPA04 s 384(2)),[5] it cannot engage in fact-finding or receive further evidence: *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481; *Madden v NSW IMC* [1999] NSWSC 196.

The decision will not be disturbed on the ground of an error of law unless the error is material to the determination: *Gorczynski v AWM Dickinson & Son* [2005] NSWSC 277 at [22]; *Honest Remark Pty Ltd v Allstate Explorations NL* [2008] NSWSC 439 at [24]; *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR(NSW) 304 at [16].

Unless it affirms the decision appealed from, the court must make such orders as the assessor should have made, or remit the matter to the assessor or panel for redetermination in accordance with the judgment of the court: LPA04 s 384(3); *A Goninan & Co Ltd v Gill* (2001) 51 NSWLR 441 at [26]. Although the section provides that on a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given, that applies not to the court's determination of the appeal, which is one on a question of law only, but only to a redetermination by an assessor on remitter: *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674 at [65], [89]; *McCausland v Surfing Hardware International Holdings Pty Ltd* [2010] NSWDC 222 at [27]–[50].

[5-0550] Appeal by leave, de novo

Under LPA04, a party to an application for costs assessment may also appeal, by leave, against the determination of the application by a costs assessor or a review panel: LPA04 s 385. The appeal lies, in the case of a practitioner/client assessment, to the District Court (LPA04 s 385(1)), and in the case of a party/party assessment, to the court or tribunal that made the costs order: LPA04 s 385(2); see *McCausland v Surfing Hardware International Holdings Pty Ltd*, above, at [16]; *Legal Employment Consulting and Training Pty Ltd v Patterson* [2010] NSWSC 130 at [6], referring to *Legal Employment Consulting and Training Pty Ltd v Patterson* [2009] NSWDC 357 at [7]–[10]; *Madden v NSW IMC* [1999] NSWSC 196; *Altaranesi v Sydney Local Health District* [2012] NSWDC 90 at [14]–[25]; *Cameron v Walker Legal* [2013] NSWSC 1985 at [40]. If leave is granted, the appeal is a hearing de novo: LPA04 s 385(4).

The purpose of imposing a requirement for leave to appeal is to provide a "filter", so as to avoid burdening the resources of the courts and the parties with inappropriate appeals: *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [11]. While there is a very wide discretion (*Chapmans Ltd v Yandell*, above, at [12]), leave should not be too readily granted: *Wende v Horwath (NSW) Pty Ltd* [2008] NSWSC 1241; *Lyons v Wende* [2007] NSWSC 101. There is no exhaustive description of the factors relevant to a grant of leave to appeal, other than the overall justice of the case: *Busuttil v Holder* (unrep, 7/11/96, NSWSC); *Chapmans Ltd v Yandell*. However, the existence of a seriously arguable case of error, and the quantum in dispute (or differently put, considerations of proportionality) are usually highly relevant: *Aktas v Westpac Banking Corporation Ltd* [2013] NSWSC 1451 at [21]. Additional relevant considerations include whether there are questions of fact upon which it is desirable that there be an opportunity for oral evidence and cross-examination, which was not available before the assessor (*Wentworth v Rogers* (2006) 66 NSWLR 474 at [190]); whether there is an appeal as of right to which the issues on which leave is required are related (*Chapmans Ltd v Yandell* at [12]; *Levy v Bergseng* (2008) 72 NSWLR 178 at [50]); and whether the applicant has

4 If the facts are in dispute, it may be a mixed question of fact and law: *Lyons v Wende* [2007] NSWSC 101.

5 The court may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

exhausted rights of review by a review panel. The court may, if the matter has not been the subject of a review, refer the appeal to the Manager Costs Assessment, for reference to a Review Panel: LPA04 s 389.

Because, if leave is granted, the appeal is de novo, the appellant is not confined by grounds of appeal; the evidence is tendered again, without any restriction on further or fresh evidence; there is no requirement to demonstrate error; and the court must in effect re-perform the assessment process.

Appeals under LPULAA before November 2015

[5-0560] Appeal as of right on a matter of law

Under the pre-November 2015 version of LPULAA, there is a right of appeal from a decision of a review panel on a matter of law. Unlike under LPA04, under LPULAA the appeal lies only from a review panel, and not from an assessor at first instance. The appeal is to the District Court: LPULAA, Historical version for 2 July 2015 to 23 November 2015, s 89(1).

The general discussion above of such appeals under LPA04 remains applicable to this type of appeal under LPULAA: see **[5-0540]**. However, it ceases to be applicable to appeals to which LPULAA applies which are instituted after 23 November 2015, as such appeals are no longer confined to a matter of law.

[5-0570] Appeal by leave, by way of rehearing

Under the pre-November 2015 form of LPULAA, there is an appeal by leave from the decision of a review panel generally. Unlike under LPA04, under LPULAA the appeal lies only from a review panel, and not from an assessor at first instance. The appeal is to the District Court: LPULAA, Historical version for 2 July 2015 to 23 November 2015, s 89(2).

The general discussion above of considerations informing leave to appeal under LPA04 remains applicable to leave to appeal under LPULAA (see **[5-0550]**), save that as an appeal lies only from a review panel and not from an assessor at first instance, it is no longer relevant whether rights of review have been exhausted.

In contrast to LPA04, if leave is granted, the appeal is by way of rehearing, not de novo, with fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor being permissible only with the leave of the court. Because the appeal is by way of rehearing, it is necessary for an appellant to identify error (of law, of fact or of discretion) in the determination of the review panel. In such appeals, the court may adopt a less rigorous view to the receipt of fresh evidence than applies in appeals to the Court of Appeal, not least because there is no facility for oral evidence and cross-examination before an assessor. In particular, where there are contested questions of fact which have not been the subject of oral evidence and cross-examination before the costs assessor or review panel, a relatively liberal approach to the reception of fresh evidence may be anticipated: Cf *Wentworth v Rogers* (2006) 66 NSWLR 474 at [190].

Appeals under LPULAA from 23 November 2015

[5-0580] Appeal by way of rehearing

Under the post-November 2015 LPULAA arrangements, a party to a costs assessment that has been the subject of a review may appeal against a decision of the review panel to:

- the District Court, but only with the leave of the court if the amount of costs in dispute is less than $25,000, or
- the Supreme Court, but only with the leave of the court if the amount of costs in dispute is less than $100,000.

[5-0590] Leave to appeal

In addition to providing a "filter" against inappropriate appeals as discussed above (see **[5-0550]**), the post-November 2015 provisions have the additional purpose of encouraging appeals to be brought in an appropriate jurisdiction. Thus leave to appeal is required (a) in the District Court, if the amount of costs in dispute on the appeal is less than $25,000, and (b) in the Supreme Court, if the amount of costs in dispute is less than $100,000.

The considerations relevant to granting leave to appeal discussed in connection with the earlier legislation remain applicable, except that it is no longer relevant whether there is an appeal as of right to which the issues on which leave is required are related: see **[5-0550]**, **[5-0570]**.

[5-0600] Removal and remitter

The Supreme Court may remit the matter to the District Court, and may remove proceedings from the District Court: LPULAA s 89(3), (3A). This power may be exercised to remove into the Supreme Court matters in which important questions of principle are involved, and to remit matters which do not involve issues warranting the attention of the Supreme Court.

Ancillary procedures (all regimes)

[5-0610] Institution of appeals

Appeals and applications for leave to appeal should be commenced by summons in UCPR Form 84 (UCPR rr 6.4(1)(b); 50.4(1); 50.12(3)), and must specify the relief claimed (UCPR r 6.12), whether the appeal relates to the whole or part only (and if so what part) of the decision below (UCPR rr 50.4(1)(a); 50.12(3)(a)); the decision sought in place of the decision appealed from (UCPR rr 50.4(1)(b); 50.12(3)(b)); and a statement setting out briefly the grounds of appeal, including in particular any grounds on which it is contended that there is an error of law: UCPR rr 50.4(2); 50.12(4). Despite a suggestion that an appeal that does not comply with the rules in these respects is incompetent (*Katingal Pty Ltd v Amor* [2004] NSWSC 36 at [15]), the better view is that it is an irregularity which does not invalidate the proceedings); and, in an application for leave, a statement of the nature of the case, and the reasons why leave should be given: UCPR r 50.12(4). The summons should also include any application for an extension of time (UCPR rr 50.3(2), 50.12(2)), and any incidental orders, such as a suspension of the operation of the determination: see **[5-0630]**.

In the Supreme Court, appeals and applications for leave to appeal are assigned to the Common Law Division: SCA s 53(1); UCPR r 1.18.

[5-0620] Time for appeal

An appeal must be instituted, or application made for leave to appeal, within 28 days of the date on which notice of the assessor's or review panel's decision is given to the appellant: UCPR rr 50.2, 50.3(1)(a), (c); 50.12(1)(a), (c). The court may extend this time, and any such application for an extension of time to appeal must be included in the summons: UCPR rr 50.3(2), 50.12(2). On an application for extension of time, relevant considerations include the length of the delay and the explanation for it (*Currabubula Holdings Pty Ltd v State Bank NSW* [2000] NSWSC 232 at [87]–[88]; *Kehoe v Williams* [2008] NSWSC 807; *Scope Data Systems Pty Ltd v Aitken (No 2)* [2010] NSWDC 65 at [21]–[23]; *Casaceli v Morgan Lewis Alter* [2001] NSWSC 211 at [25]; *Stojanovski v Willis & Bowring* [2002] NSWSC 392; *DCL Constructions v Di Lizio* [2007] NSWSC 653; *DCL Constructions v Di Lizio* [2007] NSWSC 1180), the prospects of success of the appeal (*Currabubula Holdings Pty Ltd v State Bank NSW*, above, at [87]–[88]; *Xu v Liu* (unrep, 5/8/98, NSWSC)), and prejudice to the respondent: *Scope Data Systems Pty Ltd v Aitken (No 2)*, above, at [21]–[23].

On an application for an extension of time, the court is entitled to expect affidavit evidence explaining the delay and showing the arguability of the appeal.

[5-0630] Stays pending appeal

Under all regimes there is provision for the court to suspend the operation of the decision under appeal (LPA04 s 386(1), LPULAA s 90(1)), and to end that suspension: LPA04 s 386(2), LPULAA s 90(2). The assessor or review panel appealed from can also suspend the operation of the decision (LPA04 s 386(1), LPULAA s 90(1)), and the court — as well as the assessor or review panel who imposed it — can end such a suspension: LPA04 s 386(2), LPULAA s 90(2).

On such an application, the relevant considerations are analogous to those on an application for a stay of a judgment pending appeal, and include that the respondent is prima facie entitled to the fruits of the determination, whether the appeal has reasonable prospects of success, whether refusing a stay would render the right of appeal nugatory, and the balance of justice and convenience.

[5-0640] Costs of the appeal

By the time an appeal of this kind is disposed of by the court, there will typically already have been a contested assessment process and a review, and in party/party matters the substantive litigation that has preceded the costs order under assessment. In that context, an order in respect of the costs of the appeal that requires a further assessment process protracts the dispute. There is great public interest in minimising the scope for further disputation, including assessment proceedings, and thus a great deal to be said for utilising the power of the court under CPA s 98(4)(c) to make a gross sum costs order in respect of the costs of the appeal: Cf *Wilkie v Brown* [2016] NSWCA 128 at [53].

Common appeal issues

[5-0650] Inadequate reasons

Under LPA04, a costs assessor (and a review panel) is obliged to provide a statement of reasons with the certificate of determination: LPA04 s 370. That provision is not replicated in LPULAA, but an obligation to provide reasons has previously been found in this context in the absence of express statutory provision: *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729; affirming *Kennedy Miller Television Pty Ltd v Lancken* (unrep, 1/8/97, NSWSC). Failure to provide adequate reasons is error of law: *Nassour v Malouf t/as Malouf Solicitors* [2011] NSWSC 356; *Bobb v Wombat Securities* [2013] NSWSC 757 at [36]; *Frumar v Owners SP 36957* (2006) 67 NSWLR 321; *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674; *Randall Pty Ltd v Willoughby City Council* (2009) 9 DCLR(NSW) 31 at [56].

However, the costs assessment process is not itself a proceeding in a court (although, of course, an appeal to a court is); costs assessors are not judicial officers; and the assessment process is paper driven (although there is now a facility for oral hearings): *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR(NSW) 304 at [30]; *Brierly v Reeves* [2000] NSWSC 305; *O'Connor v Fitti* [2000] NSWSC 540; *Furber v Gray* [2002] NSWSC 1144; *Vumbucca v Sultana* (2012) 15 DCLR(NSW) 375. The obligation to give reasons must be viewed in this context: *Frumar v Owners SP 36957*, above, at [43], [45]. While the reasons should identify the essential grounds on which the determination is made (*Frumar v Owners SP 36957*), they need not be lengthy and need not address every issue that might have been raised by the parties: *Levy v Bergseng* (2008) 72 NSWLR 178; *Turner v Pride* [1999] NSWSC 850 at [23]; *Madden v NSW IMC* [1999] NSWSC 196 at [16]; *Cassegrain v CTK Engineering* [2008] NSWSC 457 at [90]; *Randall Pty Ltd v Willoughby City Council*, above, at [56]. But they must be such that a party dissatisfied with the determination has a real — not largely illusory — right of appeal, by placing the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal: *Frumar v Owners SP 36957* at [44], [46]. Generally this will require showing whether the determination was made by allowing, disallowing and adjusting items in the bill, or by the panel forming its own assessment of what was reasonable work and costs; if the former, what items had been allowed, disallowed or adjusted and on what basis; and if the latter, what work the panel considered reasonable and it was costed: *Frumar v Owners SP 36957* at [42]–[43].

However, a review panel is not required to provide its own paraphrase of the reasons of a decision under review if it agrees with the conclusions and the reasons of that decision, provided the review panel makes a statement to that effect and makes it clear that it adopts those reasons: *Wende v Horwath (NSW) Pty Ltd*, above, at [176]–[179]. This will be of great significance in matters to which LPULAA applies, where an appeal lies only from a review panel, as a challenge to the adequacy of a review panel's reasons, in circumstances where the review panel merely accepts the assessor's reasoning, must identify the defect in the assessor's reasons and the occasion when this point was taken before the review panel: *Wende v Horwath (NSW) Pty Ltd* at [176]–[179].

[5-0660] Procedural fairness

A costs assessor is obliged to observe the rules of procedural fairness: *Levy v Bergseng* (2008) 72 NSWLR 178; *Nassour v Malouf t/as Malouf Solicitors* [2011] NSWSC 356; *CSR v Eddy* (2008) 70 NSWLR 725 at [1], [10], [30]. Once again, the content of the obligation to afford procedural fairness is informed by the context. Mere non-provision to an objector of material that is in a broad sense relevant will not necessarily establish procedural unfairness, unless the objector has thereby been deprived of an opportunity to make some submission material to the question in issue: *CSR v Eddy*, above, at [1], [10], [38].

As with inadequacy of reasons, a complaint of denial of procedural fairness by an assessor will not be available on an appeal under LPULAA, where the appeal lies from the review panel and not from the assessor, unless the complaint was made on the review and not remedied by the review process: *Wende v Horwath (NSW) Pty Ltd* at [171].

Under LPA04, there was express provision that a review panel is to determine the application in the manner that a costs assessor would be required to determine an application for costs assessment, but on the evidence that was received by the costs assessor who made the determination that is the subject of the assessment and, unless the panel determines otherwise, the panel is not to receive submissions from the parties to the assessment, or to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor: LPA04 s 375. This limited the scope to complain of a denial of procedural fairness by a review panel. Under LPULAA, a review panel is to determine the application in the manner that a costs assessor would be required to determine an application for costs assessment, and there is no restriction on the receipt of submissions (LPULAA s 85(2)); accordingly there is an obligation to afford parties an opportunity to make submissions (LPULAA s 69(1)); and there is greater scope for complaints of denial of procedural fairness by a review panel in matters under LPULAA.

Legislation

- CPA s 98(4)(c)
- *Courts and Other Justice Portfolio Legislation Amendment Act 2015*
- *Legal Profession Act 2004* ss 384, 385, 389
- *Legal Profession Uniform Law Application Act 2014* ss 69(1), 85(2), 89(1), (2), (3), (3A), 90(1), (2)
- *Legal Profession Uniform Law* 2014, Sch 4, cl 18
- *Legal Profession Uniform Law Application Regulation 2015* reg 59
- SCA s 53(1)

Rules

- UCPR rr 1.18, 6.4(1)(b), 50.2, 50.3(1)(a), (2), 50.4(1), (2), 50.12(2), (3), (4), Form 84

Further references

- P Brereton, "An overview of the law relating to costs assessment appeals and costs orders" (2016) 28 *JOB* 55

[The next page is 5201]

Mining List

Acknowledgement: the following material was originally prepared by Her Honour Judge L Ashford of the District Court of NSW. It has been reviewed and updated by his Honour Judge Neilson of the District Court of NSW.

[5-0800] The compensation jurisdiction of the District Court

Last reviewed: December 2023

When the Compensation Court of NSW was abolished on 1 January 2004, the District Court was vested with its remaining jurisdiction. This jurisdiction is divided into two lists, the Coal Miners' Workers Compensation List ("the Mining List") and the Special Statutory Compensation List: see [5-1000] and ff. The governing provisions are *District Court Act 1973*, Pt 3 Div 8A (ss 142E–142P) and UCPR Sch 9 (Assignment of Business in the District Court) and Sch 11 (Provisions regarding procedure in certain lists in the District Court).

[5-0810] The Mining List

Last reviewed: December 2023

The Mining List existed for many decades before 1 January 2004, in the Compensation Court. The Mining List hears and determines all claims for workers compensation for those injured, or allegedly injured, "in or about a [coal] mine". Originally, northern mining claims were heard in Newcastle, Western Mining claims were heard in Lithgow or Katoomba, and southern mining claims were heard in Wollongong. Currently, northern and part of the western mining claims are heard in Newcastle and the other part of the western mining and the southern mining claims are heard in Sydney. The Court currently sits for 12 weeks each year in Newcastle (roughly one week each month) and for three weeks each year in Sydney. Arrangements are often made for a judge to hear a redemption application at other times in Sydney.

[5-0820] Commencement of proceedings

Last reviewed: December 2023

Proceedings are usually commenced by statement of claim (UCPR, Sch 11 Pt 2 cl 3), but certain types of proceedings are commenced by summons (Sch 11 Pt 2 cl 7). The initiating process can be filed in the Registry in either Newcastle or Sydney. The initiating process is required to bear the heading "Coal Miners' Workers Compensation List" (UCPR, Sch 11 Pt 2 cl 4). In order to comply with certain statutory restrictions on the commencement of proceedings under the Workers Compensation Legislation, an initiating process may need to have filed with it a certificate of compliance (Sch 11, Pt 2 cl 6).

[5-0830] Conciliation procedures

Last reviewed: December 2023

Schedule 11 Pt 2 Div 2 of the UCPR provides for conciliation of coal miners' claims, the conciliator being an officer or employee of the District Court nominated by the Registrar to carry out such conciliation. All such claims are referred for conciliation no later than three months after the claim is filed: Sch 11 Pt 2 cl 25.

Conciliation conferences are held in Katoomba/Lithgow, Newcastle, Sydney and Wollongong/ Port Kembla during the year.

The primary purpose of the conciliation conference is to explore the possibility of settlement. However, even if settlement is unlikely, the conference provides an opportunity to seek concessions, narrow the issues and make application for directions to enhance readiness for hearing.

Matters are listed before the Registrar approximately three months after filing, to assess readiness for conciliation. Matters are listed for conciliation by the conciliator in four lists: Wollongong, Western Mining, Newcastle, and Sydney.

Once a matter is ready for conciliation it joins the conciliation pending list and matters are listed in order of date of filing and date of readiness. At the moment, most of the solicitors on the Coal Mines Insurance panel have Sydney based offices. Matters are grouped where possible so that practitioners are not travelling for single matters.

[5-0840] The substantive law

Last reviewed: December 2023

The substantive law is often difficult to ascertain. Those entitled to make a claim for "coal miner benefits" have kept many rights that other workers have lost. For example, such claimants have kept the following rights:

(a) to obtain compensation as if they were totally incapacitated, if the employer fails provide suitable employment during a period of partial incapacity;

(b) to obtain a lump sum settlement ("redemption");

(c) to bring an action for damages against the employer at common law, with only minor restrictions of benefits.

To find the applicable law it is sometimes necessary to have recourse to repealed Acts and repealed Regulations. A necessary starting point is the *Workers Compensation Act 1987* ("the 1987 Act**"**) Sch 6 Pt 18 and subsequent transitional provisions as amendments were made to the 1987 Act. Counsel will often be able to identify the relevant provision(s).

[5-0850] Who is entitled to make a claim

Last reviewed: December 2023

A plaintiff is required to prove that he was a "worker employed in or about a mine", the terminology used in Sch 6 Pt 18 of the 1987 Act. Section 3(1) of that Act defines the word "mine":

> "mine" means a mine within the meaning of the *Coal Mines Regulation Act 1982* as in force immediately before its repeal by the *Coal Mine Health and Safety Act 2002*, but does not include any place that, in accordance with section 8(1) of the *Coal Mine Health and Safety Act 2002*, is a place to which that Act does not apply.

A plaintiff does not need to be employed as a coal miner by a colliery company. A person who is injured whilst working "in or about a mine" is entitled to coal miner benefits. The relevant case law is: *Roberts v Fuchs Lubricants (A'asia) Pty Ltd* (2002) 24 NSWCCR 135; *Pilgrim v Ellevate Engineering Pty Ltd* (2003) 25 NSWCCR 521; *Ellevate Engineering Pty Ltd v Pilgrim* [2005] NSWCA 272; *Fenton v ATF Mining Electrics Pty Ltd* (2004) 1 DDCR 744; *Badior v Muswellbrook Crane Service Pty Ltd* (2004) 2 DDCR 177; *Select Civil (Kiama) Pty Ltd v Kearney* [2012] NSWCA 320; *Baggs v Waratah Engineering Pty Ltd* [2014] HCA Trans 108; *Butt v Liebherr Aust Pty Ltd* [2015] NSWDC 3.

The earlier authorities have been collected and discussed in Butt v Liebherr Aust Pty Ltd, above.

[5-0860] Entitling event

Last reviewed: December 2023

A plaintiff must have received an "injury" as defined in s 4 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1988 Act"), not as defined in s 4 of the 1987 Act. A

plaintiff does not have to prove that his employment was either a substantial contributing factor to his injury or disease or the main contributing factor to his injury or disease, nor do the "heart attack or stroke" provisions (s 9B, 1987 Act) apply to such plaintiffs: Sch 6.

[5-0870] Injuries and disease

Last reviewed: December 2023

Psychological injury

By contrast, however, s 11A of the 1987 Act does apply to plaintiffs in this list. The original s 11A applies from 1 January 1996. The current version of s 11A commenced on 1 August 1998.

Disease provisions

The definition of injury includes a disease contracted in the course of employment where the employment was a contributing factor to the disease (ie, a temporal and causal connection) and the aggravation, acceleration, exacerbation or deterioration of any disease where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration (a causal connection). These provisions are often relied upon by plaintiffs in this List. For example, a miner may have reported many back injuries over a period of, say, 40 years, but many of those injuries appear to be self-limiting (the worker returned to normal duties after a period off work) but eventually, they become unable to work because of back complaints: the diagnosis could be degenerative disc disease of the lumbar spine or lumbar spondylosis. This will be alleged to be a disease of gradual onset or the aggravation etc of a disease of gradual onset. This argument can be applied to degenerative conditions of the back, neck and pelvis and body joints: shoulders, elbows, hips, knees and ankles: see *Kelly v Glenroc Pastoral Coy Pty Ltd* (1994) 10 NSWCCR 178 (CA); *Crisp v Chapman* (1994) 10 NSWCCR 492 (CA); *Australian Padding Co Pty Ltd v Zarb* (1996) 13 NSWCCR 365 (CA). This is often pleaded as "nature and conditions of employment". That is not a term of art and has been criticised, but is apt to invoke the disease provisions: *Davids Holdings Pty Ltd v Mirkovic* (1995) 11 NSWCCR 656. If an underlying disease is work-related, it does not matter that a period of incapacity was caused by a non-compensable aggravation or the like; compensation is still recoverable: *Calman v Commissioner of Police* [1999] HCA 60. As to the meaning of the word "disease", see *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244 at [61]; *Rail Corporation NSW v Hunt* (2012) 11 DDCR 143 at [46]–[50].

Journey injuries

See *Butt v Liebherr Australia Pty Ltd* [2015] NSWDC 3 at [15]–[17].

[5-0880] Total incapacity

Last reviewed: December 2023

Total incapacity is compensated under s 9 of *Workers Compensation Act 1926* ("1926 Act"). During the first 26 weeks of incapacity the plaintiff is entitled to the Current Weekly Wage Rate ("CWWR"), being the award rate for a standard week (usually 38 hrs) without any shift or other loadings. After the first 26 weeks, the plaintiff is compensated at the statutory rates under the 1926 Act which are still indexed and may be found in *Mills Workers Compensation NSW*, Benefits Guide. As at 1 April 2023 that rate was $469.50, plus $107.30 for a dependent spouse, plus $63.90 for each dependent child, but the total of such sums cannot exceed the CWWR.

[5-0890] Partial incapacity

Last reviewed: December 2023

Partial incapacity is compensated under s 11(1) of the 1926 Act. The compensation cannot exceed the maximum payable for total incapacity.

[5-0900] Deemed total incapacity

Last reviewed: December 2023

This is governed by s 11(2) of the 1926 Act. An employer is required to provide his injured employee with suitable employment during his partial incapacity. A failure to do so results in the payment of compensation at the rate prescribed for total incapacity. In practice, a partially incapacitated worker draws his employer's attention to his partial incapacity by requesting suitable employment, or "light duties". A failure to provide such duties renders the employer liable to pay compensation as if the worker were totally incapacitated. The worker, however, must be "ready, willing and able" to perform the selected duties, which are usually certified by his treating doctor or rehabilitation provider.

[5-0910] Cessation of payments at age 67+ pursuant to s 52(4) of the Workers Compensation Act 1987

Last reviewed: December 2023

If injury was sustained before 30 June 1985, s 52(4) does not apply. If an award of weekly payments of compensation is made in respect of incapacity due to injury, both before and after 30 June 1985, this provision comes into operation: *Rizk v Royal North Shore Hospital* (1994) 10 NSWCCR 427.

[5-0920] Hospital, medical and similar expenses

Last reviewed: December 2023

These are governed by s 60 of the 1987 Act. Usually only a general order is sought ("that the defendant pay the plaintiff's expenses under s 60"). Sometimes there is a dispute as to whether expenses actually incurred by a plaintiff are compensable. The statutory test is whether incurring such expenses was "reasonably necessary as a result of an injury": s 60(1), not "reasonable and necessary". On occasions a plaintiff may seek a declaration that proposed medical treatment (eg.. total hip or knee replacement surgery) is reasonably necessary as a result of injury. As to the power of the Court to make such a declaration, see *Perrin v SAS Trustee Corporation* [2014] NSWDC 203 at [24]–[30]. Ultimately, the Court made a conditional finding: *Perrin v SAS Trustee Corporation (No. 2)* [2015] NSWDC 345, which was the subject of a successful appeal, but the Court's power to make such a declaration or finding was not challenged: *State Super SAS Trustee Corporation Ltd v Perrin* [2016] NSWCA 232.

[5-0930] Lump sum compensation

Last reviewed: December 2023

If a loss occurs solely as a result of an injury occurring before 30 June 1987, lump sum compensation is governed by s 16 of the 1926 Act. Otherwise, ss 66 and 67 of the 1987 Act apply, unaffected by the Workers Compensation Amending Acts of 2001. Section 66 is the "Table of Maims" and s 67 provides for the payment of a lump sum for "actual pain, or anxiety or distress" resulting from any lump sums payable which exceed the statutory threshold of 10%. The quantum of the maximum payable was frozen from further indexation on 1 October 1995. The maximum amount payable for individual losses or impairment was fixed at that time at $132,300. The maximum amount payable for multiple losses or impairments was fixed at $160,950. The maximum amount payable under s 67 was fixed at $66,150.

An example may assist. A plaintiff stops working with a back complaint after 1 October 1995. The plaintiff claims a lump sum for permanent impairment of his or her back. The maximum payable for impairment of the back is 60% of $132,300, ie. $79,380. If the impairment of the back is 15%, he or she is entitled to 15% of $79,380 ie. $11,907, which is less than 10% of $132,300, so he or she cannot make a claim under s 67. If, however, the impairment of the back is 20%, then he or she

is entitled to $15,876 which exceeds to 10% threshold so he or she is entitled to make a claim under s 67. The maximum payable under s 67 is payable only "in a most extreme case and the amount payable in any other case shall be reasonably proportionate to that maximum amount having regard to the degree and quantum of pain and suffering and the severity of the loss or losses": s 67(3).

The effect(s) of any non-compensable injury or condition must be deducted from the lump sum compensation payable under s 66. For example, after many injuries to his right knee in underground mining, a plaintiff has a total knee replacement. This usually leaves a person with about 40% loss of efficient use of the right leg at or above the knee. If, however, before taking up mining, he had a medial meniscal injury as a result of playing football in his teenage years, he may have lost 10% of the efficient use of his right leg at or above the knee. Compensation is payable only for 30% loss. A very common argument is that a loss or impairment results solely from a constitutional, genetic or intrinsic degenerative condition such as osteo-arthritis or degenerative disc disease of the spine. Some medical practitioners will say that the total loss or impairment is not so caused, others will say it is wholly traumatic and others will concede an underlying constitutional condition which has been made worse by the type of work the plaintiff has done over many years. A relevant provision of the 1987 Act which still applies to coal miners is that if evidence is wanting on such an issue or it would be difficult or costly to ascertain what "deductible proportion" there might be, the "deductible proportion" is assumed to be 10% of the loss, ie. a loss of 20% of a thing is reduced to an 18% loss.

A loss of a leg at or above the knee includes the loss of a leg below the knee, and the loss of leg below the knee includes a loss of the foot. Similarly, a loss of an arm at or above the elbow includes the loss of an arm below the elbow, and the loss of an arm below the elbow includes the hand. See *Stokes v Brambles Holdings Ltd* (1994) 10 NSWCCR 515; *Summerson v Alcom Australia Ltd* (1994) 10 NSWCCR 571; *KB Hutcherson Pty Ltd v Correia* (1995) 183 CLR 50.

The sacro-ilic joints and the coccyx are part of the pelvis, not the back: see *De Gracia v State of NSW* (1993) 13 NSWCCR 73; *Clymer v RTA* (1996) 13 NSWCCR 187.

Loss of efficient use of sexual organs is often claimed by those with a "bad back". See: *Malcolm v RTA* (1995) 12 NSWCCR 258; *RTA v Malcolm* (1996) 13 NSWCCR 272 (re penis); *Waugh v Newcastle Mater Madericordiae Hospital* (1996) 13 NSWCCR 598 (female sexual organs).

[5-0940] Redemptions

Last reviewed: December 2023

Redemptions under s 15 of the 1926 Act were not continued under the 1987 Act which replaced them with "commutations" under s 51 of that Act, but that provision was repealed by Act No 61 of 2001 commencing 1 January 2002, which replaced it with a more limited right to commutation under Pt 3 Div 9 of the 1987 Act. However, coal miners kept their right to have their settlements ("redemptions" under s 15 of the 1926 Act) approved by the Court.

All redemption applications under s 15 of the former Act are made by the employer following agreement having been reached with the worker as to a redemption sum.

This constitutes a full and final settlement of the worker's rights to compensation in respect of the particular injuries/incapacities as set out in the statement of claim filed, or may be the result of separate negotiation between the parties without any statement of claim having previously been filed. The redemption application includes any right or further right to lump sum payments for loss of any limb or function: s 66. For an example of the effect of a redemption on a latent injury, see *Mount Thorley Operations Pty Ltd v Farrugia* [2020] NSWDC 798.

It is necessary for the worker to give evidence, in appropriate circumstances by affidavit, in respect of any injuries and ongoing incapacity which are included in the redemption application and in respect of any payments of compensation which have been made, including evidence in respect of medical expenses paid or unpaid.

It is the responsibility of the judge to determine if the sum offered in redemption is adequate following consideration of matters such as:

- the likelihood of further medical treatment;
- the prospects of future employment; and
- the reasons as to why the worker would prefer a lump sum in settlement of the claim acknowledging that in accepting a lump sum the worker is aware of potential rights for the future which are being forgone.

It is necessary for the worker to advise the court of consent to the redemption and a signed consent form is handed to the judge for inclusion on the file along with the tender of Short Minutes setting out the payment details in respect of the redemption.

Often the redemption amount will be part of a common law settlement and the parties will advise the judge accordingly.

It is always within the discretion of the judge hearing the application to determine if the amount is adequate and in the best interests of the worker. If the judge decides the amount is not adequate, then generally the application will be rejected.

Any redemption takes effect from the date of the application being approved. It is prudent to check that the worker is aware of any deductions by way of Health Insurance Commission payments which can be deducted from any sum redeemed or of any Centrelink benefits outstanding which will also be deducted as these sums obviously have a bearing on whether the amount approved is an adequate one. As well, the worker should be aware of any preclusion period to be served prior to an ability to access Centrelink benefits in the future.

If a worker is in receipt of voluntary payments or is subject to an award of compensation of the court it is relevant to note that those payments cease on the day of the approval of the redemption. Medical expenses should be paid up to that date. It is not appropriate there should be any deduction from the redemption sum to pay any outstanding medical/treatment expenses.

See Sch 6 Pt 4 cl 6 of the 1987 Act.

[5-0950] Costs of redemption applications

Last reviewed: December 2023

The usual order is that the employer bears the costs of the application even if the worker withdraws his consent on the day of or prior to the application being heard by the judge, or if the judge refuses to approve the application. Costs orders are not made against a worker unless the court is satisfied an application was frivolous, vexatious or without proper justification, and of course the application in redemptions is made by the employer: *Workplace Injury Management and Workers Compensation Act 1998*, s 112.

[5-0960] Costs

Last reviewed: December 2023

Costs are governed by s 112 of the *Workplace Injury Management Workers Compensation Act 1998*.

Legislation

- *Workers' Compensation Act 1926* (as amended)
- *Workers Compensation Act 1987* (as amended). Access the current Act and then select the "Historical versions" option from the menu at the top of the screen
- *Workplace Injury Management and Workers Compensation Act 1998*

Rules

- Uniform Civil Procedure Rules 2005 Sch 11 Pts 1, 2, 3, 5

Forms

- The forms for the Compensation jurisdiction are available on the District Court website.

Further references

- Practice Note DC (Civil) No 12 "Coal Miners' Workers Compensation List"
- LexisNexis, Mills Workers Compensation Practice (NSW)

[The next page is 5251]

Special Statutory Compensation List

Acknowledgement: the following material has been prepared by his Honour Judge G Neilson of the District Court of NSW.

[5-1000] Special Statutory Compensation List

The Special Statutory Compensation List contains one part of the "compensation jurisdiction" of the District Court and is governed by Pt 3 Div 8A of the *District Court Act 1973* ("the DCA"). Costs for matters in the List are governed by Pt 3 Div 8A of the DCA and UCPR r 1.27, Sch 11, Pt 4 (cl 39–45) and Pt 5 (cl 46–59). The other part of the residual jurisdiction is contained in the Coal Miner's Workers Compensation List: see [5-0800] and ff.

Proceedings assigned to this List are under:

(a) *Police Regulation (Superannuation) Act 1906*, s 21

(b) *Police Act 1990*, s 216A

(c) *Sporting Injuries Insurance Act 1978*, s 29

(d) *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, ss 16 and 30

(e) *Workers Compensation (Dust Diseases) Act 1942*, s 8I.

The Operation of the List

The List is kept by the Registrar for Sydney: UCPR, Sch 11 cl 41(1). If any proceedings are commenced at a place other than Sydney they are to be sent by the Registrar at that place to Sydney for entry into the List: cl 41(3).

Proceedings are commenced by statement of claim and should be pleaded in the normal way: cl 40. Proceedings are listed for call over before a judge appointed by the Chief Judge to control proceedings in the List, within 3 months of the filing of the statement of claim: cl 42.

Some matters are ready to have a hearing date set when first called over. Many are not. The managing judge will adjourn any matters that are not ready for hearing to another call over when it is anticipated that the matter might be ready to have a hearing date allocated. When a matter is ready for hearing, the managing judge will fix a hearing date and seek to make an accurate assessment of the length of the hearing, allowing time for addresses and an ex tempore judgment. There are no reserve matters for this List.

[5-1010] Powers when exercising compensation jurisdiction

The powers of the court when exercising the compensation jurisdiction are governed by s 142J of the the DCA. The provisions are a medley of provisions extracted from the *Compensation Court Act 1984*.

These provisions, it can be argued, give to a judge exercising compensation jurisdiction such expertise as to pay and labour conditions as the Compensation Court had attributed to it: *Mechanical Advantage Group Pty Ltd v George* [2003] NSWCA 121, per Young CJ in Eq at [60]–[63].

In *JLT Scaffolding International Pty Ltd (In Liq) v Silva* (unrep, 30/3/1994, NSWCA), Kirby P (as he then was) said at 12:

> The appeal comes to this Court from a specialised Tribunal which is dealing with compensation cases and conflicting lay and medical evidence everyday. The flavour of the expertise of the Compensation Court can be found in the judgment under appeal. Medical conditions, unfamiliar to a lay body are stated in the judgment without definition simply because those practising in the Compensation Court are, or are taken to be, familiar with the medical terms used and the ordinary and oft repeated conflicts

> of medical opinions expressed. It can be inferred from the establishment of a specialised Compensation Court (one might say especially given the abolition of such bodies elsewhere in Australia) that the Parliament of this State has entrusted the decision making in (relevantly) questions of medical causation and the aetiology of incapacity to a specialist tribunal comprised of specialist members whose expertise is refined by the repeated performance of their tasks.

This was quoted in *Strinic v Singh* (2009) 74 NSWLR 419 at [58], where it was doubted whether judges of the District Court sitting in the Civil Jurisdiction, unlike the Compensation Court, could ever be said to have "expertise" despite "familiarity" with medical terminology and conditions: at [59]. Therefore medical issues need to be approached cautiously whenever they are in dispute.

In relation to expert evidence, note the rule UCPR Sch 11 cl 44. This is designed to try to prevent a party from, for example, calling three psychiatrists or four thoracic physicians. There is a similar statutory provision relating to industrial deafness: s 142L DCA.

Appeals to the Court of Appeal are limited to error of law or to a question as to the admission or rejection of evidence: s 142N(1) DCA. Leave to appeal is required for a number of appeals: s 142N(4).

[5-1020] Costs

Costs in the compensation jurisdiction are governed by the DCA s 142K and s 112 of the *Workplace Injury Management and Workers Compensation Act 1998*. The scale of costs is governed by Sch 2 and reg 25(2) of the *Legal Profession Uniform Law Application Regulation 2015* and is subject to the *Workplace Injury Management and Workers Compensation Act 1998*.

There is a large body of case law concerning s 112(3) and (4): see Mills Workers Compensation Practice (NSW). It is important to note that because of these provisions a "costs reduction" order (that the plaintiff's costs be reduced by costs thrown away by the defendant) cannot be made: *Container Terminals Australia Ltd v Xeras* (1991) 23 NSWLR 214.

[5-1030] Police Regulation (Superannuation) Act 1906

Last reviewed: May 2023

(a) The Statutory Scheme

This Act applies to all members of the Police Force who joined prior to 1 April 1988. The District Court does not have jurisdiction for injuries occurring prior to 21 November 1979: *Staples v COP* (1990) 6 NSWCCR 33; *Dive v COP* (1997) 15 NSWCCR 366.

A member who has 20 years service and who is medically discharged, or aged 60 years or more who retires, is entitled to a pension, based upon their years of service: ss 7(1), 8. A gratuity is payable for a member who is medically discharged with less than 20 years service: s 14.

The decision as to whether a member is medically discharged is made by the Police Superannuation Advisory Committee (PSAC) by delegation from the SAS Trustee Corporation (STC), who must certify the member "to be incapable, from a specified infirmity of body or mind, of personally exercising the functions of a police officer referred to in s 14(1) of the *Police Act 1990*": s 10B(1).

A former member who has resigned or retired can ask after his or her resignation or retirement for PSAC to certify that the member "was incapable, from an infirmity of body or mind, of personally exercising the functions of a police officer referred to in s 14(1) of the *Police Act 1990* at the time of the member's resignation or retirement": s 10(1)(b), definition of "disabled member of police force".

The concepts "infirmity of body or mind" and "time of the member's resignation or retirement" were considered in *Day v SAS Trustee Corp* [2021] NSWCA 71.

If the certified infirmity is found to be caused by the member's being hurt on duty (HOD) a higher rate of pension is payable pursuant to s 10(1A). That finding is made by the Commissioner of Police (COP) through a delegate pursuant to s 31 of the *Police Act 1990*.

The basic HOD superannuation allowance is 72.75% of the member's, or former member's, attributed salary of office. If the member is totally incapacitated for work outside the police force, the member is entitled to an allowance of 85% of the attributed salary of office. There are further allowances. If the member is not totally incapacitated, the member may be entitled to an additional amount of not more than 12.25% commensurate with the member's incapacity for work outside the police force: s 10(1A)(b). If the member is totally incapacitated for work outside the police force, the member may be entitled to a further amount of pension, not less than 12.25% and not greater than 27.25% (i.e. between 85% and 100%) "commensurate, in the opinion of STC, with the risks to which the member was … required to be exposed": s 10(1A)(c). This is known as the "special risk benefit" where "the member was hurt on duty because the member was required to be exposed to risks to which members of the general workforce would normally not be required to be exposed in the course of their employment": s 10(1A)(c) chapeau.

Where a member is medically discharged with a finding of HOD, the superannuation allowance commences on the day after medical discharge. Section 9A governs the date of commencement of other HOD pensions. The construction of the section was discussed in *SAS Trustee Corp v Colquhoun* [2022] NSWCA 184. The date of the commencement of additional amounts of a superannuation allowance is governed by s 10(1D). These two provisions raise questions about "backdating", the subject of many applications to the court.

The Act also provides death benefits where the COP finds death has been caused by having been HOD: s 12C.

The Act also provides "gratuities" to be paid to members and former members who the COP finds are HOD, equivalent to compensation payable to workers under ss 60, 66, 67, 74 and 75 of the *Worker's Compensation Act 1987* (WCA): s 12D.

Once the COP decides whether the member's condition was HOD or not, the STC decides all questions relating to quantum.

Often members obtain certificates of PSAC specifying multiple infirmities. If any infirmity is accepted as being HOD, the HOD pension is payable. Nevertheless, members will seek to establish that the other infirmities be classified as HOD, as the greater the number of infirmities that are HOD, the greater will be the "top up" payable under s 10(1A)(b) and the greater the chance of being found totally incapacitated for work outside the Police Force.

(b) Applications to the District Court

An application (which is really a hearing de novo) lies to the District Court from any decision of the STC (including a delegated decision by PSAC) arising under the Act or from any decision of the COP on a question of HOD. The right to make an application about a decision of PSAC was confirmed by *SAS Trustee Corp v Rossetti* [2018] NSWCA 68 which overruled what was thought to be the way of challenging PSAC's determinations or failure to determine prior to that time. Since the decision in *Rossetti*, there have been a number of applications to the court concerning old decisions of PSAC, for example *Day v SAS Trustee Corp* [2020] NSWDC 381 and on appeal [2021] NSWCA 71. The most recent curial decision concerning old decisions of PSAC is *Pascoe v SAS Trustee Corp* [2022] NSWCA 244.

There is no power to extend the 6 month period fixed by s 21(1): *Jennings v COP* (1996) 13 NSWCCR 640. To avoid this, members sometimes ask that an earlier decision be "reviewed" and then appeal against the refusal to review — such an application is incompetent: *Richardson v SASTC* (1999) 18 NSWCCR 423.

Costs are considered above at [5-1020].

(c) Hurt on Duty (HOD)

The term is defined in s 1(2) of the Act to mean "in relation to a member of the police force, means injured in such circumstances as would, if the member were a worker within the meaning of the *Workers Compensation Act 1987*, entitle the member to compensation under that Act."

This provision imports all the entitling and disentitling provisions of the *Workers Compensation Act 1987* (WCA): *Adams v COP* (1995) 11 NSWCCR 715; *Innes v COP* (1995) 13 NSWCCR 27 at 29F; *Smith v COP (No. 2)* (2000) 20 NSWCCR 27 at [18].

This is not an appropriate place for a disquisition on workers compensation law but it is important to bear in mind the date of injury. The basic scheme of the WCA is that there must be a personal injury (which is defined in s 4 to include a disease contracted in the course of the employment and to which the employment was a contributing factor and also the aggravation, acceleration, exacerbation or deterioration of a disease where the employment was a contributing factor to the same):

(i) arising out of employment (causal relationship) or

(ii) in the course of the employment (temporal relationship).

For injuries after 12 January 1997, the employment must be "a substantial contributing factor": s 9A WCA. Consideration is also required of the decision in *Badawi v Nexon Asia Pacific Pty Ltd trading as Commander Australia Pty Ltd* (2009) 75 NSWLR 503.

For psychological injuries (to which many police succumb) occurring after 1 January 1996, consideration must be given to s 11A. This section was amended at the time s 9A was enacted. For the period 1 January 1996 to 11 January 1997, s 11A required that the employment be a substantial contributing factor to a psychological injury.

The following authorities need to be considered:

- "psychological injury": *See v COP* [2017] NSWDC 6; *Stewart v NSW Police Service* (1998) 17 NSWCCR 202; *Hunt v Dept. of Education and Training* (2003) 24 NSWCCR 642
- "wholly or predominantly": *Jackson v Work Directions Australia* (1998) 17 NSWCCR 70
- "reasonable action": *COP v Minahan* [2003] NSWCA 239; *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138
- "transfer": *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; *White v COP* (2006) 3 DDCR 446
- "performance appraisal": *See v COP* [2017] NSWDC 6 at [143]–[154]; *Bottle v Wieland Consumables Pty Ltd* [1999] NSWCC 32; *Dunn v Department of Education and Training* (2000) 19 NSWCCR 475; *Brady v COP* (2003) 25 NSWCCR 58; *Soutar v COP* (2006) 3 DCLR (NSW) 351
- "discipline": *Kushwaha v Queanbeyan CC* [2002] NSWCC 25: *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Soutar v COP (2006)* 3 DCLR (NSW) 351
- "retrenchment": *Pirie v Franklins Ltd* (2001) 22 NSWCCR 346; *Temelkov v Kemblawarra Portuguese Sports and Social Club* [2008] NSWWCCPD 96; and
- as to the interaction between s 9A and s 11A see *Department of Education and Training v Sinclair* [2005] NSWCA 465 at [55]–[58].

Other areas peculiar to HOD claims

- police off duty — putting themselves back on duty: *Lavin v COP* (2007) 4 DDCR 657
- reacting to the death of other police: *King v COP* (2004) 2 DDCR 416 at [8]–[11]; *Rogers v COP* (2005) 2 DDCR 515
- being named in the Wood Royal Commission: *Brady v COP* (2003) 25 NSWCCR 58. There are a number of unreported decisions of the Compensation Court on this issue. The essential issue

is what caused the member to be called/ cross-examined/ named etc in the Royal Commission. If it were an allegation of illegal conduct or misconduct, such conduct will need to be proved in this Court and then the decision made as to whether the member had taken himself outside the course of his employment and, if not, whether there was merely misconduct. If the latter, s 14 of the WCA needs to be considered

- allegations of crime or misconduct: *Schinnerl v COP* (1995) 11 NSWCCR 278 (lying to Internal Affairs); *Liversidge v COP* (2003) 25 NSWCCR 333 (an arrest found unlawful by the High Court, the member pleaded guilty to a departmental charge and was sued civilly); *Remoundos v COP* (2006) 3 DDCR 616 (after going on sick leave after a trivial administrative disagreement member engaged in drug trafficking); *Holovinsky v COP (No. 2)* (2006) 4 DDCR 122 (obtaining criminal intelligence of drug trafficking the wrong way)
- suicide: *Smith v COP (No. 2)* (2000) 20 NSWCCR 27; *Guff v COP* (2007) 5 DDCR 132
- Police Sporting Team injury: *Clark v COP* (2002) 1 DDCR 193, and
- misperception: *Townsend v COP* (1992) 25 NSWCCR 9 (a misperception of actual events, due to irrational thinking of a member leading to a psychiatric illness does not make that illness HOD).

(d) PSAC Certificate is binding

This court is bound to accept that the member has the infirmities certified by PSAC and that the member is incapable of discharging the duties of his office: *Saad v COP* (1995) 12 NSWCCR 70 at 75F; *Innes v COP* (1995) 13 NSWCCR 27; *Dive v COP* (1997) 15 NSWCCR 366.

Implications as to causation often arise from the nature of the certified infirmity:

- Adjustment Disorder: *Gannon v COP* (2004) 1 DDCR 380
- Major Depression: *King v COP* (2004) 2 DDCR 416; *Moon v COP* (2008) 6 DDCR 32
- PTSD: *Murray v COP* [2004] NSWCA 365.

(e) "Top Up" claims where Member not totally disabled: s 10(1A)(b)

The methodology to be adopted here is authoritatively determined in *Lembcke v SASTC* (2003) 56 NSWLR 736 per Santow JA, Meagher and Ipp JJA concurring. The easiest way to approach the issue is this to:

1. Ascertain what the member would be earning, but for his infirmity or infirmities, in the open labour market outside the Police Force.
2. Ascertain what he is now earning (disregarding the pension itself) or is capable of earning in the open labour market.
3. Make the second a proportion of the first e.g.

   Uninjured able to earn $1000 pw

   Now able to earn $600 pw

   Ability now 60%

   and ascertain the percentage loss i.e. loss of 40% of ability to earn outside the Police Force.
4. Apply that same (loss) percentage to 12.25 i.e. 4.9.
5. If STC has determined 4.9% or more, you confirm its decision. If it has determined less than 4.9% you set aside its decision and replace it with the one you have made.

In determining the quantum of the "top up", any condition which is contributing to the disablement which has not been certified either by the COP or the court as being HOD is not to be taken into account, *Miles v SAS Trustee Corp* [2016] NSWDC 56, *SAS Trustee Corp v Miles* (2018) 265 CLR 137 overruling [2018] NSWCA 86.

(f) "Top Up" claims where Member totally incapacitated: "Special Risk Benefit" s 10(1A)(c)

The following authorities need to be considered:

- *Walsh v SASTC* (2004) 1 DDCR 438 where the earlier unreported case law is collected, and
- *Grech v COP* (2004) 1 DDCR 242, which was a case under s 216 *Police Act 1990*, which was held to be, in essence, the same test. This case discusses the words "was required to be exposed to risks."

(g) Provision for past and future

Section 10(1BA) commenced on 30 June 2006. In *SAS Trustee Corp v Patterson* [2010] NSWCA 167, in construing "an application for payment of the allowance or additional amount" the Court of Appeal held the use of the word "or" was not conclusive. It could be taken as providing for the future and for persons who thereafter become otherwise entitled to apply for an allowance. Nothing in the terms of the Amending Act nor s 10(1BA) revealed an intention to affect accrued rights. Further, nothing in the *Interpretation Act*, s 30(1)(c), called for a contrary position: at [25].

A related issue arises under s 10B(2). The question in s 10B(2)(a) will be whether the member notified the COP that he or she was HOD before his or her resignation. Section 10B(2)(c) requires that the STC (having regard to medical advice on the condition and fitness for employment of the member) has certified that the former member was incapable, from that infirmity of body or mind, of personally exercising the functions of a police officer at the time of the member's resignation or retirement. An unjust dismissal does not fall within these terms: *Bigg v SAS Trustee Corp* [2016] NSWCA 236 at [35].

(h) Section 12D quantum claims

These usually concern claims for lump sum compensation that would have been payable under WCA ss 66–67 if the member were a "worker". It is important to bear in mind the date or dates of the relevant injuries.

- If the injury occurred before 30 June 1987, the entitlement is governed by s 16 of the *Workers Compensation Act 1926*.
- If the injury occurred between 30 June 1987 and 31 December 2001, the entitlement is governed by the former ss 66 and 67 of WCA 1987: the "Table of Maims".
- If the injury occurred on or after 1 January 2002, the current provisions of ss 66 and 67 need to be applied. The procedural provisions of the WCA require that the s 66 entitlement be determined by an Approved Medical Specialist. However, the procedural requirements of the WCA do not apply to the principal Act. Truss DCJ sets out how to calculate WPI for a psychiatric injury in *Gibson v SASTC* (2007) 4 DDCR 699.

[5-1040] Police Act 1990

The relevant provisions of this Act apply to members of the Police Force who joined on or after 1 April 1988.

(a) Special risk benefit for officers hurt before 30 January 2006

Sections 216 and 216A, which were repealed on 30 January 2006, still apply for injuries which occurred before 30 January 2006: Sch 4, Pt 22, cl 68–69. The correct version of the legislation to access is 1 December 2005.

As to s 216(3) see the case law cited above at [5-1030] (f) relating to the "special risk benefit" under s 10(1A)(c) of the *Police Regulation (Superannuation) Act 1906*.

As to section 216(6), see the commentary regarding [5-1030] (c) HOD under the *Police Regulation (Superannuation) Act 1906*.

(b) Special risk benefit for officers hurt on duty on or after 30 January 2006

From 30 January 2006, death and disability cover for police officers (additional to workers compensation benefits) is provided by industrial awards: Sch 4, Pt 22 of the *Police Act 1990*. Presumably any litigation arising from such claims goes to the IRC.

(c) Special risk benefit for students of policing hurt during police education: s 216AA

The District Court retains jurisdiction over appeals from decisions made pursuant to s 216A for students of policing: s 216AA.

The writer is unaware of any applications under this provision. The similarity of the test in s 216AA(4) to the test under the repealed s 216 and under s 10(1A)(c) of the *Police Regulation (Superannuation) Act 1906* should be noted.

[5-1050] Sporting Injuries Insurance Act 1978

Last reviewed: May 2023

Applications under this Act are extremely rare. A "sporting organisation" must be declared in accordance with s 5. The sporting organisation must have "an authorised activity" as defined in s 4(1A). The sporting organisation pays premium to the Sporting Injuries Fund which is administered by the Sporting Injuries Compensation Authority. A claimant must be a "registered participant" (defined in s 4(1)) of the sporting organisation. The benefits payable in respect of injury or death are modest and are contained in Sch 1. Injuries may be assessed by a medical referee or panel: s 24.

Benefits under the sporting injuries fund scheme are restricted by s 25 *Sporting Injuries Insurance Act 1978* in respect of injury and s 26 in respect of death. Certain funeral expenses are payable pursuant to s 27 *Sporting Injuries Insurance Act 1978*.

The decision to pay a benefit rests with the Sporting Injuries Committee. An appeal from a decision of the Sporting Injuries Committee lies to the District Court: s 29.

There is no reported case law.

[5-1060] Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987

Last reviewed: December 2023

This Act extends the benefits of the WCA to a number of groups of people and provides benefits for the loss of or damage to the personal property of those people. Part 4 of the Act excludes various provisions of the WCA and of the *Workplace Injury Management and Workers Compensation Act 1988* to this Act.

Part 2 of the Act applies to "firefighters" defined in s 5 to extend to all volunteer fire fighters and Rural Fire Service ("official fire fighters"). Relevant events giving rise to compensable injuries are defined in ss 7, 8, 9 and 17. The cover provided for "official fire fighters" is much greater than merely fighting bush fires. It extends to most things that a member of a bush fire brigade does. The *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation 2023* extends the cover to fundraising: cl 9. The Act is administered by and claims are heard by the Self Insurance Corporation: s 16. Appeal lies to the District Court: s 16(4).

Part 3 of the Act applies to:

(a) members of the State Emergency Service

(b) members of the NSW Volunteer Rescue Association

(c) members of Surf Life Saving NSW

(d) any person prescribed by the regulations to be an emergency service worker or rescue association worker or surf life saver, and

(e) any person whom the WorkCover Authority deems to be an emergency service worker, a rescue association worker or surf life saver.

The cover provided by s 24 is for personal injury arising out of or in the course of carrying out an "authorised activity" defined in s 23 of the Act and cll 5 and 8 of the Regulations, including a disease which is contracted, aggravated, accelerated, exacerbated or which deteriorates in carrying out the activity. They are quite extensive. For example cl 7(b) relates to members of Surf Life Saving NSW. Included are "surf life saving operations, training, preparatory activities genuinely related to those operations and fundraising".

The claims are decided by the Self Insurance Corporation (s 30) and any dissatisfied claimant can ask for a determination of the claim by the District Court: s 30(4). Claims under this Act are few and usually involve questions of quantum of death benefits, weekly payments or lump sum compensation.

[5-1070] Workers' Compensation (Dust Diseases) Act 1942

Last reviewed: May 2023

Workers who contract a "dust disease" are not entitled to compensation under the WCA but are entitled to compensation under this Act. A "dust disease" is one of the fourteen conditions specified in Sch 1 of the Act. The Act constitutes the Workers' Compensation (Dust Diseases) Authority ("DDA") (s 5) and establishes a Medical Assessment Panel (s 7) comprising three legally qualified medical practitioners appointed by the relevant Minister.

The primary entitling provision is s 8. The Medical Assessment Panel is required to certify whether a person is totally or partially disabled for work by a dust disease or that a death was due to a dust disease. It must also certify whether the disablement or death was "reasonably attributable" to the person's exposure to the inhalation of dust in an occupation to the nature of which the disease is due. The DDA is required find whether the person concerned was a worker during the whole of the period he or she was engaged in that occupation but, if he or she were a worker for only part of the time he or she was engaged in that occupation, the medical authority is required to find that the death or disablement was "reasonably attributable" to the person's exposure to dust in the occupation concerned when the person was a worker.

The rates of compensation are those prescribed by the WCA. The scheme of death benefits, however, is different: s 8(2B). The DDA acts, essentially, as both the employer and insurer of the worker.

Section 8I governs appeals. The "appeal" is a hearing de novo on its merits: *DDB v Veksans* (1993) 32 NSWLR 221; *Irhazi v DDB* (2002) 23 NSWCCR 426.

Appeals are usually from decisions of the medical assessment panel. The medical evidence is largely confined to that of thoracic surgeons and thoracic physicians, a relatively small pool of experts. The Act acknowledges this. The Medical Assessment Panel must be constituted by at least 2 of its 3 members and a decision of any 2 members is the decision of the Panel: s 7(2).

Subsection 7(4) provides:

> If a medical practitioner has given evidence or agreed to give evidence as a medical practitioner in connection with any legal proceedings taken by or on behalf of a worker or by any employer of the worker, the medical practitioner must not act as a member of the Medical Assessment Panel in connection with any case involving those proceedings.

In *Pizzini v DDB* (1991) 7 NSWCCR 278 it was held that a decision of the medical authority was void where one of its members had performed a bronchoscopy of the worker before being a member of the medical authority which issued the certificate under appeal.

Members of the Medical Assessment Panel often give evidence on appeals against a decision of the medical authority. The same issues are often relitigated: see *O'Brien v DDB* (2000) 22 NSWCCR 193 where Campbell CCCJ refers to earlier decisions at [12]. The types of issues which might arise are also demonstrated in *Cavanough v DDB* (1998) 16 NSWCCR 626.

The Act does not apply to Federal employees: *O'Brien v DDB* (2000) 22 NSWCCR 193. The Act also does not apply to volunteer "workers": *Death v Workers Compensation (Dust Diseases) Authority (No 1)* [2020] NSWDC 103.

Legislation

- *District Court Act 1973* Pt 3 Div 8A
- *Police Regulation (Superannuation) Act 1906* ss 1, 7, 8, 9A, 10, 10B, 11A, 12C, 12D, 14, 21
- *Police Act 1990* ss 14, 216, 216A, 216AA
- *Sporting Injuries Insurance Act 1978* ss 4, 5, 24, 29, Sch 1
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, ss 16, 24, 30
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation 2017* cl 9
- *Workers Compensation (Dust Diseases) Act 1942*, ss 7, 8, 8I

Rules

- UCPR r 1.27, Sch 11 Pts 4–5

Further references

Butterworths, Mills Workers Compensation Practice (NSW)

The full version of G W Neilson "The Special Statutory Compensation List", paper presented at the Judicial Commission of NSW District Court Annual Conference, 24 June 2009, Sydney, is available on JIRS.

[The next page is 5301]

Monetary jurisdiction in the District Court

Acknowledgement: the following material has been prepared by His Honour Judge L Levy of the District Court of New South Wales. Commission staff are responsible for updating it.

[5-2000] Jurisdiction according to the nature of proceedings

Last reviewed: August 2023

The monetary jurisdiction of the District Court varies according to the nature of the proceedings.

For claims involving the general law, including common law actions, intentional torts and commercial disputes, as at 16/12/2022 the jurisdictional limit of the District Court is $1,250,000: s 4(1) *District Court Act 1973*. For proceedings filed in the Court prior to the commencement date the previous jurisdictional limit of $750,000 applies.

The jurisdiction of the District Court to hear and determine motor accident claims and workplace injury damages claims is unlimited.

Problems with the jurisdictional limit can sometimes arise in respect of claims under the *Civil Liability Act 2002*. Since 1 July 2002, as a result of indexation, the maximum amount awardable for non-economic loss under that Act has increased from $350,000 to $705,000 (as at 1/10/2022): s 16. As a result, in combination with other heads of damage, damages awards can approach, and at times exceed the jurisdictional limit.

Section 144(2) CPA provides that if the District Court decides it lacks, or may lack, jurisdiction to hear and dispose of proceedings, the court must order the transfer of the proceedings to the Supreme Court: see *Mahommed v Unicomb* [2017] NSWCA 65.

[5-2005] Jurisdiction in "commercial matters"

Doubts as to the jurisdiction of the District Court in commercial matters were dealt with by the *Justice Legislation Amendment Act (No 3) 2018*. This Act amended the *District Court Act* 1973 to clarify that the District Court has jurisdiction to determine any action arising out of a commercial transaction in which the amount (if any) claimed does not exceed the court's jurisdictional limit: s 44(1)(c1) commenced on assent on 28 November 2018 and has retrospective effect from 2 February 1998. The amendment was made retrospective to ensure that past judgments are protected from challenge: Sch 3, Pt 10; Second Reading Speech p 70: Legislative Assembly, 24 October 2018. See *Gells Pty Ltd t/a Gells Lawyers v Jefferis* [2019] NSWCA 59 at [5]–[6].

[5-2010] Consent to court having unlimited jurisdiction

There may be some circumstances where a defendant has provided consent to the court having unlimited jurisdiction. This is usually made known at the commencement of the hearing by the filing of a memorandum consent to unlimited jurisdiction: s 51(2)(a) *District Court Act 1973*. The failure of the party to file a memorandum consent that has already been signed by the opposing party, may be treated as an irregularity: s 63(2) *Civil Procedure Act 2005*, and see *Woodward Pty Ltd v Kelleher* (unrep, 30/5/1989, NSWCA).

[5-2020] Extension of jurisdiction

Last reviewed: August 2023

There may be circumstances where, by the nature and extent of the particularisation of a claim capable of being seen as in excess of $1,250,000, by default, a defendant has not indicated an

objection to extend or expand the jurisdiction. In such circumstances, that extension is limited to an additional 50 per cent above the jurisdictional limit: s 51(2)(b) *District Court Act 1973*. In this way, the jurisdiction can increase from $1,250,000 to a maximum of $1,875,000: s 51(4). See *Hadaway v Robinson* [2010] NSWDC 188, where the plaintiff was awarded $1,161,368 (despite the pre-December 2022 jurisdictional limit of $750,000) in the absence of objection from the defendants. The Court inferred that, as there was no demur to the plaintiff's position, the first defendant had acceded to the extended jurisdictional submissions advanced by the plaintiff (at [686]). See *Katter v Melhem* (2015) 90 NSWLR 164 at [95]–[109].

[5-2030] Practical considerations

Last reviewed: August 2023

The following practical considerations arise:

- the entry of judgment beyond the jurisdictional limit is permissible: *Richards v Cornford* (2010) 76 NSWLR 572, per Basten JA at [12];
- It is possible that an appeal based on considerations of procedural fairness could arise from the entry of a judgment in excess of $1,250,000. Recognising this possibility, it may be preferable, where appropriate, to find a verdict in the assessed amount, but to defer the entry of final judgment of an amount in excess of $1,250,000, until the parties have had an opportunity to make submissions as to why the mechanism provided by s 51(2)(b) *District Court Act 1973* should not apply and have effect.

Legislation

- *Civil Liability Act 2002* s 16
- *Civil Procedure Act 2005* ss 63(2), 144(2)
- *District Court Act 1973* ss 4(1), 51(2)(a), (b), 51(4)

[The next page is 5501]

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]

Trans-Tasman proceedings

[5-3500] Introduction

The *Trans-Tasman Proceedings Act 2010* (Cth) ("the Act") makes provision for matters such as service of Australian initiating documents in New Zealand, the granting of interim relief by Australian courts in support of civil proceedings in New Zealand courts, the issue and service of New Zealand and Australian subpoenas, remote appearances in Australian and New Zealand courts and tribunals and the recognition and enforcement of New Zealand judgments in Australia. Part 32 of the UCPR, titled "Trans-Tasman Proceedings Act 2010 (Commonwealth)" also applies to these proceedings to make provision for the practice and procedure to be followed in NSW courts with respect to matters arising under the Act.

The following treatment is not exhaustive but refers to the principal matters provided for in the new Act and Rules.

[5-3510] Service in New Zealand of initiating documents issued by Australian courts and tribunals

Last reviewed: December 2023

Part 2 provides for the service of initiating documents for proceedings to which the Part applies: s 9.

The Part applies to a civil proceeding commenced in an Australian court and a civil proceeding commenced in an Australian tribunal. However, in the case of a tribunal certain qualifications are set out in ss 8(1)(b) and (3). Additionally certain proceedings are excluded pursuant to s 8(2).

Section 9 enables service in NZ of an initiating document issued by an Australian court or tribunal. The document must be served in New Zealand in the same way that the document is required or permitted, under the procedural rules of the Australian court or tribunal, to be served in the place of issue: s 9(2).

The note to s 9(2)(b) provides that it is not necessary for the Australian court to be satisfied that there is a connection between the proceeding and Australia. Section 10 provides that service under s 9 has the same effect and gives rise to the same proceedings as if the initiating document had been served in the place of issue. Sections 9 and 10 are not to be read down so as to apply only to service of process involving the exercise of federal jurisdiction, and are not otherwise invalid: *Zurich Insurance PLC v Koper* (2022) NSWLR 380 at [55]. This decision was unanimously upheld by the High Court of Australia: *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 which held at [6] that ss 9 and 10 validly apply in accordance with their terms to any initiating document issued by a State court relating to any civil proceeding in that court. That is so irrespective of whether the proceeding is in a matter in federal jurisdiction or in a matter in State jurisdiction.

The Act provides for certain information to be given to the defendant (s 11) and the consequences of failure to do so: s 12. The failure does not invalidate the proceedings.

A time for the filing of an appearance is provided by s 13. Section 15 provides for a security for costs order and a stay until any security ordered is given.

[5-3520] Australian courts declining jurisdiction on the grounds that a New Zealand court is a more appropriate forum

Part 3 provides that a defendant in civil proceedings may apply to the court for an order staying the proceedings on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue: s 17.

The application must be made within 30 working days of service or such shorter or longer period that the court considers appropriate: s 17(2).

Pursuant to s 18, the Australian court may determine the application without a hearing unless the plaintiff, defendant or certain other persons (ss 18(2), (4)) make a timely request for a hearing: s 18(3). Provision is made for a remote appearance about the application for an order to stay the proceedings: s 18(4).

The Australian court may grant a stay if it is satisfied the New Zealand court has jurisdiction to determine the matters in issue between the parties to the proceedings and it is the more appropriate court to determine these matters: s 19(1).

Section 19(2) sets out matters which the Australian court must take into account in determining these questions.

Section 20(3) defines an exclusive choice of court agreement.

On application under s 17 the Australian court must stay the proceedings if satisfied that an exclusive choice of court agreement designates a New Zealand court as the court to determine the matters in issue: s 20(1)(a). The court must not stay the proceeding, if satisfied that an exclusive choice of court agreement designates an Australian court as the court to determine those matters: s 20(1)(b). However, s 20(1)(a) does not apply in the circumstances enumerated in s 20(2). Section 20(1)(b) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that it is null and void under Australian law (including the rules of private international law): s 20(2A).

An Australian court cannot stay a civil proceeding on forum grounds connected with New Zealand otherwise than in accordance with Pt 3: s 21(1).

[5-3530] Restraint of proceedings

An Australian court must not restrain a person from commencing a civil proceeding in a New Zealand court on the grounds that the New Zealand court is not the appropriate forum for the proceedings: s 22(1).

An Australian court must not restrain a party to a civil proceeding before a New Zealand court from taking a step in the proceedings on the grounds that the New Zealand court is not the appropriate forum for the proceedings: s 22(2).

[5-3540] Suspension of limitation periods

Subject to certain conditions where a stay has been granted by a New Zealand court on the grounds that an Australian court is the more appropriate court, later proceedings in an Australian court will, for the purpose of limitation periods or defence, be treated as commencing at the time the New Zealand proceedings commenced: s 23.

[5-3550] Australian courts granting interim relief in support of civil proceedings in New Zealand courts

A party or intended party to civil proceedings commenced or to be commenced in a New Zealand court may apply to the Federal Court, the Family Court of Australia, the Supreme Court of a State or Territory or other prescribed Australian court for interim relief (other than a warrant for the arrest of property) in support of the New Zealand proceedings: s 25.

The Australian court may give interim relief if it considers it appropriate, and, if a similar proceeding had been commenced in the Australian court, it would have given interim relief in that proceeding: s 26.

[5-3560] Subpoenas

Part 5 provides a detailed regime for the issue, service, application to set aside and enforcement of subpoenas issued by Australian (Div 2) and New Zealand (Div 3) courts. For proceedings in an Australian court, a subpoena cannot be served in New Zealand without the leave of the court: s 31(1).

Division 3 of the UCPR provides for related procedures.

In dismissing an application for leave to issue a subpoena and serve it under s 31 of the *Trans-Tasman Proceedings Act 2010* (Cth), the Federal Court in *Rauland Australia Pty Ltd v Law* [2020] FCA 516 at [27] found that :

> ... the test for leave to serve a subpoena in New Zealand is more exacting than the test for leave to issue a subpoena … the documents must be sufficiently significant to justify the expense and inconvenience likely to be caused by service of the subpoena..... Moreover, if there is a less expensive and less inconvenient way of obtaining the documents, then leave might be refused on that basis.

This was endorsed in *In the matter of Australasian Hail Network Pty Ltd (No 2)* [2020] NSWSC 517 at [69]–[75], where the NSWSC rejected an application for leave to serve a subpoena on the basis that the same evidence the defendants sought could be more cheaply and easily obtained from the plaintiffs via discovery.

[5-3570] Remote appearances

Part 6 provides a detailed regime for remote appearances from New Zealand in an Australian court or tribunal (Div 2) and for remote appearances from Australia in a New Zealand court or tribunal (Div 3).

[5-3580] Recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals

A registrable New Zealand judgment cannot be enforced in Australia if it is not registered in an Australian court under s 68: s 65(1).

This prohibition extends to provisions, forming part of a judgment which deals with different matters, some of which would, if contained in a separate judgment, make that separate judgment a registrable New Zealand judgment: ss 65(2), 71.

[5-3590] Meaning of registrable New Zealand judgment

A registrable New Zealand judgment is defined in s 66.

[5-3600] Application to register New Zealand judgments

An entitled person may apply to register a New Zealand judgment, with certain exceptions, in a superior Australian court or an inferior Australian court that has power to give the relief that is in the judgment: s 67(1). In the case of a civil pecuniary penalty, the inferior court must be one that has power to impose such a penalty of the same value: s 67(2).

[5-3610] Registration of New Zealand judgments

An Australian court must, on application under s 67, register a registrable New Zealand judgment in that court in accordance with Pt 7: s 68(1). It remains registered unless set aside under s 72: s 68(2).

[5-3620] Setting aside registration

An Australian court, on appropriate application, must set aside the registration if it is satisfied that enforcement would be contrary to public policy in Australia, or the judgment was registered in contravention of the Act, or if the judgment was given in a proceeding of which the subject matter

was immovable property or was given in a proceeding, in which the subject matter was movable property and that property was, at the time of the proceeding in the original court or tribunal not situated in New Zealand: s 72(1).

The application must be made within 30 working days after the day notice of registration was given under s 73 or a court-granted longer period: s 72(2).

The Australian court must not set aside the registration otherwise than in accordance with s 72.

[5-3630] Notice of registration

Upon registration, notice of registration must be given to every liable person within 15 working days or court-granted longer period: s 73.

[5-3640] Effect of registration and notice of registration

A registered New Zealand judgment has the same force and effect and may give rise to the same proceedings for enforcement as if the judgment had been given by the Australian court in which it is registered: s 74(1). However, if notice of registration has not been given pursuant to s 73, then s 74(1) does not apply during the period that is 45 working days after registration: s 74(2).

[5-3650] Restrictions on enforcing registered New Zealand judgments

A registered New Zealand judgment is capable of being enforced in Australia only if, and to the extent that, at the time it is being or is to be enforced, the judgment is capable of being enforced in the original court or tribunal or in another New Zealand court or tribunal: s 75.

[5-3660] Other matters

Section 76 provides for an Australian court to make conditional orders amounting to a stay of execution pending an appeal. However that provision does not affect any other powers of the Australian court to grant a stay on any grounds on which the court could stay the enforcement of a judgment of an Australian court or tribunal

Section 77 makes provision for the costs and expenses of the enforcement of a registered New Zealand judgment and s 78 deals with interest thereon.

[5-3670] Private international law does not affect enforcement of registered New Zealand judgments

Enforcement in Australia of a registered New Zealand judgment is not affected by the operation of any rule of private international law (other than any rule in Pt 7) in operation in Australia: s 79(1).

An Australian court may not refuse to enforce, or delay, limit or prohibit the enforcement of, a registered New Zealand judgment on any of the following grounds:

- enforcing the judgment would involve the direct or indirect enforcement in Australia of a New Zealand public law
- New Zealand tax is payable under the judgment
- the judgment imposes a civil pecuniary penalty or a regulatory regime criminal fine.

[5-3680] UCPR Part 32

UCPR Pt 32, amongst other things, provides for:

- the commencement of civil proceedings under the Act (r 32.3)
- interlocutory proceedings (r 32.4)

- procedural matters relating to subpoenas (Div 3)
- procedural matters relating to the enforcement of judgments (Div 4)
- application for order for use of audio link or audiovisual link: r 32.13.

Legislation

- *Trans-Tasman Proceedings Act 2010* (Cth), ss 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 25, 26, 65, 66, 67, 68, 72, 73, 74, 75, 76, 77, 78, 79, Pts 2, 3, 5, 6
- *Evidence and Procedure (New Zealand) Act 1994* (Cth)

Rules

- UCPR Pt 32, rr 32.3, 32.4, 32.13 Div 3, Div 4

[The next page is 5601]

Defamation

Acknowledgement: the following material has been prepared by her Honour Judge Judith Gibson, District Court of NSW and was reviewed in 2022 by Prof David Rolph, FAAL, Professor of Law, University of Sydney Law School.

[5-4000] Introduction

Last reviewed: December 2024

The topics covered by this section are:

- pleadings used in defamation actions
- common interlocutory applications
- conduct of jury and judge-alone trials
- assessment of damages
- limitation issues (*Limitation Act 1969*, s 14B)
- costs, and
- a list of texts for further reading.

Defamation actions are perceived as "controversial" (P George, *Defamation Law in Australia*, 4th edn, LexisNexis, Sydney, 2023 ("George") at 3.13) because freedom of speech and protection of reputation are difficult to balance. Many of the complexities derive from maintaining this balance.

Although defamation actions are popularly believed to be actions by the famous or newsworthy against the media, analysis of damages awards (T K Tobin and M G Sexton, *Australian Defamation Law and Practice*, LexisNexis, Sydney, 1991 ("Tobin & Sexton") at [60,100]) shows that most publications are non-media newsletters, electronic publications such as emails (see Tobin & Sexton at [24,000]–[24,090]) or social media. Actions for slander, where the extent of publication is limited, are increasingly rare. The high cost and complexity of proceedings are important considerations for any party considering commencing (*Walter v Buckeridge (No 4)* [2011] WASC 313) or defending (*Jones v Sutton (No 2)* [2005] NSWCA 203 at [48]–[53]) proceedings. The costs of case-managing defamation claims and hearing trials may not be recoverable in full, even where a party is successful, if the court considers the circumstances do not justify the costs sought: *Greiss v Seven Network (Operations) Ltd (Costs)* [2024] FCA 377 at [44].

[5-4005] The legislative framework

Last reviewed: June 2024

Defamation actions in Australia are governed by substantially uniform Defamation Acts ("UDA") of each State and Territory. The relevant legislation in each of the other States and Territories is as follows: *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)) and the *Defamation Act 2006* (NT) (collectively referred to as "the uniform legislation").

In NSW, the *Defamation Act 2005* replaces the *Defamation Act 1974*, which applied to publications made before 1 January 2006. The principal differences between the repealed NSW legislation and the UDA are the changed role of the imputation (which is no longer the cause of action), the increased role of the jury (which now determines defences as well as imputations issues, but not damages) and a cap on general damages. The UDA do not codify the law of defamation. Common law principles operate alongside the UDA.

A comparison table for the relevant sections of the UDA in all States and territories of Australia is set out in Tobin & Sexton at [60,000]. This is followed by the text of the *Defamation Act 2005* (at p 21,511ff), and extracts from the UCPR (Tobin & Sexton at [31,505]–[31,583]). This helpfully puts together the main legislative provisions for defamation actions.

Another relevant statute is the *Limitation Act 1969*. Restrictive limitation provisions apply to defamation actions.

The *Limitation Act 1969*, s 14B provides that an action for defamation is not maintainable if brought after the end of a limitation period of one year running from "the date of the publication of the matter complained of". "Publication" occurs each time the matter is read, heard or seen. The limitation period can be extended in limited circumstances: *Limitation Act 1969*, s 56A. Because every communication of defamatory matter gives rise to a separate cause of action (known as the "multiple publication rule"), problems may arise applying the limitation period in defamation, particularly where the material is published online. The *Defamation Amendment Act 2020* (discussed further below) introduced a "single publication rule" under the *Limitation Act 1969*, s 14C for publications after the date of the amendments. This provides that, where a publisher publishes defamatory matter and subsequently the publisher or an associate publishes substantially the same defamatory matter, the cause of action in defamation is taken to accrue at the date of first publication. The interaction of the old and new limitation provisions can create complexities: *Lehrmann v Network Ten Pty Ltd (Limitation Extension)* [2023] FCA 385; *Ingram v Ingram* [2022] NSWDC 653 at [32]–[36].

[5-4006] Defamation Amendment Act 2020

Last reviewed: December 2024

The changes clearly necessary to defamation law resulting from online publication problems led to increasing calls for reform. Change to the legislation to reflect online publication is, however, only one of the issues requiring reform; the principal issues in the reform debate related to the nature and extent of those changes, particularly where what was perceived as small claims or "backyarders" were involved. These reforms were put forward in two stages (George at 43.1).

As to publications made in NSW, following a statutory review of the Australian uniform defamation legislation, the *Defamation Amendment Act 2020* (NSW) was assented to on 11/8/2020. The Act commenced on 1/7/2021 (LW 25/6/2021). The Uniform Civil Procedure (Amendment No 95) Rule 2020 also commenced on that date to take into account the commencement of the Stage 1 reforms (LW 22/12/2020).

This legislation was also enacted in other States (*Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic); *Defamation (Miscellaneous) Amendment Act 2020* (SA); *Defamation (Model Provisions) and Other Legislation Amendment Act 2021* (Qld)); as well as in Tasmania, but with a commencement date of 12/11/2021: *Defamation Amendment Act 2021* (Tas). However, WA has not yet enacted the legislation. To date, no legislation has been passed in the NT but the legislation is in force in the ACT: *Civil Law (Wrongs) Amendment Act 2021* (ACT).

The difficulty caused by this piecemeal taking up of the reforms is that online publications are almost invariably able to be downloaded in every State and Territory of Australia, and inconsistencies between those jurisdictions as to the taking up of those reforms has given new focus to the interpretation of the choice of law provisions in s 11 UDA.

Perhaps the most important of the changes made by the Act, in terms of interlocutory and trial procedure, is the introduction of a serious harm threshold (s 10A) and a mandatory requirement for service of a concerns notice (s 12B). Such a notice must contain the information identified in s 12A. The courts' initial approach was that failure to send a notice at all resulted in the proceedings being struck out, as the statutory language is mandatory and not directory and errors of this kind

cannot be retrospectively corrected: *Clayton v Heffron* (1960) 105 CLR 214 at 247 (per Dixon CJ, McTiernan, Taylor and Windeyer J), applied in *Hooper v Catholic Family Services trading as Centacare Catholic Family Services* [2023] FedCFamC2G 323 at [51]–[68].

There are two areas of conflict. First, where no notice has been sent (for example in WA), the question is whether the notice provisions are procedural or substantive, and this is now the subject of conflicting authority: *Peros v Nationwide News Pty Ltd (No 3)* [2024] QSC 192; *Aguasa v Hunter* [2024] WASC 380. Second, where a notice has been sent but is asserted to give no or inadequate particulars of serious harm, the court may be generous as to whether there is sufficient information to form the basis of a valid concerns notice: *Gayed v Virgin Mary & St Markorious Coptic Orthodox Church* [2024] NSWSC 1232.

The second stage of these reforms commenced on 12/8/2022, when the Meeting of Attorneys-General agreed that the draft Stage 2 Pt A Model Defamation Amendment Provisions 2022 would be released for public consultation. These provisions relate to defamatory content published online, focusing on digital intermediaries. This includes social media platforms, but there are provisions for exemptions for intermediaries who play a passive role in publishing content.

A consultation draft on the Stage 2 Pt B provisions was released separately. These provisions are designed to provide immunity for defamatory material reported to the police, thereby removing barriers to reporting criminal misconduct. There are also provisions for protection of reports to other complaints-handling bodies.

The major changes concerning digital intermediaries were summarised by the Attorney General for NSW as follows:

> In summary, there are six key reforms: one, a conditional exemption from defamation liability for conduit, caching and storage services, and for search engines in relation to organic search results; two, updates to the mandatory requirements for an offer to make amends for online publications; three, a requirement for courts to consider balancing factors when making preliminary discovery orders against digital intermediaries; four, a new innocent dissemination defence for digital intermediaries, subject to a simple complaints process; five, a specific power for courts to make non-party orders against digital intermediaries to prevent access to defamatory matter online; and six, expanded electronic means by which notices can be served.
>
> (Legislative Assembly Hansard, Second Reading Speech, 11/10/2023)

The *Defamation Amendment Act 2023* (NSW), which implements both Stage 2 reforms, commenced on 1/7/2024. The *Civil Law (Wrongs) Amendment Act 2024* (ACT), which implements both Stage 2 reforms, commenced on 1/7/2024. The *Justice Legislation Amendment (Integrity, Defamation and Other Matters) Act 2024* (Vic), which implements both reforms, commenced on 11/9/2024. Other States and territories have not implemented the reforms.

In WA and the NT, where none of these reforms have been taken up, the law remains as before. In Queensland, SA and Tasmania, where the Stage 2 reforms have not been implemented, the so-called "internet" defences remain as before. For these reasons, it is necessary to consider the law applicable in relation to each claim with care.

[5-4007] Publications made on the internet where the new provisions do not apply

Last reviewed: December 2024

There are defences falling outside the uniform legislation for internet service providers ("ISPs") as well as the defence of innocent dissemination (outlined in more detail below).

Schedule 5, cl 91 of the *Broadcasting Services Act 1992* (Cth), which provided immunity from State and Territory laws and common law and equitable principles to ISPs and internet content hosts in circumstances where they were not aware of the nature of the content in question, was replaced (as of 23 January 2022) by s 235 of the *Online Safety Act 2021* (Cth), which is in the same form. Clause 91 was never the subject of consideration by the courts, so the extent of the protection that it gave, and which s 235 continues to give, to these entities has yet to be tested.

The *Online Safety Act* may also need to be consulted where an online publication is offensive, as opposed to (or in addition to) any claim for defamation. The *Online Safety Act* provides for the appointment of an eSafety Commissioner as well as a complaints process for the removal of online cyberabuse. The definition of "serious harm" in s 5 ("serious physical harm or serious harm to a person's mental health, whether temporary or permanent") may be a useful analogy in rulings on serious harm under s 10A of the amended legislation (for publications made after 1 July 2021 in those States and territories where the uniform legislation has been amended).

The law relating to internet publication is changing rapidly; in *Tamiz v Google Inc* [2012] EWHC 449 (QB), Eady J considered an ISP was not liable even after notification that its service was being used for the communication of defamatory matter, principally because of the sheer volume of internet publication.

Changing views as to liability commenced with *Google Inc v Duffy* [2017] SASFC 130, where the Full Court of the Supreme Court of SA affirmed the decision of the first instance judge (Blue J) that a search engine operator was liable for publication of both search results and web articles in its capacity as a secondary/subordinate publisher of defamatory material (the Full Court also upheld the trial judge's assessment of damages at $100,000). Google's search was liable in this context because it facilitated the reading of the matters complained of in a substantial, proximate and indeed essential way, not unlike placing a "post-it" note on a printed publication (at [173]) and by reason of the instantaneous nature of the publication: at [181].

In *Trkulja v Google LLC* (2018) 263 CLR 149, the High Court of Australia set aside the summary dismissal of claims for defamation arising out of the publication by the defendant of "snippets". This complex decision has been the subject of considerable academic debate (see K Barnett, "Trkulja v Google LLC", *High Court Blog*, The University of Melbourne, 3 July 2018).

While the leading Australian case remains *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, and liability for third party commentary has been considered at length in *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Ltd v Voller; Australian News Channel Pty Ltd v Voller* (2021) 273 CLR 346, the High Court has now, by majority, held that when it is functioning purely as a search engine, Google is a search engine and not a publisher: *Google LLC v Defteros* (2022) 277 CLR 358. The differing approaches taken by the High Court in both these decisions confirm that this is an area of the law where there is likely to be significant change and development. There is no clear ratio in the majority judgments. Many questions are raised and not all have been answered. In particular, in *Google LLC v Defteros*, there is an issue as to how broad the application of this judgment is, as the Canadian decision on which much of the reasoning was based *(Crookes v Newton* [2011] 3 SCR 269) was not a case involving a Google search result, but a hyperlink on a website.

In *Voller,* the question was whether media companies whose Facebook pages hosted comments by third parties were in fact publishers of the defamatory material. At first instance and on appeal, it was held that the media companies were publishers of the third-party comments notwithstanding the technological limitations on their control of the pages. Before the High Court, the appellants changed their position on the issue of intention and knowledge, to contend that the common law required that the publication of defamatory material be intentional, which meant that, in circumstances of no prior notification (as was the case in *Voller*, as no concerns notice was sent before suit), there was no publication: at [20].

All the members of the court rejected the submissions about the need for publication to be intentional, and effectively held that publication did not require knowledge. However, their Honours differed in their method of assessment of whether the media companies had participated in the act of publication and (in the case of Edelman and Steward JJ, both of whom would have allowed the appeal in part) as to the consequences of these findings.

Kiefel CJ, Keane and Gleeson JJ considered that the media companies had facilitated, encouraged and thereby assisted the posting of comments by the third-party Facebook users, which rendered

them the publishers of those comments. Gageler and Gordon JJ similarly emphasised that the media companies had chosen to operate public Facebook pages in order to engage commercially with the over 15 million Australians who were Facebook users and concluded that these arrangements gave their claim of being passive and unwitting victims of Facebook's method of functioning an air of unreality.

Edelman J dissented in part. While the appellants had assisted in the publication of third-party comments, by merely creating a page in posting a story with an invitation to comment, they had not manifested an intention or common purpose with the author of the comment and their unrelated words would not be in pursuance of, or in response to, the invitation. A random remark by a third party, unconnected to the story, would not fall within any manifest common intention.

Steward J would also have allowed the appeal in part. Merely allowing third-party access to a Facebook page is, of itself, insufficient to justify a factual conclusion that the Facebook page participated in the publication of all the third-party comments posted thereafter. It followed that there must be some feature of the content, nature or circumstances of a Facebook post that justified a conclusion that it had procured, provoked or conduced third-party defamatory comment or comments, such as to make the Facebook page owner the publisher of such comments: at [180].

It is important to note that this decision relates to liability for publication only, and not to the defence of innocent dissemination, although Rothman J (at first instance) had, after finding the appellants were publishers, gone on to consider aspects of the defence of innocent dissemination under s 32 of the *Defamation Act 2005*. The issue of the defence of innocent dissemination was specifically excluded from consideration in the Court of Appeal (at [37] per Basten JA), which was in turn the position that the High Court took: at [17]–[19]. The issue of the defences to be relied upon will now be an issue for the trial.

[5-4010] The pleadings

Last reviewed: December 2024

In NSW, defamation cases are conducted in the Federal Court of Australia in accordance with the Defamation Practice Note DEF-1 (commenced 12/11/2019), in the Supreme Court in accordance with Practice Note No SC CL 4 — Defamation List (commenced 5/9/2014), and in the District Court in accordance with DC Practice Note No 6 — Defamation List (commenced 9/2/2015). The practice notes regulate the speedy and efficient disposal of interlocutory applications. As to the jurisdiction of the Federal Court, initially considered to arise under cross-vesting provisions if there was a cause of action in the ACT or the NT (*Crosby v Kelly* (2012) 203 FCR 451), see J Ledda, "The Federal Court and the Uniform Defamation Law: in search of lost purity" (2023) 25 *Media and Arts Law Review* 168.

The practice notes and case management methods of these courts differ in some respects. One example is the availability of trial by jury. The presumptive mode of trial in the Federal Court is trial by judge alone. Although the Federal Court has a discretion to order trial by jury, the provisions of the *Federal Court of Australia Act 1976* (Cth) on the mode of trial in that forum override the right of any party to elect to have a defamation case tried by a jury under State defamation legislation. The Full Federal Court has stated that trial by jury in a defamation case in the Federal Court will be exceedingly rare: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61; but cf *Lehrmann v Network Ten Pty Ltd (Tribunal of Fact)* [2023] FCA 612 at [14]–[25].

A second area of difference is management of defamation claims in a specialist list or under the docket system. The Federal Court's preference for the docket system means interlocutory issues will generally be left to the trial: *Goodfellow v Fairfax Media Publications Pty Limited* [2017] FCA 1152 at [25]–[28]. This can have significant costs consequences for a party who fails on a threshold issue such as the capacity of the imputations: *Taylor v Nationwide News Pty Ltd (No 2)* [2022] FCA 149. The Supreme and District Courts both case manage defamation actions in a specialist list.

Case management practices will be impacted by s 10A of the uniform legislation in the states and territories in which it is in place as the serious harm component (which is jurisdictional in nature) will require certainty on issues such as imputations which might otherwise have been left to trial: *Selkirk v Wyatt* [2024] FCAFC 48 at [57]–[58].

Pleadings

The pleadings in a defamation action (which do not require verification: UCPR r 14.22) consist of the statement of claim (to which the concerns notice must be attached), the defence (and cross-claim if applicable) and, depending upon the defences pleaded, a Reply particularising issues such as malice.

The concerns notice

Significant changes to procedure were introduced by the amending legislation which came into force on 1/7/2021 in those jurisdictions that have enacted the reform legislation. Before proceedings are commenced, the plaintiff must serve a concerns notice on all parties likely to be the subject of any claim: *Defamation Act 2005* s 12B. This is a substantive, not a procedural, requirement. Failure to provide particulars of serious harm or the other essential elements in s 12A(1)(a), or to provide reasonable further particulars if sought, will result in the concerns notice being invalid. Any proceedings commenced on the invalid concerns notice (or without a concerns notice) will be struck out: *Randell v McLachlain* [2022] NSWDC 506.

Proceedings cannot be commenced until 28 days after service of the concerns notice unless leave of the court is granted (*Hoser v Herald and Weekly Times Pty Limited & Anor (Ruling)* [2022] VCC 2213) or, if there is a request for particulars, within a further 14 days (or other time agreed by the parties) of their answer: s 12A(3)–(5).

The concerns notice must be attached to the statement of claim: UCPR r 15.19(2)(c).

Where further publications are made by the defendant after proceedings have been commenced, it is not necessary to send a further concerns notice, even if those publications are not similar in nature: *Newman v Whittington* [2022] NSWSC 1725. There has not yet been any judicial consideration of the situation where another defendant is joined to proceedings that have already commenced, or where a defendant brings a cross-claim; however, in *Murdoch v Private Media Pty Ltd (No 4)* [2023] FCA 114, leave was granted to the plaintiff to join two additional defendants without any discussion of these issues.

The NT and WA have opted out of the first round of reforms. In *Peros v Nationwide News Pty Ltd* [2024] QSC 80 it was held that the mandatory requirement to issue a concerns notice before commencing proceedings, which applies under Queensland law but not WA law, was procedural in character and did not have extraterritorial effect outside of Queensland. As noted above, there is now conflicting authority on this issue: *Aguasa v Hunter* [2024] WASC 380.

The statement of claim

The pleadings must contain full particulars of the matter complained of and its context, the imputations pleaded to arise (whether in their natural and ordinary meaning or by true innuendo), details of publication (including particulars of identification if the plaintiff is not named) and republication, as well as any claim for special damages and aggravated compensatory damages: Tobin & Sexton at [25,015]–[25,115]. In addition, for actions commenced in relation to publications after 1 July 2022, particulars of serious harm must be provided, not only in the statement of claim but in the concerns notice that precedes it: *Defamation Act 2005* s 12A(1)(a)(iv). Exemplary damages are not available: s 37.

Generally speaking, liability for publication is construed broadly: *Webb v Bloch* (1928) 41 CLR 331. The plaintiff may bring proceedings not only against the author of the publication but any other person who has authorised or otherwise participated in the publication — such as the proprietor of a newspaper, the source of the information or the person who repeats the libel — and the choice of whom to sue is a matter for the plaintiff: Tobin & Sexton [5260]–[5265].

The tort of defamation is based upon the communication of defamatory meaning, and not simply upon the words spoken (or written). In *Monson v Tussaud's Ltd* [1894] 1 QB 671 the plaintiff brought proceedings for defamation after the Madame Tussauds museum placed a wax statue of him carrying a gun in a section devoted to famous murders. In fact a verdict of "not proven" had been given in Mr Monson's trial for murder (the jury, however, only awarded a farthing in damages). Even photographs can, in some circumstances, convey a defamatory meaning: *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

There must be a plea of publication to a third party and, if the plaintiff is not named, particulars of identification should be provided, with verification if considered necessary: *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188; *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [14]–[22].

Where the publication was made on the internet, the element of publication requires proof that the article was downloaded or accessed: *Dow-Jones and Co Inc v Gutnick* (2002) 210 CLR 575 at [25]–[28], [44]. The plaintiff must therefore set out for each matter complained of that it was downloaded or accessed and seen by at least one person, as well as the State or Territory in which that person downloaded or accessed the material and, if the plaintiff was not named, particulars of how the person downloading or accessing the matter complained of identified the plaintiff.

The precise words said to have been written or spoken must also be pleaded; it is not enough to identify their substance: *Collins v Jones* [1955] 1 QB 564. Where the matter complained of is not defamatory on its face, the plaintiff must plead those extrinsic facts said to give rise to the defamatory imputation, and set out how persons knowing these would have understood the publication to refer to the plaintiff: Tobin & Sexton [3360]–[3370].

The statement of claim must also include particulars of serious harm to reputation for publications made after the date s 10A comes into force. This is a new statutory element of the cause of action in defamation, in addition to the existing common law elements of defamatory matter, identification and publication. The element of serious harm to reputation was introduced by the *Defamation Amendment Act 2020*, which commenced on 1 July 2021. It is modelled on the *Defamation Act 2013* s 1, which applies in England and Wales. See generally D Rolph, "A serious harm threshold for Australian defamation law" (2022) 51 *Australian Bar Review* 185.

Where a plaintiff brings proceedings against a defendant for a republication of the defendant's words made by a third party, in circumstances where the republication is asserted to be the natural and probable consequence of the defendant's publication, this should be pleaded and particularised. The pleading should state whether the republication is relied upon as a cause of action pleaded against the defendant, or as a matter going only to damages: Tobin & Sexton at [5295]–[5395].

Prior to the introduction of s 10A, damage to reputation in defamation actions was presumed and it was not necessary to allege or prove injury to reputation: *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 150 per Windeyer J; *Bristow v Adams* [2012] NSWCA 166. For actions the subject of the legislative amendments, the plaintiff must now include particulars of serious harm in the concerns notice (s 12A(1)(a)(iv)) as well as in the statement of claim: *Newman v Whittington* [2022] NSWSC 249 at [47]. The claim for compensatory damages, special damages and/or aggravated compensatory damages, together with particulars of the facts and matters relied upon (UCPR r 15.31), are still provided in the same way.

Two kinds of serious harm – past and future – may be particularised in both the concerns notice and the statement of claim: *Banks v Cadwalladr* [2022] EWHC 1417 at [51]. These particulars should be "fact rich": *High Quality Jewellers Pty Ltd (ACN 119 428 394) & Ors v Ramaihi (Ruling)* [2022] VCC 1924 at [10].

Damages for non-economic loss under the UDA are capped: s 35. For publications made after 1 July 2021, that cap is a "hard" cap. A plaintiff has also always been entitled to claim general damages for loss of business (as opposed to special damages): *Andrews v John Fairfax & Sons Ltd*

[1980] 2 NSWLR 225; Tobin & Sexton at [25,110]. The relationship between an *Andrews* claim and the cap on damages has not yet been authoritatively determined. Any claim for special damage should be particularised: Tobin & Sexton [25,105].

Claims for damages for defamation attract interest, generally from the date of defamation until the verdict: *John Fairfax & Sons v Kelly* (1987) 8 NSWLR 131, although interest may be awarded even if a claim for interest is not pleaded (*Murphy v Murphy* [1963] VR 610), it is preferable for it to be pleaded.

The defence

The defence sets out whether the publication, identification and imputations are admitted, the defences pleaded to the publication and matters relevant to damages, such as a plea of mitigation of damages.

Where the matter complained of is restricted to publication in Australia, defences under the Act and the common law of Australia must be pleaded. Where the matter complained of is pleaded to have been published outside Australia (for example, publications in other jurisdictions, via the internet), defences in the jurisdiction where the publication is heard, read or downloaded will apply: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Rader v Haines* [2021] NSWDC 610 (publication made in the United Kingdom).

In Australia, defences fall into three main categories: justification, fair comment and privilege (absolute or qualified): "Speaking generally, a defamatory publication is actionable only when it is not excused, protected or justified by law", M McHugh, "What is an Actionable Defamation?", *Aspects of the Law of Defamation in New South Wales*, J Gibson (ed), Law Society of NSW, 1990, p xxxi. Both statutory and common law defences may be pleaded, as the entitlement to rely upon common law defences, such as the "*Hore-Lacy*" defence (*David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; see *Besser v Kermode* (2011) 81 NSWLR 157 at [58] and [75]) has been retained: ss 6(2) and 24. This provision means that common law decisions on issues such as publication, defamatory meaning, and damages are also largely applicable (note, however, that the distinction between libel and slander at common law has been abolished: *Defamation Act*, s 7).

The requirements for pleading and particularisation of statutory defences are set out in UCPR rr 14.31 and 15.21. The specific requirements in relation to each of these defences, and the relevant section of the *Defamation Act* for each such defence, are as follows:

1. **Justification (s 25):** UCPR rr 14.32 and 15.22. The most common problems with this defence arise from last-minute particulars, or an application to plead it just before the trial: *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648; Tobin & Sexton at [25,175]. The particulars of this defence, other than in clear situations where it is fully set out in the publication, should be set out with precision, and may include material not referred to in the matter complained of, including events subsequent to the publication: Tobin & Sexton at [25,180]–[25,190].
2. **Contextual truth (s 26):** UCPR rr 14.33 and 15.23. Although the scope of this defence was reduced by *Besser v Kermode*, above, the reformulated defence, which came into effect on 1/7/2021, should revitalise this defence by permitting the defendant to "plead back" the plaintiff's imputations as contextual imputations. See Tobin & Sexton at [25,145]–[25,160]. The pleadings and particulars are described in Tobin & Sexton at [25,165]–[25,170].
3. **Absolute privilege (s 27):** UCPR rr 14.34 and 15.24. This defence is commonly dealt with as a summary judgment application. Amendments to the defence of absolute privilege set out in Pt B of the stage two review of the Model Defamation Provisions, which were assented to in NSW on 30/10/2023, extend the defence of absolute privilege to communications with police and other prescribed statutory bodies. These amendments are intended to result in the court quickly dismissing proceedings and are likely to result in more frequent applications for summary dismissal on the grounds of absolute privilege.

4. **Publication of public and official documents (s 28):** UCPR rr 14.35 and 15.25.
5. **Fair report of proceedings of public concern (s 29):** UCPR rr 14.36 and 15.26.
6. **Qualified privilege (s 30):** UCPR rr 14.37 and 15.27. The requirements for particulars of this defence are set out in Tobin & Sexton at [25,215]–[25,220]. If this defence is pleaded, the plaintiff should usually file a reply, in order to put in issue whether the publication was "reasonable" in all the circumstances within the meaning of ss 30(1)(c) and 30(3). Note that this defence differs from the common law defence, which is described in further detail below.
7. **Publication of matter concerning issue of public interest (s 29A):** UCPR r 14.36A.
8. **Honest opinion (s 31):** UCPR rr 14.38 and 15.28. This statutory defence is, with some modifications, adapted from the common law defence of fair comment, but it is still possible to rely upon the common law defence. There are three forms of honest opinion defence: s 31(1)–(3). If this defence is pleaded, the plaintiff should usually file a Reply, in order to put in issue the matters in s 31(4). The defence has rarely been successful, but see *O'Brien v Australian Broadcasting Corp* [2016] NSWSC 1289.
9. **Scientific or academic peer review (s 30A):** UCPR r 14.37A.
10. **Innocent dissemination (s 32):** UCPR rr 14.39 and 15.29. This defence, once little used, is of significance for internet publications. In addition to s 32, an ISP may rely upon *Online Safety Act 2021* (Cth) s 235; see also Tobin & Sexton [24,035]; Collins at [3.08], [16.133]–[16.144]. The common law defence of innocent dissemination also survives.

No specific provision has been made in the UCPR for the procedure of offer of amends, statutory defences (for absolute or qualified privilege) contained in other legislation, or for common law pleadings such as the *Lange* defence: *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

The nature of offer of amends, statutory defences of good faith and the common law defences may briefly be summarised as follows:

1. **Offer of amends:** *Defamation Act* Pt 3, Div 1. This provides for service of a "concerns notice" (s 14(2)) followed by a procedure for the making of an offer to make amends (s 15) which may be withdrawn (s 16) or accepted (s 17). A concerns notice is now mandatory; defamation proceedings cannot be commenced without a concerns notice having been served on the defendant: (s 12B). As to the formal requirements of a concerns notice, see s 12A. For the avoidance of doubt, a document filed or lodged in a proceeding to commence defamation proceedings does not constitute a Concerns notice: s 12A(2). Where there is a failure to accept a reasonable offer to make amends "a court" (s 18(2)) must determine whether the offer was made as soon as practicable and was reasonable, having regard to the circumstances set out in s 18(2). The provisions of the *Defamation Act* prior to the new amendments were unclear as to whether determination of these issues is a matter for the jury or for a judge sitting alone: (*Hunt v Radio 2SM Pty Ltd (No 2)* (2010) 10 DCLR (NSW) 240) but it is now expressly provided that this is a matter for determination by the trial judge: s 18(3). The defence is not limited to small publications, and substantial damages may be awarded. In *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 McCallum J held that an offer of amends of $50,000 and an apology were insufficient where the imputations were gravely serious claims that a teacher had sexual relations with underage students; at that time the award of $350,000 was the highest sum awarded under the uniform legislation.
2. **Statutory defences containing a good faith provision:** An example of a statutory provision offering a defence for a publication made in good faith is *Health Care Complaints Act 1993* (NSW), s 96.
3. **Common law variant of justification (*David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667):** This defence has been held by the NSW Court of Appeal (see *Fairfax Media Publications Pty Ltd v Bateman* (2015) 90 NSWLR 79) to be unavailable in this State, but it

is available in most other States and territories; see, for example, *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206; *Balzolal v Fairfax Digital Australia and New Zealand Pty Ltd* [2016] QSC 175; *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314.

4. **Comment at common law:** The pleadings and particulars for the common law defence of comment are similar to those of the statutory defence. Given the greater flexibility of the statutory defence, this defence is unlikely to be often encountered.

5. **Qualified privilege at common law:** This is the most commonly pleaded defence, and the particulars necessary to establish it differ from the statutory defence. It is not possible, in this overview, to deal with the elements of the defence in detail. The general principles are set out in Tobin & Sexton at [14,010]–[14,065]. Attempts by the media to rely upon this defence have been unsuccessful: Tobin & Sexton at [14,070] and *Lloyd-Jones v Allen* [2012] NSWCA 230. Qualified privilege at common law was described as a limited defence in *Bennette v Cohen* [2009] NSWCA 60 at [139]–[143]. However, the High Court has since reviewed and clarified elements of reciprocity and interest in *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534, and rejected the asserted requirement, in cases such as *Bennette*, for "pressing need" (at [51]) for the publication to have been made. The High Court explained the operation of the defence where the publication was made in response to an attack (see also *Harbour Radio Pty Ltd v Trad* (2011) 245 CLR 257).

6. **The *Lange* defence:** The right of freedom of speech implied in the Constitution, and its impact upon defamation law, in relation to publications in the media concerning "government and political matters", is explained in *Lange v Australian Broadcasting Corp* (1997) 180 CLR 520. The decision has been criticised as limited (see R Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd edn, Thomson Reuters, at [27-58] n155), and its impact on defamation law since 1997 has been slight. It is not possible to deal with the complexities of this defence in this overview of defamation law. Briefly stated, the decision is a hybrid of common law and statutory qualified privilege, with a more stringent test of reasonableness than statutory qualified privilege. The defence has, for most practical purposes, been superseded by the s 30 defence, and probably now the s 29A defence as well. For a detailed analysis, see P Applegarth, "Distorting the Law of Defamation" (2011) 30(1) *University of Queensland Law Journal* 99-117.

   The availability of a defence of qualified privilege at common law for statements made in election campaigns is limited to pending elections: *Marshall v Megna* [2013] NSWCA 30. There is no independent third category of qualified privilege falling outside the ambit of "election cases" and the *Lange* defence in respect of which the requirement of reasonableness is dispensed with: *Marshall* at [120] per Beazley JA; see also Tobin & Sexton at [14,025].

7. **Consent:** This rarely used defence, which requires the defendant to prove the plaintiff consented to the publication being made, has been successful in two actions in Australia: *Austen v Ansett Transport Industries (Operations) Pty Ltd* [1993] FCA 403; *Dudzinski v Kellow* (1999) 47 IPR 333; [1999] FCA 390; *Dudzinski v Kellow* [1999] FCA 1264; cf *Frew v John Fairfax Publications Pty Ltd* [2004] VSC 311. See R Brown, above, Ch 11.

Summary judgment applications

Summary judgment applications may be brought by the defendant in certain limited circumstances:

- if the plaintiff is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act*, s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, or in relation to statements made concerning court proceedings (*Cumberland v Clark* (1996) 39 NSWLR 514 at 518–521), in Parliament (*Della Bosca v Arena* [1999] NSWSC 1057), or under the amendments in the *Defamation Amendment Act 2023* which extends absolute privilege for publications in NSW to the police and certain statutory bodies;

- where the proceedings may be struck out as an abuse of process; for example, where other proceedings have been brought for the same publication: *Bracks v Smyth-Kirk* [2009] NSWCA 401. Leave to commence proceedings under s 23 may be granted retrospectively: *Carey v Australian Broadcasting Corp* (2012) 84 NSWLR 90;
- where issues of proportionality (*Bleyer v Google Inc* (2014) 88 NSWLR 670) or a failure to meet the minimum threshold of seriousness (*Kostov v Nationwide News Pty Ltd* (2018) NSWLR 1073) arise. This is a controversial area of the law, as these doctrines have yet to receive appellate confirmation; or
- the early determination of "serious harm" set out in s 10A for publications to which the 2021 amendments apply. This has rapidly become the most common application for summary disposal of proceedings.

Summary judgment applications brought on the basis that the claim is trivial, successful in the UK, have also been brought in NSW but without success: *Barach v University of NSW* [2011] NSWSC 431; *Bristow v Adams* [2012] NSWCA 166 at [41], as well as in other jurisdictions: *Lazarus v Azize* [2015] ACTSC 344; *Asmar v Fontana* [2018] VSC 382. In *Bleyer v Google Inc* (2014) 88 NSWLR 670, McCallum J permanently stayed proceedings pursuant to UCPR r 12.7 and CPA s 67 where the publication was limited, the defences strong and enforcement in the United States unlikely. Nevertheless, pleadings which are clearly hopeless may be dismissed summarily: *McGrane v Channel Seven Brisbane Pty Ltd* [2012] QSC 133; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850 at [28]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [101]–[103]; *Trkilja v Dobrijevic (No 2)* [2014] VSC 594.

The Reply

If a plaintiff intends to meet any defamation defence either by alleging malice or by relying upon any other matter that would defeat the defence, this must be pleaded in a Reply containing the particulars set out in UCPR rr 15.1 and 15.31, these being the facts, matters and circumstances relied upon by the plaintiff to establish the allegations or matters of defeasance: see Tobin & Sexton at [18,001]–[18,060] and [25,225]. The onus of proof lies upon the defendant to establish matters relevant to the defences, such as qualified privilege, but once these elements have been established, the burden of establishing malice lies on the plaintiff, not upon the defendant: *Dillon v Cush* [2010] NSWCA 165 at [63]–[67].

Other pleadings

- **Claims for indemnity between defendants or against third parties:** Defendants may bring claims under the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) for contribution or indemnity against each other or against a third party.
- **Cross claims:** Claims for defamation have been brought as a cross-claim to a claim for misleading and deceptive conduct (*Madden v Seafolly Pty Ltd* [2014] FCFCA 30) and infringement of copyright (*Boyapati v Rockefeller Management Corp* (2008) 77 IPR 251 as well as to a claim for defamation (*Greinert v Booker* [2018] NSWSC 1194).
- **Discovery and interrogatories:** The principal difference between discovery and interrogatories in defamation action is that more than 30 interrogatories may be administered: *Lewis v Page* (unrep, 19/7/89, NSWSC). This allows for a number of commonly used interrogatories to be administered as to the defences, see [5-4040] below.

[5-4020] Applications to amend or to strike out pleadings and other pre-trial issues

Last reviewed: June 2024

Applications to amend or strike out portions of the pleadings in defamation actions occur most commonly at two stages. The first is at the commencement of the litigation. Applications for rulings

at this stage usually consist of challenges to the form and capacity of the plaintiff's imputations and, after the defence has been filed, if contextual truth is pleaded, an application by the plaintiff either to strike out or to plead back contextual imputations: *McMahon v John Fairfax Publications Pty Ltd (No 3)* [2012] NSWSC 196. Applications to strike out proceedings commenced after the one-year limitation period are generally brought at the commencement of the proceedings rather than at the trial. The most common applications brought at the commencement of proceedings are for the early determination of the threshold issue of serious harm and applications to strike out proceedings by reason of asserted defects in the concerns notice and statement of claim in particularising serious harm.

Applications for amendment of pleadings are often brought shortly before the trial: *Lee v Keddie* [2011] NSWCA 2; *Murdoch v Private Media Pty Ltd (No 4)* [2023] FCA 114 at [31] and [53] (trial date vacated due to plaintiff's counsel's "mistakes"); *McMahon v John Fairfax Publications Pty Ltd* [2011] NSWSC 485. They may also be brought during (*TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682 at 695; *Ainsworth v Burden* [2005] NSWCA 174 at [51]), or even after the trial: *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [52]ff. Where the result of amendment would be to adjourn or delay the trial, these applications are often refused: *Lee v Keddie*.

[5-4030] Applications to amend or to strike out imputations

Last reviewed: December 2024

When a judge makes orders striking out imputations, pleadings, or a cause of action, reasons should be given: *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWCA 6 at [102]. Imputations may achieve a greater importance in document drafting as a result of the requirement, for claims brought under the amended legislation, that the imputations to be relied upon must be set out in the concerns notice: s 12A(1)(a)(iii); s 12B(2)(b); *Selkirk v Wyatt* [2024] FCAFC 48.

Imputations pleaded by parties fall into three categories: those pleaded by the plaintiff, those pleaded by the defendant pursuant to s 26 *Defamation Act*, and "*Hore-Lacy*" imputations: *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; *Besser v Kermode* (2011) 81 NSWLR 157 at [56].

There were many judgments concerning form and capacity of imputations in NSW after the procedure first became widespread in the late 1970s. This is because, prior to the UDA, the imputations (and not the publications from which they were derived) were the cause of action: *Defamation Act 1974* s 9. An amendment to the *Defamation Act 1974*, s 7A, in 1994, restricted the jury's role essentially to this issue only. This led to many "perverse" or unreasonable verdicts in the NSW Supreme Court. The UDA accordingly abandoned the concept of a cause of action based on the pleaded imputations; the cause of action is the publication. Applications to strike out imputations are increasingly rarely made, and NSW decisions on these issues prior to the UDA need to be read with some caution as a result.

The principles to follow on capacity issues are those set out by the High Court in *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716, where the court (in particular Kirby J at [20]–[22]) warned against "excessive refinement" in relation to pleading imputations. The High Court essentially restated these principles in *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

The relevant principles in relation to challenges to the plaintiff's imputations may be summarised as follows:

1. Imputations may be challenged on three bases: "capacity" (whether the imputation is conveyed); form; and defamatory meaning.
2. The correct approach to determining issues of capacity is set out in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164–167, *Griffith v John Fairfax Publications Pty Ltd* [2004] NSWCA 300 at [19]–[20] and *Favell v Queensland Newspapers Pty Ltd*, above. In *Hue v The Vietnamese Herald* [2009] NSWSC 1292 at [9], McCallum J

summarised the principle very simply as being "whether the meaning contended for is reasonably capable of being conveyed by the matter complained of", noting the statement in *Favell* at [17] that the question is ultimately what a jury could properly make of the imputation. The High Court stated:

> Such a step is not to be undertaken lightly but only, it has been said, with great caution. In the end, however, it depends on the degree of assurance with which the requisite conclusion is or can be arrived at. The fact that reasonable minds may possibly differ about whether or not the material is capable of defamatory meaning is a strong, perhaps an insuperable, reason for not exercising the discretion to strike out: *Favell v Queensland Newspapers Pty Ltd* [2004] QCA 135; *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at [6].

3. Issues of the proper form of imputations, like capacity, are questions of practical justice rather than philology: *Drummoyne Municipal Council v Australian Broadcasting Corp* (1991) 21 NSWLR 135 at 137 per Gleeson CJ; see also *Gant v The Age Co Ltd* [2011] VSC 169 at [40]. Objections commonly raised are that the words in the imputation offend some principle of grammar or meaning by being ambiguous or a "weasel word". If the word used is slang which is not widely known, the imputation may require an alternative true innuendo pleading: *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161 ("bent").
4. An imputation is defamatory, according to the most commonly applied test, if the words tend to lower the plaintiff in the estimation of right-thinking members of society generally: *Sim v Stretch* [1936] 2 All ER 1237; *Radio 2UE Sydney Pty Ltd v Chesterton*, above, at [3]–[7]. Courts should be slow to find that an imputation is not defamatory, or that the bane is outweighed by the antidote (*Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749), as these are quintessentially matters for the tribunal of fact.
5. Similar principles apply to challenges to the form and capacity of the defendant's imputations.

[5-4040] Other interlocutory applications

Last reviewed: December 2024

Other pre-trial applications range from urgent applications for an interlocutory injunction, to arguments unique to defamation law (such as so-called "strike in" applications) to arguments common to other causes of action, such as disputes about the adequacy of discovery or answers to interrogatories.

1. **Discovery before action:** Where a plaintiff seeks preliminary discovery to enable proceedings to be commenced, an application may be brought under UCPR r 5.2(2)(a). There is, however, a rule of practice that both during the process of discovery and in pre-discovery proceedings, a media defendant will not be required to disclose the sources for the matter complained of if those sources provided information to the media defendant on conditions of confidentiality ("the newspaper rule"): *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 (the *Newspaper Rule* case); *Guide Dog Owners' & Friends' Association v Herald & Weekly Times* [1990] VR 451.The principles are set out by McColl JA in *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506 at [46]–[52]. Proceedings should not already be on foot: *Nine Network Australia Pty Ltd v Ajaka* [2022] NSWCA 91.
2. **Interlocutory injunction:** The circumstances in which an interlocutory injunction will be granted in defamation actions are rare as, in addition to the barriers faced by litigants in other causes of action (*American Cyanamid v Ethicon Ltd* [1975] AC 396), a plaintiff in defamation proceedings faces the additional hurdle of balancing the asserted damage to his reputation with the defendant's entitlement to freedom of speech: *Church of Scientology of California Inc v Readers Digest Services Pty Ltd* [1980] 1 NSWLR 344; see also *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57. Justice Heydon, in the latter case, in dissent, said that the effect of the majority's decision was that "as a practical matter no plaintiff is ever likely

to succeed in an application against a mass media defendant for an interlocutory injunction to restrain publication of defamatory material on a matter of public interest, however strong the plaintiff's case, however feeble the defences and however damaging the defamation": at [170]. The relevant principles are discussed in Tobin & Sexton at [23,001]–[23,037] and in George at 39.2. Such applications are generally brought in the Supreme Court, although the District Court's jurisdiction would permit the making of ancillary interlocutory orders.

Interlocutory injunctions may become more common as defamation actions increasingly reflect privacy concerns: D Rolph, "Irreconcilable Differences? Interlocutory injunctions for defamation and privacy" (2012) 17 *Media and Arts Law Review* 170-200; George at 14.7. Actions for breach of privacy in England (a cause of action not available in Australia) are a fertile source for such applications; actions for breach of privacy now outnumber defamation actions: see International Forum for Responsible Media, *Inforrm Blog*, Table of Media Law cases, accessed 20 November 2019.

3. **Discovery, interrogatories and challenges to pleadings:** While the same principles applicable to discovery in civil litigation generally apply to defamation, failure to provide full discovery may have serious consequences: *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264; *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523. A defendant may not, however, insist upon discovery prior to providing particulars of justification which make the documents sought relevant: see the cases discussed in Tobin & Sexton at [25,230].

   Topics upon which interrogatories may be administered by the plaintiff include specific admissions in relation to publication, identification (if the plaintiff is not named), intention to convey the imputations, the extent of publication and readership, inquiries prior to publication, belief in the truth of the imputations and failure to apologise: *Clarke v Ainsworth* (1996) 40 NSWLR 463. The topics about which a defendant may interrogate include "reaction" (*Kermode v Fairfax Media Publications (No 2)* [2011] NSWSC 646 at [27]–[29]), injury to reputation, in the form helpfully set out by Hunt J in *Assaf v Skalkos* (1995) A Def R 52-050, and the plaintiff's belief as to falsity: *Clout v Jones* [2011] NSWSC 1430. More than 30 interrogatories may be administered: *Lewis v Page* (unrep, 19/7/89, NSWSC).

   Applications to strike out defences, and in particular the defence of justification, have been granted in a number of actions in the Federal Court: see for example *ABC v Chau Chak Wing* (2019) 271 FCR 632.

4. **Jury-related applications:** Jury trials are increasingly rare in Australia. Where one party has requisitioned a jury, the opposing party may challenge the requisition. The most common grounds are that the correct procedure for requisitioning a jury has not been followed (*Bristow v Adams* (2010) 10 DCLR (NSW) 261) or where it is asserted the grounds set out in *Defamation Ac*t, s 21 are relied upon: *Ange v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1200. The CPA does not confer power on the court to dispense with a jury by the court's own motion: *(Channel Seven Pty Ltd v Fierravanti-Wells* (2011) 81 NSWLR 315 at [94]).

5. **Non-publication orders:** Applications for injunctive relief may be accompanied by an application for a non-publication order, such as the anonymisation of the parties' names (*W v M* [2009] NSWSC 1084) and/or for the proceedings to be conducted in the absence of the public: *AMI Aus Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1290. See [1-0400]ff.

6. **Strike-in applications:** The plaintiff must plead the defamatory words and any other words capable of materially altering the meaning of the matter complained of. Determining the context of the publication may be difficult if it is, for example, one of a series of publications separated by time, or space, such as book instalments (*Burrows v Knightley* (1987) 10 NSWLR 651), or if the plaintiff has sued on part only of a broadcast: *Gordon v Amalgamated Television Services Pty Ltd* [1980] 2 NSWLR 410 at 413–415; *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605 at [26]. An application may be made to "strike out" portions of a matter

complained of if the plaintiff has included material that is arguably a separate publication or (more commonly) to "strike in" portions of a publication which have been excluded by the plaintiff.

The most common "strike in" issue is the role of the hyperlink: *Crookes v Wikimedia Foundation Inc* (2011) SCC 47 (Supreme Court of Canada); Collins at [3.11]ff; [5.29]–[5.34]; see also *Google LLC v Defteros* (2022) 277 CLR 358.

7. **Summary judgment applications:** See [5-4010]. The most common of these are now applications for proceedings to be dismissed due to failure to file a conforming concerns notice (ss 12A and 12B UDA) and for the determination of serious harm (s 10A UDA). These fall into the following categories:
   (i) Failure to serve a concerns notice prior to proceedings resulted in dismissal in *Cavar v Campbelltown Catholic Club Ltd (No 2)* [2023] NSWSC 1272 at [96]; *Heaven Builders Pty Ltd v Moustafa* [2023] ACTMC 27; *Hooper v Catholic Family Services t/a Centacare Catholic Family Services* [2023] FedCFamC2G 323 and *Bailey v McCrae & Ors (Civil Dispute)* [2023] ACAT 51.
   (ii) Where notice is given but is defective in form or content, that may result in summary dismissal (*Supaphien v Chaiyabarn* [2023] ACTSC 240) or, if it occurs at trial, dismissal of the proceedings, which can give rise to limitation and s 23 UDA issues (*Khan v Hassan (Ruling No 3)* [2023] VCC 2243).
   (iii) An application for early determination of serious harm may be refused where the issue is more appropriately dealt with at trial: *GRC Project Pty Ltd t/a GRC Property Management v Lai* [2023] NSWDC 63 (serious slanders in Chinese unsuitable for separate ruling). The court may of its own motion direct a s 10A hearing or, if such an order has been made, revoke it: *Qu v Wilks* [2023] VSCA 198.
8. **Transfer of proceedings to another court:** Applications to transfer proceedings to another jurisdiction proceed on the same bases as applications in other actions. In *Crosby v Kelly* (2012) 203 FCR 451 the Full Court of the Federal Court held that *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 9(3) created a surrogate Commonwealth law by reference to the jurisdiction of the ACT Supreme Court, thereby conferring jurisdiction to hear defamation actions on Commonwealth courts. However, where there is no single justiciable controversy (and thus no accrued jurisdiction) the court may sever the defamation claim: *Caughey v Peckham (No 3)* [2023] FedCFamC1F 618. Transfers between superior and inferior courts may also occur as a result of court management. In *Do v Kolsumdet Pty Ltd* [2023] FCA 592, Bromwich J determined of his own motion that the proceedings were unsuitable for the Federal Court and should be transferred to the Federal Circuit Court.

[5-4050] Limitation issues

When the UDA was enacted, all jurisdictions amended their limitation statutes to provide that a cause of action was not maintainable if brought after the end of the limitation period (one year) from the date of publication of the matter complained of: *Limitation Act 1969* s 14B. An extension of up to three years may be granted, but the test (that the plaintiff must demonstrate that it was not reasonable to have commenced an action within the one year period from date of publication) has been called a "difficult hurdle": *Rayney v State of Western Australia (No 3)* [2010] WASC 83 at [41].

The test of unreasonableness was a difficult one to satisfy; in *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, the court (by majority) considered that negotiations for an offer of amends (where the plaintiff contended it was not reasonable to start proceedings which would imperil these negotiations) was an insufficient ground.

There have been changes to the limitation statutes as a result of the reforms to the Model Defamation Provisions, which came into effect in NSW on 1 July 2021, following the

commencement of the *Defamation Amendment Act 2020*. The limitation period remains one year under the *Limitation Act 1969*, s 14B but the test for extending the limitation period for up to three years under the *Limitation Act 1969* (NSW) s 56A has been altered to confer a discretion on the court to grant the extension where the court is satisfied that it is just and reasonable to do so. As to the relevant considerations for the exercise of this discretion, see *Limitation Act 1969* s 56A(3).

Prior to 1 July 2021, there was no "single publication" rule in NSW. The effect of this was that every communication of defamatory matter created a separate cause of action, with the limitation period running for each cause of action. The *Limitation Act 1969* s 14C now creates a "single publication" rule, providing that the limitation period for subsequent publication of similar matter by the same publisher or an associate will run from the time of first publication.

[5-4060] Conduct of the trial (judge sitting alone)

Last reviewed: June 2024

Where the parties have not requisitioned a jury, the trial judge will determine all issues of fact and law. In such cases, a separate hearing as to damages is not necessary.

The role of the judge during the trial

Due to the complexity of defamation trials, judges used to play an active role in both jury and non-jury trials, by putting questions to witnesses, pointing out *Brown v Dunn* problems (*Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219) or limiting address time in accordance with the principles discussed in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15. While this is still the case in other common law jurisdictions (Brown, [17.2(3)(a)]), this may not be the case in NSW: *Lee v Cha* [2008] NSWCA 13.

Many of the applications that parties make during a trial occur whether a jury is empanelled or not; for convenience, applications which mainly relate to the jury's role are set out in a separate section below. The following are examples of rulings which may be sought in a judge-alone trial:

- **No case submission:** where the claim is clearly hopeless, an application may be made during the trial for the whole case to be struck out: *Wijayaweera v St Gobain Abrasives Ltd (No 2)* [2012] FCA 98 (note that this application proceeds on different principles to those applicable to an application to take a defence or the whole action from the jury; see [5-4070] below);
- **Reputation:** the plaintiff may seek to lead evidence about good reputation (*Mizikovsky v Queensland Television Ltd (No 3)* [2011] QSC 375) and/or the defendant about bad reputation: Tobin & Sexton at [26,575]. The entitlement of a defendant to lead evidence of bad reputation as a serious harm issue is explained in *Selkirk v Wyatt* [2024] FCAFC 48.
- **Special damage:** evidence, including expert evidence, may be led, in the same manner as in other causes of action: Tobin & Sexton at [26,555];
- **Splitting/inverting the case:** see Tobin & Sexton at [26,568]; *French v Triple M Melbourne Pty Ltd (Ruling No 2)* [2008] VSC 548;
- **After the judgment:** in rare cases, an application may be made to the court to correct an error or oversight. In *Duma v Fairfax Media Publications Pty Limited (No 4)* [2023] FCA 159, the trial judge reduced the damages awarded from $545,000 to $465,000 by reason of having overlooked evidence about the mitigating impact of an award of damages against another defendant.

[5-4070] Additional matters for conduct of the trial before a jury

Last reviewed: June 2024

Delineation of the role of judge and jury

The jury determines whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established: s 22(2). However, if an issue relating to defences is dealt with by the judge, rather than the jury, at general law, this continues to

be the case under the *Defamation Act 2005*: s 22(5)(b). It is for the judge, however, to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount: s 22(3). Section 10A(4) of the *Defamation Act* specifically grants the court (and not the jury) power to determine serious harm.

Empanelling the jury

Defamation Act s 21 provides that either the plaintiff or the defendant may elect for proceedings to be tried by a jury. The procedure for requisitioning a jury, and payment of the fee, is set out in UCPR rr 29.2 and 29.2A. The number of jurors is four, not 12 as in criminal trials. An application for a jury of 12 instead of four may be made: *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148. See *Jury Act 1977* (NSW) s 20. The procedure for empanelment is similar to that in a criminal jury trial. Each party has two challenges.

Judge's opening remarks to the jury

The opening remarks that a judge makes in a defamation jury trial are similar to those made in criminal trials. It may be appropriate to raise with counsel whether to give a *Skaf* direction: *R v Skaf* (2004) 60 NSWLR 86; see *Dehsabzi v John Fairfax Publications Pty Ltd (No 4)* (2008) 8 DCLR (NSW) 175.

The questions to go to the jury

The jury is required to answer specific questions as to whether the imputations pleaded are conveyed, whether the imputations are defamatory, and disputed issues of fact relevant for the determination of the defence: *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511.

The questions are drafted by the parties. Any disputes about the questions which the jury must answer should be formulated and ruled upon by the trial judge, preferably before the trial has started.

Opening and closing addresses of counsel

While each party must be given reasonable time to address the jury the judge may take into account the temporal restraints of the trial: *Keramianakis v Regional Publishers Pty Ltd* (2007) 70 NSWLR 395.

Applications to discharge the jury during the trial

Applications to discharge the jury are commonly made, but rarely granted. The most common bases for such an application are:

- inflammatory language by counsel (*Lever v Murray* (unrep, 5/11/92, NSWCA));
- cross-examination outside the case as particularised (*Antoniadis v TCN Channel Nine Pty Ltd* (unrep, 3/3/97, NSWSC));
- misstatements by counsel as to the law (*Lee v Cha* [2005] NSWCA 279; *Lee v Cha* [2006] HCATrans 132).

Separate ruling on imputation meanings

The trial judge may rule on imputations before the trial commences. An application by the defendants for the jury to retire before evidence being led, to consider the meaning of the plaintiff's imputations, was refused in *Ouda v Hunter (No 2)* [2023] VSC 384.

Delays during the trial

Adjournments due to unavailability of witnesses during a civil trial are dealt with on different principles to that of a criminal trial and are matters for the discretion of the judge: *Turner v Meryweather* (1849) 7 CB 251; *Singleton v Ffrench* (1986) 5 NSWLR 425.

Application to take a defence away from the jury

On an application by a party, the trial judge may take a defence (*Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 632) or the whole case (*Barbaro v Amalgamated Television Services Pty Ltd* (1989) 20 NSWLR 493) from the jury.

When a submission is made that an issue or a defence should be withdrawn from the jury, it is the trial judge's duty to determine whether there is any evidence on which the jury could reasonably find that the party opposing the motion has made out a case on the balance of probabilities. The judge has regard to the evidence favouring the party opposing the motion and disregards the evidence of the proponent of the motion: *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 47 per Clarke JA.

Summing up by the judge to the jury

It is the trial judge's duty to instruct on all issues raised by the pleadings and evidence, in an orderly and precise way, correctly stating the applicable law and how that law is to be applied: Brown at [17.2(2)(c)(v)]; *Singleton v Ffrench* (1986) 5 NSWLR 425. A helpful outline of what the trial judge should cover is set out by Lord Bingham of Cornhill CJ in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 961. A pro forma summing up for a jury in a civil trial is set out in this Bench Book at [3-0030].

It is acceptable for the trial judge to emphasise particular arguments by one side or to take such other steps as are necessary to maintain a reasonable equilibrium in the way in which issues go to the jury: *Illawarra Newspapers Pty Ltd v Butler* [1981] 2 NSWLR 502 at 509 per Samuels JA. While judges express opinions in other common law jurisdictions (Brown [17.2(3)(d)], and formerly did so in Australia (*Jackson v Brennan* (1911) 13 WALR 121; *Cunningham v Ryan* (1919) 27 CLR 294; *Seymour v Australian Broadcasting Corp* (1990) 19 NSWLR 219 at 225 per Glass JA), judges should be cautious about expressing views at any stage of the trial: *Channel Seven Sydney Pty Ltd v Mohammed* (2008) 70 NSWLR 669.

Any objection to the judge's summing up must identify the points of law or questions of fact with precision: *Buck v Jones* [2002] NSWCA 8.

The jury determines all disputed issues of fact (*Morgan v John Fairfax & Sons Ltd* (1988) 13 NSWLR 208) and not issues of law: *Singleton v Ffrench*, above.

The jury verdict

Where a jury is deadlocked, consideration may be given to giving a *Black* direction: *Criminal Trial Courts Bench Book*, 2nd ed, 2002 at [8-060]. A majority verdict may be taken: *Morgan v John Fairfax & Son Pty Ltd* (1990) 20 NSWLR 511.

If the jury, in answers to questions, has given answers which appear to indicate misunderstanding, the judge is entitled to question them and to give them an opportunity to amend the answers: *Australian Broadcasting Corp v Reading* [2004] NSWCA 411 at [111]. Where a jury verdict is asserted to be perverse, an application to set the verdict aside may be made. The procedure is set out in *Hall v Swan* [2009] NSWCA 371, one of a series of "perverse" Supreme Court s 7A jury verdicts. Apart from these s 7A verdicts, "perverse" or unreasonable verdicts in defamation are rare.

[5-4080] Common evidence problems

Last reviewed: June 2024

Rulings on evidence, such as the admissibility of business records, applications for exclusion or limitation of evidence pursuant to *Evidence Act 1995* s 135 and issues of credit, generally proceed in the same manner as other civil trials, whether there is a jury or not. Some common problems in jury trials are:

- tender of a transcript of the matter complained of where it is a television or radio broadcast: *Foreign Media Pty Ltd v Konstantinidis* [2003] NSWCA 161 at [17]–[18] (foreign language publication); *Nuclear Utility Technology & Environmental Corporation Inc (Nu-Tec) v Australian Broadcasting Corporation* [2010] NSWSC 711;
- cross-examination outside the particulars, which may lead to an application to discharge the jury (*TCN Channel Nine Pty Ltd v Antoniadis* (1998) 44 NSWLR 682);

- admissibility of a criminal history, which is permissible under *Defamation Act*, s 42 for convictions;
- whether the jury should hear evidence relevant only to the issue of damages, although damages are an issue for the trial judge (s 22(3)): *Greig v WIN Television Pty Ltd* [2009] NSWSC 876 at [10]–[12] (jury permitted to hear this evidence);
- tendency, credit and s 135 issues: *Blomfield v Nationwide News Pty Ltd* [2009] NSWSC 977 at 978, 979;
- preservation of ephemeral records, such as social media: a notation may be sought by a party requesting that social media or electronic records be kept pending the trial, see for example, *Cavric v Nationwide News Pty Ltd* [2015] NSWDC 107.

Directions may be made that the judgments are not published until after the jury has completed its role in the trial: *McMahon v John Fairfax Publications Pty Ltd* [2012] NSWSC 196 at 197,198.

[5-4090] Damages

Last reviewed: June 2024

The assessment of damages is an issue for the judge, whether or not a jury has been empanelled for the liability section of the trial: *Defamation Act*, s 22(3).

In those jurisdictions which have passed the Stage 1 reforms, s 35 imposes a cap (a hard cap for actions after 1/7/2021) on damages that can be awarded in "defamation proceedings" ($250,000 as at 1 January 2006, which is revised on 1 July of each year in accordance with the provisions of s 35(3); see the table in Tobin & Sexton at [20,100] for the current maximum figure). The maximum amount of damages for non-economic loss is only to be awarded in the most serious case: s 35(2). The cap applies to an award in particular proceedings, whether or not there are multiple causes of action: *Davis v Nationwide News Pty Ltd* (2008) 71 NSWLR 606. It is unresolved whether the cap applied separately to each plaintiff in proceedings with multiple plaintiffs.

Damage was presumed, under the legislation prior to 1/7/2021, once the publication of defamatory matter and serious harm resulting from the publication had been proved. That is no longer the case: *Selkirk v Wyatt* [2024] FCAFC 48.

The relevant heads include vindication (Tobin & Sexton at [20,020]), injury to feelings and to reputation (Tobin & Sexton at [20,025]), and consolation. The principles for compensatory damages are comprehensively reviewed by Tobin & Sexton at [21,001]–[21,180] and by George, ch 31–38. The plaintiff may claim special or aggravated compensatory damages, but exemplary damages are not available for publications where the place of publication is within the States and territories of Australia: Tobin & Sexton at [22,180].

[5-4095] Aggravated compensatory damages

Last reviewed: June 2024

Aggravated compensatory damages (Tobin & Sexton at [22,001]–[22,210]; George, ch 33) must be the subject of pleading and particulars, and generally are claimed in relation to the conduct of the defendant at the time of publication, the mode and extent of publication, failure to apologise and retract, and the conduct of the litigation by the defendant (the most common basis for which is an unsuccessful claim of justification by a defendant).

As with aggravation of damages, the factors upon which a defendant may rely on the issue of mitigation of damages are many and various: Tobin & Sexton at [22,110]–[22,145]. The most

common include partial success of a defence of justification (*Cerutti v Crestside Pty Ltd*, above) or contextual truth (*Holt v TCN Channel Nine Pty Ltd* (2012) 82 NSWLR 293; affirmed *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96), the proffer of an apology, or the award of damages for another publication having the same meaning or effect as the matter complained of: *Defamation Act* s 38.

The relationship between the cap of ordinary compensatory damages and aggravated compensatory damages under the *Defamation Act 2005* s 35 and the analogous provision in the other States and territories was controversial.

In *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 John Dixon J considered that the language of s 35 made it clear that, once the court was satisfied that an award of aggravated damages should be made in excess of the cap, the cap on damages no longer applied. The same approach was taken in *Rayney v The State of WA (No 9)* [2017] WASC 367 and was confirmed on appeal in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154, as is noted in *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201.

As noted above, from 1/7/2021, following the commencement of the *Defamation Amendment Act 2020*, a different approach to the assessment of aggravated damages now applies in jurisdictions where these amendments impose a hard cap. An award of ordinary compensatory damages can only be made up to the statutory cap on damages for non-economic loss: s 35(1)–(2).

If the court is satisfied that an award of aggravated damages should be made under the amended legislation, it may do so but must assess aggravated damages as a separate head of damages from ordinary compensatory damages: s 35(2B); *Doak v Birks* [2022] NSWDC 625 at [113]–[130]. This is so whether or not the award of aggravated damages would exceed the cap on damages for non-economic loss. The approach under statute to the assessment of aggravated damages differs from the approach at common law. Conventionally, at common law, damages for ordinary and aggravated compensatory damages were assessed together.

[5-4096] Special damages and injury to health

Claims for special damages in defamation may be brought where it is asserted that the publication of the matter complained of results in actual loss: see Tobin & Sexton at [21,165]. The range of losses may be quite far-reaching, such as the cost of making films to combat the negative publicity engendered by the defamatory publication (*Comalco Ltd v ABC* (1985) 64 ACTR 1; *ABC v Comalco Ltd* (1986) 12 FCR 510) or the loss of film roles for an actress: *Wilson v Bauer Media Pty Ltd* [2017] VSC 521. Such a claim requires specific pleading and is generally supported by expert evidence. Such a claim differs from an "Andrews" claim (*Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225) for general loss of business, which is generally only supported by particulars and discovery: see Tobin & Sexton at [21,175].

Claims for damages for injury to health are rare: see Tobin & Sexton at [21,145]; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [77]–[78].

[5-4097] Derisory damages and mitigation of damages

Last reviewed: June 2024

While injury to reputation is presumed, even in relation to the most anodyne or limited publication, the circumstances of the publication may be such that only nominal damages should be awarded: *Beaven v Fink* [2009] NSWDC 218 (damages of $2,500 for slander to one person). Such awards are generally described as "nominal" (*Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57 per Gleeson CJ and Crennan J at [19]) or "derisory" awards: *Holt v TCN Channel Nine Pty Ltd (No 2)* (2012) 82 NSWLR 293 per Adamson J at [9]. The most celebrated of these very small awards was

the farthing damages award to the plaintiff in the litigation arising from the portion of Leon Uris's book, *Exodus*, Doubleday & Co, 1958, concerning the alleged conduct of experiments by a doctor in concentration camps during the Holocaust: *Dering v Uris* [1964] 2 All ER 660; [1964] 2 WLR 1298 (see *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 at [983]). An even smaller award (nil damages) was challenged in *Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* (2022) 109 NSWLR 468, but Leeming JA (Simpson AJA and Mitchelmore JA concurring) at [282]–[285] considered an award of nil damages (made contingently by the first instance judge) to be not only possible but appropriate on the facts of the case.

Where a defendant has been successful in a defence of partial justification, the damages may be significantly reduced: *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96; [2014] NSWCA 90 (award of $5,000). The question of mitigation of damages may also arise where there has been partial success in a defence of justification: *Holt v TCN Channel Nine Pty Ltd*, above, at [32]; see *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282; [1988] 1 WLR 116 at 120. Tobin & Sexton at [21,087] note the question of whether adverse findings as to a plaintiff's credit may be taken into account is a question that cannot be considered closed, despite the NSWCA considering that such evidence was irrelevant in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.

[5-4098] Evidence of bad — and good — reputation

While evidence of bad reputation in the relevant sector of reputation may be given, courts have declined to permit evidence of specific acts of bad reputation to be pleaded where there is no plea of justification: see Tobin & Sexton [21,050]. The defendant is limited to particulars of general bad reputation, which must be given before trial: see Tobin & Sexton [21,055]–[21,080]. Evidence of prior criminal convictions may be given, but only if such particulars are given before trial: see Tobin & Sexton [21,090].

While it is not necessary for a plaintiff to lead evidence of good reputation, it is common to do so: see Tobin & Sexton [21,085].

[5-4099] Range of damages in defamation actions under the uniform legislation

Last reviewed: June 2024

The three most controversial features of defamation are the large number of actions commenced (proportionate to the population), the size of damages awards and the escalating legal costs. Legislative reform aimed at reducing the number of small claims by the introduction of a serious harm test (s 10A) and restoring the hard cap were introduced in response to these concerns.

Defamation damages awards have increased under the UDA for a number of reasons. The first is the increase in the cap in excess of the consumer price index: J Cashen, "Defamation cap rising well above inflation", *Gazette of Law and Journalism*, 10/12/2014. The second is the change in judicial interpretation of the role of the cap on general damages from being a ceiling (*Attrill v Christie* [2007] NSWSC 1386) to being merely an indication of the top amount that can be awarded: *Cripps v Vakras* [2015] VSCA 193 per Kyrou J at [603]–[608]; *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 per McCallum J at [127]; *Sheales v The Age Co Ltd* [2017] VSC 380 per John Dixon J at [70]. The third has been the interpretation of the "hard cap" as no longer applying if aggravated damages are awarded, as well as the bringing of substantial claims for special damages: *Wilson v Bauer Media Pty Ltd*, above ($3,917,472 awarded to actress for loss of opportunity; set aside on appeal in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674); *Rayney v The State of WA (No 9)* [2017] WASC 367 ($1.777 million awarded to barrister for loss of work; see also *Rayney v The State of WA* [2022] WASCA 44). The fourth is forum shopping for courts where the absence of jury trials and case management make it easier for inexperienced parties to conduct the proceedings.

[5-4100] Costs

Last reviewed: June 2024

The "unique aspects" of defamation actions (G Dal Pont, *Law of Costs*, 3rd edn, at [12.21]) have resulted in special costs provisions designed to promote settlement. Section 40, modelled on s 40A *Defamation Act 1974* (see *Jones v Sutton (No 2)* [2005] NSWCA 203), provides that in awarding costs, the court has regard to:

- the way in which the parties have conducted the case (including misuse of a party's superior financial position);
- other matters considered relevant: s 40(1).

A significant factor may be whether the failure of a party to "make a settlement offer" or "agree to a settlement offer" (s 40(2)) is reasonable. The definition of "settlement offer" is set out in s 40(3) and, as it means "any" offer to settle, may presumably include invalid offers of compromise or "without prejudice" offers, as well as offers to amend, which are specifically referred to in s 40(3). In *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946 the court considered that the defendant's "walk away" offer (withdrawal of the action on the basis that each pay their own costs) was not reasonable at the time that it was made.

While the court still retains a wide discretion on issues of costs, courts in defamation proceedings have often been reluctant to enforce provisions to impose costs on an unsuccessful party who had prolonged a trial by deliberate false allegations, or continued proceedings where there was obviously no hope of success: Tobin & Sexton at [26,615], citing *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354 and *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534. In *Hyndes v Nationwide News Pty Ltd* [2012] NSWCA 349 the plaintiff lost the case, but did not have to pay indemnity costs despite rejecting six offers, all better than the result. Indemnity costs under s 40 may not apply to appeals because of the inherent difference between first instance and appeal costs: *Ten Group Pty Ltd (No 2) v Cornes* (2012) 114 SASR 106. Costs issues under the UDA take into account the need to promote a speedy and non-litigious method of resolving disputes and avoiding protracted litigation wherever possible: *Davis v Nationwide News Pty Ltd*, above, at [26]; *Haddon v Forsyth (No 2)* [2011] NSWSC 693 at [5].

If only a small amount of damages is awarded, that does not disentitle a plaintiff from an award of costs, although the size of the verdict may be taken into account when considering whether the defendant's failure to make a costs offer was "unreasonable" (s 40): *Holt v TCN Channel Nine Pty Ltd* (2012) 82 NSWLR 293 at [51]–[62] affirmed [2014] NSWCA 90, but cf *Milne v Ell* [2014] NSWCA 407 at [28]–[30]. Almost all Supreme Court verdicts have, in breach of the court's costs rules, fallen below the District Court jurisdiction limit (as counsel for Nationwide News Pty Ltd pointed out in *West v Nationwide News Pty Ltd* [2003] NSWSC 767). Following *West*, defamation proceedings were removed from the category of claims to which this costs rule applied: SCR Pt 52A r 33(1)(v); No 380 of 2003). This exemption has been continued under UCPR Pt 42. Recent decisions of the Federal Court have taken a strong line against the bringing of modest claims in the Federal Court, even where the applicant is a person of high profile such as a Member of Parliament (*Bazzi v Dutton* (2022) 289 FCR 1) and/or the publication is made by a mass media publisher (*Greiss v Seven Network (Operations) Ltd (No 2)* [2024] FCA 98).

[5-4110] Current trends

Last reviewed: December 2024

As noted at the commencement of this chapter, after decades, or indeed centuries, of relative stability, defamation law is currently undergoing profound change. The majority of publications now sued upon are internet or other electronic publications: *North Coast Children's Home Inc (t/as Child and Adolescent Specialist Programs and Accommodation (Caspa)) v Martin (No 2)* [2014] NSWDC 142;

Polias v Ryall [2014] NSWSC 1692; *Wilson v Ferguson* [2015] WASC 15. Social media has had an impact on many aspects of defamation law; for example, in *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674, failure to publish the apology in the newspaper's Twitter account was one of the reasons for the court finding that the offer of amends was inadequate.

The full impact upon defamation law of electronic publication, human rights legislation and privacy rights in other common law jurisdictions such as the United Kingdom, Canada, New Zealand and the United States has yet to be felt in Australia.

While foreign judgments on issues such as hyperlinks have been able to be absorbed (see *Google LLC v Defteros* (2022) 277 CLR 358), Australian courts (*Barach v University of NSW* [2011] NSWSC 431; *Manefield v Child Care NSW* [2010] NSWSC 1420; *Bristow v Adams* [2012] NSWCA 166 at [41]) have, to date, not been prepared to follow or adopt decisions such as *Jameel v Dow Jones & Co Inc* [2005] QB 946 in striking out claims which do not disclose a real and substantial tort, the decision by McCallum J in *Bleyer v Google Inc* (2014) 88 NSWLR 670 not having been taken further.

The impact of privacy law upon defamation law is another area where significant changes to the law are also likely. While a tort of privacy has received some recognition in Australia (*Doe v Australian Broadcasting Corp* [2007] VCC 281; *Grosse v Purvis* (2003) Aust Torts Reports 81-706), some judges, such as Davies J, consider it is still "unclear" whether a tort of privacy exists at common law in Australia (*Chan v Sellwood* [2009] NSWSC 1335 at [37]), although the NSWCA has stated to the contrary: *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364 at [124]; *Maynes v Casey* [2011] NSWCA 156.

On 12/9/2024, the Commonwealth Attorney-General introduced the Privacy and Other Legislation Amendment Bill 2024. The Bill, a response to the *Privacy Act Review Report*, remains before Parliament.

In addition, as the Leveson Inquiry (*The Leveson Inquiry: Culture, Practice and Ethics of the Press* in the UK) and the Finkelstein Report (*Report of the Independent Inquiry into the Media and Media Regulation*, which was reported to the Australian Government on 28/2/2012) have made clear, the increased ease of electronic surveillance has made profound changes to news gathering techniques, resulting in a shift from complaints about false and defamatory publications to complaints of publication of truthful material which should remain private. The impact of electronic publication in general and social media in particular upon causes of action for defamation in the future will be considerable, and the adequacy of the uniform legislation to deal with limitation and proportionality issues will be strongly tested.

More recently, claims of publication of "fake news" reports of a sensational nature have resulted in the seeking of forms of relief other than damages, such as contempt of court (*Doe v Dowling* [2017] NSWSC 1037) or prosecution for a criminal offence: *Brown v Commonwealth DPP* [2016] NSWCA 333 (prosecution under s 474.17 Criminal Code (Cth)).

[5-4220] Further references

Legislation

- *Broadcasting Services Act 1992* (Cth), Sch 5 cll 3, 91 (repealed)
- *Civil Procedure Act 2005*
- Criminal Code (Cth) s 474.17
- *Defamation Act 2005* ss 6(2), 9, 10, 10A, 12A, 12B, 14(2), 15, 16, 17, 18(2), 21, 22(3), 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 38, 40, 42
- *Evidence Act 1995* s 135

- *Health Care Complaints Act 1993* s 96
- *Law Reform (Miscellaneous Provisions) Act 1946*
- *Limitation Act 1969* s 14B
- *Online Safety Act 2021* (Cth) s 235

Rules

- UCPR rr 5.2(2)(a), 14.22, 14.31, 14.32, 14.33, 14.34, 14.35, 14.36, 14.37, 14.38, 14.39, 14.40, 15.1, 15.19, 15.21, 15.22, 15.23, 15.24, 15.25, 15.26, 15.27, 15.28, 15.29, 15.30, 15.31, 29.2, 29.2A, Pt 42

Practice Note

- Federal Court of Australia Defamation Practice Note DEF-1 (commenced 12/11/2019)
- Supreme Court Practice Note No SC CL 4 — Defamation List (commenced 1/7/2021)
- District Court Practice Note No 6 — Defamation List (commenced 3/6/2015)

Further references

Books

- R Brown, *Brown on Defamation* (Canada, United Kingdom, Australia, New Zealand United States), 2nd edn, Carswell, Canada, 1994
- M Collins, *Law of Defamation and the Internet*, 3rd edn, OUP, 2010
- G Dal Pont, *Law of Costs*, 5th edn, LexisNexis, Sydney, 2021
- P George, *Defamation Law in Australia*, 4th edn, LexisNexis, Sydney, 2023
- R Parkes et al, *Gatley on Libel and Slander*, 13th edn, Sweet & Maxwell, London, 2022
- D Rolph, *Defamation Law*, 2nd edn, Thomson Reuters, Sydney, 2024
- T Tobin, M Sexton, J Gibson (Bulletin author), G Corish (editor, LexisNexis), *Australian Defamation Law and Practice*, LexisNexis, Sydney, 1991–
- *Gazette of Law & Journalism* (e-newsletter). There are also e-newsletters in other common law jurisdictions such as *Inforrm* (United Kingdom) and the *Media Law Prof Blog* (United States)

Articles

- J Gibson, "Adapting defamation law reform to online publication" (2018) 22 *MALR* 119
- J Ledda, "The Federal Court and the Uniform Defamation Law: in search of lost purity" (2023) 25 *Media and Arts Law Review* 168
- K Pappalardo and N Suzor, "The liability of Australian online intermediaries" (2018) 40(4) *Sydney Law Review* 469
- D Rolph, "Irreconcilable differences? Interlocutory injunctions for defamation and privacy" (2012) 17 *MALR* 170–200
- D Rolph, "A serious harm threshold for Australian defamation law" (2022) 51 *Australian Bar Review* 185
- C Sewell, "More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013" (2020) 12(1) *Journal of Media Law* 47.

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Possession List

Acknowledgement: the following material has been prepared by the Honourable Justice D Davies of the Supreme Court of New South Wales.

The author gratefully acknowledges the assistance of Peter Johnson SC (formerly a judge of the Supreme Court administering the Possession List), Christopher Bradford, Stephen Dodd, Jack Clifford and Alexandra Baker.

[5-5000] Introduction

Prior to the enactment of the *Supreme Court Act* in 1970, a person not in actual possession of the land but who had an immediate right to obtain possession of the land, brought an action in ejectment. Section 79 of the *Supreme Court Act 1970* replaced the action of ejectment by providing that any person who might have brought such an action could commence proceedings and claim judgment for possession of land and claim such other relief as the matter of the case required. *Civil Procedure Act 2005* s 20 is now the governing provision and it provides that a claim for judgment for possession of land takes the place of a claim in an action for ejectment that could have been brought under the practice of the Supreme Court as it was immediately before 1 July 1972, the date of commencement of the *Supreme Court Act 1970*.[1]

There is a specialist list in the Common Law Division called the Possession List (UCPR r 45.1(1)) and proceedings in which a claim for possession of land is made are to be entered in the Possession List: r 45.4(1). However, that requirement does not apply to proceedings involving a professional negligence claim, being proceedings which have been entered in the Professional Negligence List: r 45.4(2).

Although most claims for possession of land arise from mortgage transactions and defaults thereunder, other types of claims for possession of land regularly appear in the Possession List. These include claims by executors or administrators for possession of property forming part of the estate of a deceased and which is occupied by some other person, claims by trustees in bankruptcy in respect of property forming part of the estate of a bankrupt, claims by trustees for sale appointed under *Conveyancing Act 1919*, s 66G against one or both of the owners of the land (eg *Rambaldi v Woodward* [2012] NSWSC 434 at [45]: cf *Van Oosterum v Van Oosterum* [2011] NSWSC 663), and claims by councils for possession of land in the context of the exercise of a power of sale for unpaid rates: *Harden Shire Council v Richardson* [2012] NSWSC 622.

Because the vast majority of claims result from defaults under mortgages the practices and procedures of the court have been directed to these claims.

The Possession List was the largest specialist list in the court in 2022, during which time 1,059 claims were filed. In 2021, 710 claims were filed. All Possession List cases are assumed to be uncontested at the time of filing, and the majority of claims were disposed either by default judgment for the plaintiff or by administrative dismissal when the plaintiff did not take further steps to progress its claim. Of the 858 disposals in 2022, approximately 6% (54 matters) were contested.

There is one significant group of claims in which possession is sought that may not be brought in the Supreme Court or indeed in the District Court or Local Court. Those are proceedings to recover possession of residential premises subject to a Residential Tenancy Agreement: *Residential Tenancies Act 2010*, s 119. It has been held that the similarly, but not identically, worded predecessor to this section (*Residential Tenancies Act 1987*, s 71) did not deny jurisdiction to the Supreme Court but merely provided tenants or former tenants a defence to such proceedings when commenced in the

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1 See also, s 92 of the CPA provides that judgment for possession of land takes the place of, and, subject to the uniform rules, has the same effect as, a judgment for the claimant in ejectment given under the practice of the Supreme Court as it was immediately before 1 July 1972.

court: *Whiteford v Commonwealth of Australia* (1995) 38 NSWLR 100; *Rossi v Alameddine* [2010] NSWSC 967 at [42]–[44]. For example, by agreement of the parties, the Supreme Court has made declarations as to the continuance or termination of a Residential Tenancy Agreement where it was procedurally expedient to consider the issue in conjunction with the issue of unconscionable conduct under the Australian Consumer Law, with a view to parties entering consent orders in the Civil and Administrative Tribunal consistent with those declarations: see *Aboriginal Housing Company Limited v Kaye-Engel (No 3)* [2014] NSWSC 718; *Aboriginal Housing Company Ltd v Kaye-Engel (No 7)* [2015] NSWSC 1554 at [60]. However, s 81 of the *Residential Tenancies Act 2010* has the result that no order terminating a residential tenancy, and thereby giving possession of the land, can be made by the Supreme Court.

The practice of the Possession List is regulated by Practice Note SC CL 6.

[5-5010] Commencement of proceedings

Proceedings claiming possession of land must be commenced by Statement of Claim: UCPR r 6.3(f). They are to be entered in the Possession List: r 45.4. The proceedings may be commenced either by filing a hard copy of the Statement of Claim at the registry or by e-filing.

The Practice Note enables, but does not prescribe, a short form of Statement of Claim to be used where the claim for possession arises out of a loan. The short form of the Statement of Claim is Annexure 1 to the Practice Note and enables the material facts concerning the loan, the mortgage, the default and the consequent entitlement to possession to be pleaded in brief terms including the provision of particulars of default. It is necessary for a Statement of Claim, whether or not in short form, to comply with the requirements as to pleadings contained in UCPR r 14.15.

The originating process that is to be entered in the Possession List is to have a cover sheet in the approved form: r 6.8A. That cover sheet is Form 93 of the UCPR forms. It contains what is described as an "Important Notice" issued by the court in 17 different languages including English. The notice informs the recipient that he or she has 28 days from receipt of the originating process to file a defence and it provides information concerning where full legal advice may be obtained to assist the person.

If there is a person in occupation of the whole or any part of the land when proceedings are commenced, and that person is not joined as a defendant, the plaintiff must either state in the originating process that the plaintiff does not seek to disturb the occupier's occupation of the land or must serve the originating process on the occupier together with a notice to the effect that the occupier may apply to the court to be added as a defendant. If the occupier does not do so within 10 days after service, the occupier may be evicted under a judgment entered in the occupier's absence: r 6.8. The customary practice is for such a notice to be served whether or not it is known that anybody other than the defendant is in occupation of the land. For a discussion of this rule, see *National Australia Bank Ltd v Nikolaidis* [2011] NSWSC 506. It is also common for process servers serving the originating process to enquire when the defendant is served who else is in occupation of the land.

Regulation 36 of the *National Consumer Credit Protection Regulations* 2010 (Cth) requires possession proceedings to be brought in the jurisdiction where the mortgagor lives regardless of where the land is situated. The regulation permits application to be made to transfer the proceedings to a court of another State or Territory, presumably where the land is situated. If the proceedings remain in a court outside NSW, problems may arise at the time of enforcing any judgment which is registered in NSW, because of the need to serve occupiers of the land. Rule 36.8A (LW 5.4.2019) deals with this situation.

If no defence is filed within 28 days the plaintiff may move for default judgment by the filing of a Notice of Motion. Rules 16.3, 16.4 and 36.8 govern this procedure. In particular what must be included in the affidavit in support of the motion is set out in rr 16.4 and 36.8. Ordinarily default judgment is entered within three weeks of the filing of such Notice of Motion.

Applications to set aside a default judgment are usually dealt with by the Common Law Case Management ("CLCM") Registrar. The CLCM Registrar has delegated power with respect to applications under r 36.16 but not under r 36.15. Although a defendant usually needs to point to an arguable defence in addition to providing an explanation for not acting to file a defence (*Vacuum Oil Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 244; *Balanced Securities Ltd v Oberlechner* [2007] NSWSC 80 at [19]) there may be circumstances, particularly involving irregularity or absence of good faith, where this will not be necessary: *Commonwealth Bank of Australia v Wales* [2012] NSWSC 407.

As Annexure 2 to the Practice Note makes clear, all matters in the Possession List are automatically entered into the Online Court and will be managed there in the absence of an order to the contrary. Matters concerning the Online Court appear in Annexure 2 to the Practice Note and also in Practice Note SC Gen 12.

[5-5020] Defended proceedings

Where a matter is defended, the procedures set out in the Practice Note will be followed. A directions hearing will be appointed before the CLCM Registrar. At that directions hearing the proceedings will ordinarily be referred to one of the judges who deal with case management of Possession List matters. This directions hearing before the judge is known as a Judicial Directions Hearing.

Paragraphs 18–20 of the Practice Note deal with the usual practice at a Judicial Directions Hearing. The principal purpose is for the judge to examine any defence and/or cross-claim which has been filed to ascertain if it discloses either a reasonable defence or a reasonable claim against the plaintiff or some other person. The judge has the power to strike out a pleading, whether or not a Notice of Motion has been filed by the plaintiff, but will ordinarily only do so in the absence of a motion in a clear case. In other cases it will be necessary for the plaintiff to file a motion to strike out and/or for summary judgment.

An example of a clear case is where the defendant is bankrupt. In such a case, any interest in the property is held by that person for the benefit of the official trustee, and the defendant has no standing in proceedings brought against them claiming possession of the property: *NAB Ltd v Strik* [2009] NSWSC 184; *Scott v Wondal* [2015] NSWSC 1577. The bankruptcy does not prevent the mortgagee obtaining an order for possession of the land including signing default judgment, but it does prevent obtaining a judgment for the debt owed: *Hanshaw v NAB Ltd* [2012] NSWCA 100; see also r 6.30.

Where a document purporting to be a defence is sought to be filed, but contains a fatal and obvious deficiency such as a complete absence of any pleaded or particularised defence, the appropriate course is for the officer in the registry to refuse to accept the document for filing. If it is accepted for filing the court may nonetheless subsequently refuse to accept it under r 4.10(4) with the effect that the document will not have been filed: *Bendigo and Adelaide Bank Ltd v Chowdhury* [2012] NSWSC 592 at [12]–[16].

If the judge determines that no defence to the claim is shown, the defendant is likely to be given one further opportunity to file a defence that properly discloses a defence to the claim, particularly if unrepresented. If such a defence is filed, the judge who conducted the Judicial Directions Hearing will continue to case manage the proceedings.

Interlocutory applications are discouraged. The Practice Note stipulates that leave must be sought from the judge case managing the particular proceedings, or in other cases, from the judge administering the Possession List, except for particular specified applications. This is partly to prevent unnecessary motions by self-represented litigants, and partly to ensure that time is not wasted on summary judgment motions when a final hearing is likely to be more effective in bringing finality to proceedings.

At an appropriate time, the judge who is case managing the proceedings will either fix a hearing date or give the parties leave to approach the listing manager to obtain a hearing date. The Practice Note provides that upon a hearing date being allocated, the usual order for hearing is deemed to be made unless the court otherwise orders. The usual order involves the filing of a court book containing the pleadings, evidence, objections to evidence, joint statement of issues and outline submissions.

The most commonly filed defences include reliance upon the following statutory provisions:

- the *Contracts Review Act 1980*
- the Australian Consumer Law s 18, Sch 2 to the *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act* s 52 and *Fair Trading Act* s 42), for matters of misleading or deceptive conduct
- the *Australian Securities and Investments Commission Act 2001* (Cth) Pt 2 Div 2 for matters of unconscionable conduct in relation to financial services
- the National Credit Code, Sch 1 to the *National Consumer Credit Protection Act 2009* (formerly Uniform Consumer Credit Code, Sch 1 to the *Consumer Credit (New South Wales) Act 1995*)
- the *Farm Debt Mediation Act 1994*, and
- the *Code of Banking Practice* (2013).

In addition, general common law and equitable doctrines including unconscionability in equity, and principles derived from *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Yerkey v Jones* (1939) 63 CLR 649 are often raised.

Significant recent cases discussing the *Contracts Review Act 1980* include *First Mortgage Managed Investments Pty Limited v Pittman* [2014] NSWCA 110; *Provident Capital Ltd v Papa* [2013] NSWCA 36; and *Knezevic v Perpetual Trustees Victoria Ltd & Anor* [2013] NSWCA 199. Earlier decisions of note include: *St George Bank Ltd v Trimarchi* [2004] NSWCA 120; *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; *Mizzi v Reliance Financial Services Pty Ltd* [2007] NSWSC 37.

Reliance on the National Credit Code generally involves an assertion that a loan is subject to the provisions of that Code despite the borrower having signed a "business purpose declaration" (in the form prescribed by the *National Consumer Credit Protection Regulations* 2010, r 68): s 13(2). Such cases frequently involve an enquiry into the reasonableness of the lender's knowledge or belief about the purpose of the loan in order to determine whether the declaration is ineffective: s 13(3). For a discussion about the issues that arise in such claims, see *ANZ Banking Group Limited v Fink* [2015] NSWSC 506. The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Cth) means that decisions under the repealed Uniform Consumer Credit Code are likely to be relevant for some time notwithstanding the commencement of the new Commonwealth legislation: *Perpetual Trustees Victoria Ltd v Monas* [2010] NSWSC 1156.

The *Farm Debt Mediation Act 1994* provides for mediation where a creditor seeks possession of a property under a farm mortgage and where there is a dispute, for instance, as to whether the farmer is in default, or whether the lender is entitled to rely on such default: *Waller v Hargraves Secured Investments Ltd* (2012) 245 CLR 311. For issues associated with the *Farm Debt Mediation Act*, see also *Ciavarella v Hargraves Secured Investments Ltd* [2016] NSWCA 304; *Sharpe v Hargraves Secured Investments Ltd* [2013] NSWCA 288; *McMahon v Permanent Custodians Ltd* [2013] NSWCA 275; and *Roxo v Normandie Farm (Dairy) Pty Ltd* [2012] NSWSC 765.

Because many lenders engage in what is called securitisation of loans made to borrowers, some defendants put forward a defence based on such securitisation to argue that the plaintiff is not the correct party to make the claim. However, where the plaintiff is the registered mortgagee and where no notice has been served under the *Conveyancing Act* 1919, s 12 such defence is liable to be struck out: *Summerland Credit Union Ltd v Lamberton; Summerland Credit Union Ltd v Jonathan* [2014] NSWSC 547 at [15]; *Perpetual Trustees Victoria Ltd v Cox* [2014] NSWCA 328 at [24]; *Westpac*

Banking Corporation Ltd v Mason [2011] NSWSC 1241 at [27]–[30]; *RHG Mortgage Corporation Ltd v Astolfi* [2011] NSWSC 1526 at [13]–[18]; *Hou v Westpac Banking Corporation Ltd* [2015] VSCA 57 at [61]–[66]; *Puglia v RHG Mortgage Corporation Ltd* [2013] WASCA 143 at [9].

It is common for other parties to be added to defended proceedings. Where a mortgage broker has been involved in the obtaining of the loan, such broker will frequently be joined by the defendant as a cross-defendant in the proceedings. It is not uncommon for plaintiffs thereafter to amend their claim to name the mortgage broker as a defendant, or to bring a cross-claim themselves against the mortgage broker, claiming damages against them on the basis that the allegations made by the original defendant are made out.

Although a mortgage broker is ordinarily the agent of the borrower (*Morlend Finance Corporation (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284 at 308; *Fitzgerald v Watson* [2011] NSWSC 736 at [25]), *ANZ Banking Group Ltd v Bragg (No 3)* [2017] NSWSC 208 at [47]–[51]; *Perpetual Trustee Company Limited v Bowie* [2015] NSWSC 328 at [38]) an issue often arises about whether the broker should instead be characterised as the agent of the lender: see, for example, *Permanent Trustee Co Ltd v O'Donnell* [2009] NSWSC 902. In *Michalopoulos v Perpetual Trustees Victoria Ltd* [2010] NSWSC 1450 (which was followed in *Tran v Perpetual Trustees Victoria Ltd* [2012] NSWSC 1560 at [43]–[44]), the court found (at [75]–[53]) that the broker was an agent of the lender due, in part, to their agreement under which the broker was required to provide all relevant information, including adverse information, about the borrower.

However, it was noted in *Citigroup Pty Limited v Middling (No 4)* [2015] NSWSC 221 at [70]–[79] that *Michalopoulos* may not be consistent with the more recent decision in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389. In *Tonto*, it was held that a similar agreement between broker and lender did not give rise to an agency relationship, but that the fact of agency was not determinative as to the attribution of knowledge and responsibility under the CRA (at [255]–[267]). Ultimately, the language of any instrument executed by the parties is not determinative, and the true character of their relationship emerges from an examination of all the surrounding circumstances in each case: *Tonto Home Loans Australia Pty Ltd v Tavares*; *FirstMac Ltd v Di Benedetto; FirstMac Ltd v O'Donnell* [2011] NSWCA 389, especially at [182] and [194]; *NAB Limited v Smith* [2014] NSWSC 1605 at [253].

A mortgage broker who communicates to a lender or mortgage manager that it has a client who wants to borrow money and who has signed a loan application and associated documents will reasonably be understood to be representing the truth of those matters, and may have a liability for any misleading or deceptive conduct: *Perpetual Trustee Co Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367; *Latol Pty Limited v Gersbeck* [2015] NSWSC 1631 at [39]–[42].

In other cases the solicitor who acted for the borrower is joined. Although such a claim involves a professional negligence claim, the proceedings ordinarily remain in the Possession List to be case-managed in accordance with the Possession List Practice Note. For the limits on the duty of a solicitor to advise on the transaction, particularly in respect of the duty to advise borrowers to seek independent financial advice, see *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at [418] and *Dominic v Riz* [2009] NSWCA 216; cf *Provident Capital Ltd v Papa* [2013] NSWCA 36 at [75]–[82], [120]–[122].

Where the loan in default was obtained by way of refinancing of an earlier loan, it is generally not appropriate that the earlier mortgagee be joined to the proceedings even if allegations are made against that mortgagee involving the unjustness of the earlier contract or unconscionability in the procuring of it: *Bank of Western Australia v Tannous* [2010] NSWSC 1319. However in respect of claims of subrogation, or restitution, made by an incoming mortgagee against an earlier one, courts have been prepared to join earlier mortgagees at an interlocutory stage pending a full determination of the issues at a final hearing, particularly in circumstances where such claims were novel in the context of possession proceedings: *ANZ Banking Group Limited v Londish* [2013] NSWSC 1423 at [102]; *Trust Co Fiduciary Services Ltd v Hassarati (No 2)* [2011] NSWSC 1396.

Where it is not alleged that the earlier loan was unjust it will ordinarily be the case that the defendant will be required to give credit for that part of the impugned loan which was used to pay out the earlier loan: *Collier v Morlend Finance Corporation* (1989) 6 BPR 92,462; [1989] ANZ ConvR 515. The application of this principle may have the result of depriving the defendant of any defence in circumstances where the principal sum advanced by the plaintiff was used to discharge a prior mortgage: *Nibar Investments Pty Ltd v Manikad Pty Ltd* [2014] NSWSC 920 at [12]-[16]; *ANZ Banking Group Ltd v Fink* [2013] NSWSC 1781. However, this is neither an unyielding rule nor an inevitable result: see *National Australia Bank Ltd v Sayed* [2011] NSWSC 1414 at [24]–[25]; *First Mortgage Managed Investments Pty Limited v Pittman* [2014] NSWCA 110 at [172]–[174]; *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 at [24]–[25].

[5-5030] Writs of execution

Where judgment has been entered for possession of land, whether by default or otherwise, the plaintiff may apply for a writ to enforce the judgment of the court: CPA s 104. Such application must be made by Notice of Motion; see UCPR Form 59. Rules 39.1–39.3 deal with the procedure. In particular r 39.3(2) sets out what must be included in the affidavit in support. Notice must be given to tenants under the *Residential Tenancies Act*, s 122 and the *Sheriff Act 2005*, s 7A. Particularly because of the need to serve the notice to tenants, a writ will not ordinarily be executed by the sheriff in a time period of less than six weeks after it is received by the sheriff.

[5-5035] Writs of restitution

A writ of restitution is a writ in aid of another writ of execution: UCPR r 39.1(1)(g); UCPR Forms 61, 62; *Perpetual Ltd v Kelso* [2008] NSWSC 906 at [19]–[21]; *Wiltshire County Council v Frazer* [1986] 1 All ER 65. If, after a writ for possession is issued, executed, and returned the defendant regains possession of the property, ordinarily by trespass, a plaintiff may obtain a writ of restitution to restore the plaintiff to the premises: see *Australia and New Zealand Banking Group Ltd v Rafferty* [2018] NSWSC 960; *Commonwealth Bank of Australia v Maksacheff* [2015] NSWSC 1860. Under a delegation made pursuant to s 13 CPA by the Chief Justice, the Registrar has the power to grant the leave to which s 39.1 UCPR refers. A writ of restitution may be issued in circumstances where a defendant does not trespass to regain possession of the property: see *Capital Access Pty Ltd v Charnwood Constructions Pty Ltd* [2022] NSWSC 1185, where the defendant sought and obtained the right to go back into possession on the basis that a further writ would be executed six weeks thereafter if he had not repaid the debt, who then became a trespasser to the property upon failing to repay the debt and deliver up possession.

Where a defendant has a realistic prospect of obtaining finance so as to discharge its indebtedness to a plaintiff, it remains open to the defendant to pay out the plaintiff before the plaintiff exercises its power of sale: *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; *GE Personal Finance Pty Ltd v Smith* [2006] NSWSC 889 at [17]–[18]; *Perpetual Ltd v Kelso* at [25].

[5-5040] Stay applications

The court has power to stay any proceedings, including by prohibiting the sheriff from taking any further action on a writ of possession: CPA ss 67, 135(2)(b).

The Practice Note deals with such applications at paras 29 to 36. The registrar has a delegated power by virtue of CPA s 13 to grant a stay under s 135(2)(b). Ordinarily, the registrar will deal with stay applications based on a default judgment except where a stay has been previously granted or refused by a judge. In such cases, the application will be heard by the duty judge.

The most common circumstances in which a stay is sought by a defendant include:

- where the defendant is attempting to refinance and to discharge the mortgage
- where the defendant is attempting to sell the property

- where the defendant asserts that an arguable defence to the proceedings exists and wishes to be let in to defend the proceedings
- where a delay in the execution of the writ is sought on hardship grounds.

The Practice Note provides that in non-urgent applications to stay the execution of a writ of possession (where no time has been fixed for the sheriff to take possession of the property or such time has been fixed and that time is more than four working days from the time when the application is brought to stay the execution of the writ) the application should be brought by Notice of Motion and affidavit in support, and these should be served on the opposing party. Annexed to the affidavit should be any documents to be relied upon by the applicant such as:

- where the loan is to be re-financed — proof of steps undertaken to refinance
- where the subject property is to be sold — copies of agent sale agreements, contract for sale of property, advertisements, etc
- where the proceedings are to be defended — a draft defence; and
- where hardship is claimed — the facts and circumstances relied upon in this regard.

For a discussion of the relevant principles see in particular *GE Personal Finance Pty Ltd v Smith* [2006] NSWSC 889 at [9]–[40]. A defendant applying for a stay ought to be in a position to explain his or her inaction prior to making the application: *Smith* at [12]. An important consideration will be whether the defendant has paid any monies to the plaintiff since default: *Smith* at [24]. A defendant can have no expectation of an extended stay on hardship grounds alone if it is inevitable that the plaintiff is otherwise entitled to obtain possession of the property: *Smith* at [22]; *Stacks Managed Investments Ltd v Rambaldi and Cull as trustees of the Bankrupt Estate of Reinhardt* [2020] NSWSC 722 at [40]–[41].

Where the application is a contested one it may be important for the mortgagee to lead evidence of the value of the property so that the equity margin and any likely shortfall on a sale can be ascertained if a stay is granted.

[5-5050] Assistance for debtors

The Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre (NSW)) offers information and various services to consumers in financial stress (see https://financialrights.org.au) including relevant fact sheets, sample letters to lenders and a national debt helpline.

The *Mortgage Stress Handbook* is a helpful publication, the 4th edition of which was published in 2019 by Legal Aid NSW and the Financial Rights Legal Centre. It provides practical assistance to defendants in Possession List matters on a range of issues, including available defences and the manner in which such defences may be pleaded and particularised.

Another source of assistance (referred to in the Important Notice contained in the Statement of Claim) is LawAccess NSW which is a Government telephone service providing legal information and, in some cases, referrals and advice.

Mortgage lenders known as Authorised Deposit-taking Institutions (ADIs) and institutions including banks, building societies and credit unions, are required as part of the Australian Financial Services Licensing System to be a member of an ASIC approved External Dispute Resolution Scheme. This is a scheme under the auspices of the Australian Financial Complaints Authority. It has taken over complaints formerly lodged with the Financial Ombudsman Service and the Credit & Investments Ombudsman Service.

A defendant may make application to this Authority provided that judgment has not been given against them. As part of the arrangement between the services and the Authority, the lender is not able to take any further step in the prosecution of the proceedings until there has been a resolution

by the service of the debtor's application. The practical effect of an application being made to the Authority is that proceedings will need to be adjourned for between three and six months so that a resolution of the application by the service can be made.

Legislation

- *Australian Securities and Investments Commission Act 2001* Pt 2 Div 2
- *Civil Procedure Act 2005* ss 13, 20, 67, 104, 135(2)(b)
- *Competition and Consumer Act 2010* (Cth) Sch 2
- *Contracts Review Act 1980*
- *Conveyancing Act* ss 12, 66G
- *Farm Debt Mediation Act 1994*
- *National Consumer Credit Protection Act 2009* (Cth) and National Credit Code
- *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth)
- *Residential Tenancies Act 2010* s 119, 122
- *Sheriff Act 2005* s 7A
- UCPR rr 6.3(f), 6.8, 6.8A, 6.30, 14.15, 16.3, 16.4, 36.8, 36.16, 39.1–39.3, 45.1(1), 45.4, Form 93

Practice Notes

- Practice Note SC CL 6

Further references

- *Ritchie's Uniform Civil Procedure*, LexisNexis Butterworths, Australia, 2006
- A Kelly and N Walker, *The Mortgage Stress Handbook*, Legal Aid NSW and the Financial Rights Legal Centre, 4th ed, Sydney, 2019.

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Concurrent evidence

Acknowledgement: the following material was originally prepared by the Honourable Justice P McClellan AM former Chief Judge at Common Law of the Supreme Court of New South Wales.

[5-6000] General

Concurrent evidence has been described as "essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavor to identify the issues and arrive where possible at a common resolution of them": P McClellan, "New method with experts – concurrent evidence" (2010) 3 *Journal of Court Innovation* 259 at 264.

The legal framework governing the use of concurrent expert evidence in civil matters in NSW is set out in Pt 31, Div 2 of the UCPR. Rule 31.19 requires any party intending to call expert evidence at trial, or to whom it becomes apparent that they or another may adduce expert evidence, to promptly seek directions from the court. Unless the court otherwise orders, expert evidence may not be adduced at trial unless directions have been sought in accordance with r 31.19, and if any such directions have been given by the court, the expert evidence may not be adduced otherwise than in accordance with those directions: r 31.19(3). (Note that r 31.19 does not apply to proceedings with respect to a professional negligence claim: r 31.19(4).)

Rule 31.20(1) confers a broad discretionary power on the court in respect of the use of expert evidence in the proceedings. It provides: "Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings".

Rule 31.35 makes specific provision for concurrent expert evidence. It relevantly provides that the court may give any one or more of the following directions:

- a direction that the expert witnesses be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with r 31.35): r 31.35(c)(i))
- a direction that the expert witnesses, when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence: r 31.35(c)(ii)
- a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the issue or issues concerned: r 31.35(d)
- a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness: r 31.35(e)
- a direction that each expert witness be cross-examined in a particular manner or sequence: r 31.35(f)
- a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete: rr 31.35(g)(i)–(ii)
- a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to: r 31.35(h), and
- such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit: r 31.35(i).

It is customary for the experts to confer before they give evidence so as to refine the issues in dispute. Rule 31.24 facilitates this process. It relevantly provides that the court may at any time

direct the experts: to confer, either generally or in relation to specified matters; to endeavour to reach agreement on any matters in issue; to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement; and to base any joint report on specified facts or assumptions of fact. The court may direct that the conference be held with or without the attendance of the parties or their legal representatives; with or without the attendance of the parties or their legal representatives, at the parties' option; or with or without the attendance of a facilitator (that is, a person independent of the parties and who may or may not be an expert in relation to the matters in issue): rr 31.24(2)(a)–(c). Unless the parties agree, the content of the conference between the expert witnesses must not be referred to at any hearing: r 31.24(6). Expert witnesses directed in accordance with r 31.24 may apply in writing to the court for further directions to assist the expert witness in the performance of his or her functions in any respect: rr 31.24(3)–(4). An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected: r 31.24(5).

Concurrent and consecutive expert evidence in criminal trials is dealt with by s 275C of the *Criminal Procedure Act 1986*.

[5-6010] Advantages

Aside from efficiency gains, concurrent evidence tends also to improve the quality of the expert evidence available to the decision-maker. The experts give their opinions free from the constraints of the adversarial process, and are not limited to answering questions from counsel. They are thus able to present their views comprehensively, without distortion by the advocate's skill: P McClellan, "New Method with Experts – Concurrent Evidence", at 266. As the experts are able to respond directly to each other, each of their opinions comes in for rigorous testing by their peers. Often the experts will ask each other incisive questions that would not have occurred to counsel. The judge is therefore better placed to determine which of the expert opinions should be accepted: see, for example, *Halverson v Dobler* [2006] NSWSC 1307 at [67].

[5-6020] General guidance

The New South Wales Court of Appeal has considered the use of concurrent evidence in the context of determining the point at which judicial intervention has the effect of denying the parties procedural fairness. In *Botany Bay Council v Rethmann Australia Environmental Services Pty Ltd* [2004] NSWCA 414, Tobias JA (Spigelman CJ and Santow JA agreeing) held at [46] that interventions from the judge are permissible to the extent that their purpose is to clarify the experts' evidence, rather than to cross-examine the witnesses or challenge their evidence. Particularly in matters where a judge sits without a jury, "the judge may intervene to control, to clarify, or to make known a provisional view": *Botany Bay Council*, above, at [43], quoting *Kekatos v The Council of the Law Society of New South Wales* [1999] NSWCA 288 at [60] (Giles JA).

[5-6030] Supreme Court procedure

The General Case Management Practice Note of the Supreme Court, Common Law Division 5 (PN 5), as amended, mandates the presumptive use of concurrent expert evidence in all proceedings in which a claim is made for damages for personal injury or disability. Paragraph 37 provides, in respect of such proceedings: "All expert evidence will be given concurrently unless there is a single expert appointed or the court grants leave for expert evidence to be given in an alternate manner". The rationale for the presumptive use of concurrent expert evidence is set out at [32] of PN 5, which recites the court's concern about the costs and delays associated with the large number of experts expected to give evidence in personal injury cases. The court is particularly concerned to avoid overlap between expert opinions as well as the expenses associated with expert reports that go unused or are otherwise of little assistance to the court.

Paragraph 38 of PN 5 explains the procedure for deciding between the use of a single expert and the use of multiple experts. It provides: "At the first Directions Hearing the parties are to produce a schedule of the issues in respect of which expert evidence may be adduced and identify whether those issues potentially should be dealt with by a single expert witness appointed by the parties or by expert witnesses retained by each party who will give evidence concurrently".

If expert evidence is to be given concurrently, the parties are to agree on the issues to be discussed by the expert witnesses within 14 days of all expert witness statements or reports being filed and served. If the parties are unable to reach agreement within the 14-day period, they must arrange for the matter to be re-listed before the court for directions as to the issues to be discussed by the expert witnesses: PN 5, at [39].

To refine the issues in cases where expert evidence is to be given concurrently, the experts in each area of expertise are to confer and produce a report, with respect to the issues to be discussed by them, setting out a statement of matters agreed and matters not agreed (see also UCPR r 31.25). With respect to matters not agreed, short reasons should be provided as to the basis of the disagreement. Such a report should be produced within 35 days of the first Directions hearing or such other time as the court may order: PN 5, at [40].

The PN 5 should be read alongside Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses). Paragraph 8 provides that the issues to be discussed by the experts should be framed to resolve a controversy in the proceedings. If possible, the issues so identified should be capable of being dealt with by way of a brief response. The Practice Note also makes provision for how the joint conference is to be convened and conducted (at [12]–[24]), as well as how the joint report is to be prepared: at [25]–[29]. It emphasises throughout that the experts must comply with the Expert Witness Code of Conduct set out in Sch 7 to the UCPR and made binding on experts by r 31.23.

Legislation

- UCPR Pt 31, Div 2, Sch 7

Practice Notes

- Practice Note SC CL 5, Common Law Division
- Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses) as amended in December 2012

Further references

- P McClellan, "New method with experts – concurrent evidence" (2010) 3 *Journal of Court Innovation* 259
- "Concurrent evidence: new methods with experts", Educational DVD, Judicial Commission of New South Wales and Australasian Institute of Judicial Administration, 2006

[The next page is 5851]

Intentional torts

Acknowledgement: the Honourable A Whealy QC, former judge of the Supreme Court of NSW, prepared the following material. Commission staff are responsible for updating it.

[5-7000] Trespass to the person — the intentional torts

This chapter is concerned with the torts of assault, battery, false imprisonment and intimidation. Closely allied with these is a further tortious action, namely proceedings to recover damages for malicious prosecution.

The three torts that emerged from the concept of trespass to the person — assault, battery and false imprisonment are actionable per se — that is without proof of damage (although if the wrongful act, does result in injury, damages can be recovered for that injury as well). In malicious prosecution proceedings, however, it is necessary to assert and prove damage.

[5-7010] Assault

An assault is any direct and intentional threat made by a person that places the plaintiff in reasonable apprehension of an imminent contact with the plaintiff's person, either by the defendant or by some person or thing within the defendant's control: K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011 at 44 ("Barker et al").

The gist of assault has been stated in J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998 ("Fleming") as focusing on the apprehension of impending contact. Thus, the effect on the victim's mind created by the threat is the crux, not whether the defendant actually had the intention or means to follow it up. The intent required for the tort of assault is the desire to arouse an apprehension of physical contact, not necessarily an intention to inflict actual harm.

In *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, the plaintiff was an excluded gambler who had unlawfully returned to the casino to play roulette. Employees of the casino saw him and identified him as an excluded person. He was approached and accompanied to an "interview room" where he was required to remain until police arrived sometime later. Mr Rixon unsuccessfully sued for damages for assault, battery and false imprisonment. In relation to the assault issue, the facts were that a casino employee had placed his hand on the plaintiff's shoulder and, when he turned around, asked him: "Are you Brian Rixon?". These actions were central to the question as to whether Mr Rixon had been the victim of an assault and, in addition, a battery.

Sheller JA (with whom Priestley and Heydon JJ agreed) stressed the distinction referred to in Fleming set out above. His Honour said that, on the facts of the case, the primary judge had been correct to find that the employee did not have the intention to create in Mr Rixon's mind the apprehension of imminent harmful conduct. Moreover, the employee's placement of his hand on the plaintiff's shoulder did not constitute a battery. On the false imprisonment claim, the court found that the *Casino Control Act 1992* and its regulations justified the plaintiff's detention for a short period of time until the arrival of the police.

In *State of NSW v Ibbett* (2005) 65 NSWLR 168 the Court of Appeal upheld the trial judge's factual findings while increasing the damages awarded. The circumstances of the case were that two policemen gave chase to Mr Ibbett, in the township of Foster, suspecting that he may have been involved in a criminal offence. They pursued him to a house where he lived with his mother, Mrs Ibbett. Without legal justification, one of the policemen entered the property and arrested Mr Ibbett.

His mother came into the garage where these events occurred. The police officer produced a gun and pointed it at Mrs Ibbett saying, "Open the bloody door and let my mate in". Mrs Ibbett, who was an elderly woman, had never seen a gun before and was, not unnaturally, petrified.

The trial judge held that both police officers had been on the property without unlawful justification and, additionally, the confrontation between the police officer and Mrs Ibbett was more than sufficient to justify the requirements of an immediate apprehension of harm on her part, so as to amount to an assault. The Court of Appeal agreed with the trial judge as later did the High Court. See also Clarke JA in *Cowell v Corrective Services Commission (NSW)* (1988)13 NSWLR 714.

[5-7020] Conduct constituting a threat

Although threats that amount to an assault normally encompass words, they will not always do so. For example, actions may suffice if they place the plaintiff in reasonable apprehension of receiving a battery. As to words, in *Barton v Armstrong* [1969] 2 NSWR 451 a politician made threats over the telephone and these were held to be capable of constituting an assault. Given the explosion of modern methods of media communication, there is no reason why threats made in emails, text messages or on Facebook (so long as they satisfy the legal test) could not qualify. Importantly, the reasonable apprehension must relate to an imminent attack.

Note: the requirement is for an imminent battery, not an immediate one.

[5-7030] Reasonable apprehension

This requirement means that an assault cannot be proved if the plaintiff is not aware of the threat. Moreover, the apprehension must be a reasonable one. Thus, if an unloaded gun or a toy pistol is pointed at the plaintiff, the defendant will not be liable where the plaintiff knows or has reason to believe that the gun is not loaded or is a toy: *Logdon v DPP* [1976] Crim LR 121.

[5-7040] Battery

Last reviewed: December 2023

A defendant who directly causes physical contact with a plaintiff (including by using an instrument) will commit a battery unless the defendant proves the absence of intent and negligence on their part, that is, that the defendant was "utterly without fault": *Croucher v Cachia* (2016) 95 NSWLR 117. This case is also authority for the proposition that ss 3B(1)(a) and 21 of the *Civil Liability Act 2002* (NSW) do not operate upon the particular cause of action pleaded, but instead upon the particular act which gives rise to the civil liability and the intent of the person doing that act. It is necessary to look at the character of the underlying conduct, rather than whether the claim is in respect of an "intentional tort".

Battery cases (sometimes wrongly referred to as "assault cases" — although the two often go hand in hand) often involve difficult factual disputes requiring the resolution of widely conflicting versions as to what happened during a particular occasion or event, whether domestic or otherwise.

The requisite intention for battery is simply this: the defendant must have intended the consequence of the contact with the plaintiff. The defendant need not know the contact is unlawful. He or she need not intend to cause harm or damage as a result of the contact.

A person who pulls the trigger of a rifle believing it to be unloaded may be found to be negligent, but will not be liable in trespass, because they did not intend that the bullet from the rifle should strike the injured plaintiff. The requisite intention will have been absent.

In most cases, it will be apparent that an intention to make contact can simply be inferred from the nature and circumstances of the striking. If I strike someone with an axe, it will be apparent, except in the most unusual circumstances, that I intended to make contact with the injured person.

[5-7050] Contact with the person of the plaintiff

Contact, as has been pointed out by academic writers (Barker et al at p 41), can take a variety of forms. Thus, spitting on a person, forcibly taking blood or taking finger prints would be regarded as contact. Similarly, shining a light into a person's eyes will be regarded as contact: *Walker v Hamm* [2008] VSC 596 at [307].

The modern position, however, is that hostile intent or angry state of mind are not necessary to establish battery: *Rixon v Star City Pty Ltd*, above, at [52]. It is for that reason that a medical procedure carried out without the patient's consent may be a battery.

On the other hand, it is not every contact that will be taken to be a battery. People come into physical contact on a daily basis. For example it is impossible to avoid contact with other persons in a crowded train or at a popular sporting or concert event. The inevitable "jostling" that occurs in these incidents in every day life is simply not actionable as a battery: *Rixon* at [53]–[54]; *Colins v Wilcock* [1984] 3 All ER 374 per Robert Goff LJ.

[5-7060] Defences

Defences to the trespass torts include necessity, for example, in the case of a medical emergency where a patient's life is at risk and the obtaining of consent is not possible (*Hunter New England Area Health Service v A* (2009) 74 NSWLR 88); self-defence (*Fontin v Katapodis* (1962) 108 CLR 177); and consent.

In the case of self-defence in NSW, however, see Pt 7 of the *Civil Liability Act 2002*. This applies to any kind of civil liability for personal injury. The legislation places a restriction on the damages which can be awarded for disproportionate acts of self-defence. Reasonable acts of self-defence against unlawful acts will not be actionable at all.

In *State of NSW v McMaster* [2015] NSWCA 228, the NSW Court of Appeal affirmed the availability of self-defence in the civil context. It will be made out if the defendant believed on reasonable grounds that what he did was necessary for the protection of himself, or another. The defendant's response to the threat is a factor to be taken into account but is not inherently determinative.

The court also held that the term "unlawful" in s 52 *Civil Liability Act* extends to tortious conduct such that the section may apply as a defence to liability for actions done in self-defence against the commission of a tort.

[5-7070] Consent

An interference or injury to which a person has consented cannot be wrongful. It is the responsibility of the defendant, however, to raise a defence of consent and to prove it: *Hart v Herron* [1984] Aust Torts Reports 80–201 at 67,814. If the defendant proves that the plaintiff has consented to the acts in question then a claim in assault, battery (or false imprisonment) will not succeed.

[5-7080] Medical cases

Medical practitioners must obtain consent from the patient to any medical or surgical procedure. Absent the patient's consent, the practitioner who performs a procedure will have committed a battery and trespass to the person. However, consent to one procedure does not imply consent to another. Subject to any possible defence of necessity, the carrying out of a medical procedure that is not the procedure, the subject of a consent, will constitute a battery.

In *Dean v Phung* [2012] NSWCA 223, the plaintiff was injured at work when a piece of timber struck him on the chin causing minor injuries to his front teeth. His employer arranged for him to see the defendant, a dental surgeon. Over a 12-month period, the defendant carried out root-canal therapy and fitted crowns on all the plaintiff's teeth at a cost of $73,640. In proceedings between the plaintiff and the dentist, the latter admitted liability but asserted that the damages were to be assessed

in accordance with the *Civil Liability Act 2002* (NSW). The trial judge accepted that submission, noting that the dentist had admitted liability in negligence but had denied liability for trespass to the person. Accordingly, damages were calculated in accordance with the formula in the *Civil Liability Act 2002*.

On appeal, the plaintiff claimed the primary judge had not adequately addressed the issue of trespass to person. His case was that the dental treatment had been completely unnecessary to address the problem with his teeth; and the dentist must have known that when embarking on the treatment. Advice that the treatment was necessary must have been fraudulent, consequently the fraud vitiated any consent given to the procedure. Accordingly, the plaintiff argued, the dentist was liable for battery in treating him without a valid consent. The *Civil Liability Act 2002* s 3B excludes "civil liability … in respect of an intentional act that is done … with intent to cause injury".

Basten JA (with whom Beazley JA agreed) held that "…the dentist probably did not believe at the time that he carried out the treatment that it was necessary…". His Honour conducted a detailed examination of consent to medical treatment, including consideration as to who bore the burden of negativing consent. Basten JA at [61]–[64] expressed four principles supported by the authorities he had examined:

1. Consent is validly given in respect of medical treatment where the patient has been given basic information as the nature of the proposed procedure. If however, it could be demonstrated objectively that a procedure of the nature carried out was not capable of addressing the patient's problem, there would be no valid consent.
2. It is necessary to distinguish between core elements of the procedure and peripheral elements, including risks of adverse outcomes. Wrong advice about the latter may involve negligence but will not vitiate consent.
3. The motive of the practitioner in seeking consent will be relevant to the question whether there is a valid consent.
4. Burden of proof will lie on the practitioner to establish the existence of a valid consent where that is in issue.

Applying these principles, Basten JA held that the dentist's concessions were sufficient to show that the appellant did not consent to the treatment because it was not necessary for his particular condition. As a result, the treatment constituted a trespass to the person and s 3B operated to exclude the defendant's liability from the operation of the Act.

If, however, some kind of fraud were required to vitiate consent, Basten JA considered that the dentist at the least had been reckless as to whether the treatment was either appropriate or necessary. Consequently, on either basis, the plaintiff was entitled to have his damages re-assessed and, in the circumstances, increased.

Macfarlan JA differed from Basten JA in only one respect. His Honour did not accept that the dentist's concessions that the treatments were unnecessary indicated of themselves that the treatment constituted a trespass to the person. However, Macfarlan JA accepted that the dentist had acted fraudulently in the sense that he was reckless as to whether the treatment was either appropriate or necessary. The practitioner had performed the treatment to generate income for himself. This enabled a conclusion that consent was vitiated and a trespass had occurred.

In *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 the court was confronted with a difficult choice. A young man — only a few months away from his 18th birthday — had refused to receive his own treated blood products. The treatment was necessary to preserve his life. He had provided cogent reasons for his refusal, based on his religious beliefs. His refusal was fully supported by his parents who were of the same religious persuasion.

The court, exercising its "parens patriae" jurisdiction, essentially overrode these genuine beliefs, holding that the welfare of the patient required that the primary judge make the order permitting

the treatment. The court acknowledged that, without the order, the proposed treatment would have constituted a battery upon the young man. The order was made, notwithstanding that in a few months time, the appellant would be, as an adult, entitled to refuse any further treatment for his condition.

[5-7100] False imprisonment

Last reviewed: December 2023

The tort of false imprisonment is a form of trespass to the person. It is committed when there is a total deprivation of a person's liberty, which is caused by the defendant's voluntary and unlawful conduct. Whether the plaintiff has been imprisoned is a question of fact and it is not necessary to consider whether there may be detention or imprisonment in circumstances where the complainant is unaware of the restraint on his or her liberty: *State of NSW v Le* [2017] NSWCA 290 at [7]. It is irrelevant whether the defendant intended to act unlawfully or to cause injury. In *Ruddock v Taylor* (2005) 222 CLR 612 at [140], Kirby J (in dissent, but not on this point) described unlawful imprisonment as a "tort of strict liability".

For example, where a prisoner is held in detention beyond the terms of their sentence as a consequence of an honest mistake, the defendant will nonetheless be liable for false imprisonment: *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714.

[5-7110] What is imprisonment?

Last reviewed: December 2023

Traditionally the notion of false imprisonment related to arrest by police officers or other authorities. This is still a feature of the reported cases but the potential areas of "detention" have expanded. The following cases provide a range of illustrations of this contemporary enlargement of the notion of "imprisonment".

Watson v Marshall and Cade

In *Watson v Marshall and Cade* (1971) 124 CLR 621, a police officer asked the plaintiff to accompany him to a psychiatric hospital. The plaintiff believed he would have been compelled to go along if he had refused. The High Court held that the plaintiff had a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go with the defendant. This restraint thereby imposed on the plaintiff amounted to imprisonment (per Walsh J at 625).

Whitbread v Rail Corporation of NSW

In *Whitbread v Rail Corporation of NSW* [2011] NSWCA 130, two brothers who were intoxicated and belligerent, attempted to travel from Gosford railway station in the early hours of the morning without tickets. There was an altercation between the two brothers and state rail transit officers. One of the transit officers was convicted of a criminal assault on one of the brothers. This assault occurred immediately before the officers made a so-called "citizen's arrest", the brothers were restrained by handcuffing and pinned to the ground until police arrived. The Court of Appeal agreed with the trial judge that the transit officers were entitled to "arrest" the brothers and that the degree of force used, and the duration of their being restrained, was not unreasonable. The brothers had been validly arrested and restrained because of their failure to comply with the transit officers' lawful directions to leave the railway station. See also *Nasr v State of NSW* (2007) 170 A Crim R 78 where the Court of Appeal examined the issue of the duration of detention.

Darcy v State of NSW

Darcy v State of NSW [2011] NSWCA 413 demonstrates the width of the concept of imprisonment. The plaintiff was a young woman with severe developmental disabilities. She lived in the community but in circumstances where she had been in trouble with the police on occasions. Ultimately, the Local Court ordered that she be taken to Kanangra, a residential centre which accommodates and

treats persons with intellectual and other disabilities, located in Morisett. The order required Ms Darcy to be taken there "for assessment and treatment". The Department of Community Services intended that Ms Darcy should be returned to the community but difficulties of a bureaucratic and funding nature prevented this happening. Her case was an unusual one and, in the situation which developed, she remained at Kanangra for some six years before residential accommodation was arranged for her. The primary issue was whether the circumstances of her stay at Kanangra amounted to imprisonment. The secondary issue was whether the Public Guardian had consented to her remaining at the institution.

The Court of Appeal held that Ms Darcy had been detained at Kanangra. She did not wish to stay there and, while she had a relatively wide degree of freedom within the property, she was required to return there after any absence. The degree of latitude she had in being able to leave the premises, for example to visit her mother, was offset by the fact that she could only do so with permission, and on condition that she returned to the institute.

The court explored the issue of lawful justification for her detention at Kanangra. In this regard, the court, while acknowledging that the Public Guardian did not consent to Ms Darcy staying at the premises on a permanent basis, nevertheless consented tacitly to her remaining there while attempts were made to find her appropriate accommodation.

State of SA v Lampard-Trevorrow

In *State of SA v Lampard-Trevorrow* (2010) 106 SASR 331, the Full Court of the South Australian Supreme Court gave consideration to whether a member of the stolen generation, Bruce Trevorrow, had been falsely imprisoned. The circumstances were that, when he was about a year old, he was taken from hospital by an officer of the Aborigines Protection Board and later placed in long-term foster care without his parents knowing of the removal or the fostering. There was no maltreatment or issue of neglect or any other matter which justified the removal of the plaintiff from his family. The plaintiff lived in foster care until he was 10 years old. The Full Court unanimously held that, while neither the plaintiff nor his parents had consented to his foster placement, he was not falsely imprisoned during the period of his foster care. The fact that the plaintiff was an infant and needed care and nurture spoke against any finding of restraint. Any element of restraint, whilst he grew as a young child, was solely attributable to the obligation of his foster parents to care for him and also attributable to his immaturity. The court said:

> We do not think it realistic to describe the care and protection given by the carer of a child a restraint on the child, in the relevant sense of the term.

It is significant however that the plaintiff's claim of negligence against the State was upheld by the appeal court.

State of NSW v TD

In *State of NSW v TD* (2013) 83 NSWLR 566, the respondent was charged with robbery and assault with intent to rob. Her fitness to be tried was in doubt and a special hearing under the mental health legislation in New South Wales was held. A District Court judge found, on the limited evidence available, that she had committed the offence of assault with intent to rob. His Honour set a "limiting term" of 20 months and ordered that she be detained at Mulawa Correctional Centre. The Mental Health Review Tribunal determined that the respondent was suffering from mental illness. Accordingly, the District Court judge then ordered that the respondent be taken to and detained in a hospital. Contrary to this order, for some 16 days, the appellant was detained in a cell at Long Bay Gaol in an area which was not gazetted as a hospital.

The Court of Appeal had to determine whether she was entitled to damages for unlawful imprisonment. The court held that, as a consequence of the second order made, it became the only lawful authority for the continued detention of the respondent. In these circumstances, the State could not justify her detention in the particular area of Long Bay Gaol where she had been held. The order required her to be detained in a hospital and this was the only relevant order which determined

her place of detention. The mere fact that she could and should have been detained in another place did not prevent the detention being unlawful. Consequently, the necessary elements of the claim were established.

This decision may be contrasted with the decision of the House of Lords in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58. In that case, the House of Lords decided that prisoners lawfully committed to prison under the relevant legislation did not have a residual liberty which would entitle them to sue the Secretary of State for the Home Department or a governor of the prison if the prisoners were unlawfully confined in a particular area of the prison. However, in *State of NSW v TD*, the Court of Appeal held that the House of Lords' decision was principally based on the terms of the legislation under consideration.

State of NSW v Kable

In *State of NSW v Kable* (2013) 252 CLR 118, the High Court of Australia held that a detention order which had been made by the Supreme Court (but under legislation which was later held invalid) provided lawful authority for Mr Kable's detention. The trial judge had held that the detention order was valid until it was set aside. The High Court agreed that the original detention order provided lawful authority for the respondent's detention and allowed the appeal by the State against the orders made in the New South Wales Court of Appeal.

Hyder v Commonwealth of Australia

In *Hyder v Commonwealth of Australia* [2012] NSWCA 336, the judgment of McColl JA contains a valuable discussion of the meaning to be given to the phrase "an honest belief on reasonable grounds". The appellant had bought proceedings against the Commonwealth of Australia alleging that a federal police agent had arrested him without lawful justification and thereby falsely imprisoned him. There was no doubt that the police officer honestly believed that the respondent was a particular person of dubious background and that he had committed an offence for the purposes of the *Crimes Act 1914* (Cth) s 3W. The critical issue at trial was whether the officer held this honest belief "on reasonable grounds". Basten JA did not agree with McColl JA's conclusion. However, Hoeben JA, the third member of the court, agreed with McColl JA that the officer's belief was held on reasonable grounds. See also **[5-7115] Justification**.

The critical question turned upon the evaluation of the complex and thorough material obtained by the Australian Tax Office. The police officer relied on this information to form his belief that the respondent had been engaged in a fraudulent scheme. Hoeben JA also placed reliance on the surrounding circumstances and the source of information on which the officer had relied. His Honour agreed that the primary judge had not erred in concluding that the officer had reasonable grounds for his belief for the purposes of the *Crimes Act 1914* s 3W(1).

Haskins v The Commonwealth

In *Haskins v The Commonwealth* (2011) 244 CLR 22, the High Court held that a member of the defence force who had been convicted by a military court of disciplinary offences and sentenced to punishment, including detention, could not succeed in a claim for false imprisonment. This was so notwithstanding that the relevant provisions of the *Defence Force Discipline Act 1982* subsequently had been held to be invalid. A majority of the High Court held that while serving members of the defence forces retained the rights and duties of the civilians, it did not follow that an action for false imprisonment would lie as between service members in respect of the "bona fide execution of a form of military punishment that could be lawfully imposed": at [57]. This is one of those rare cases where the court considered matters of public policy in deciding whether a cause of action for this tort would be available. The court said at [67]:

> To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force.

State of NSW v Le

In *State of NSW v Le* [2017] NSWCA 290 the respondent was stopped by transport police at Liverpool railway station and asked to produce his Opal card. The card bore the endorsement "senior/pensioner". He produced a pensioner concession card but could not supply any photo ID when asked. There was a brief interlude during which the officer checked the details over the radio. Mr Le was then told he was free to go. The respondent commenced proceedings in the District Court claiming damages for assault and false imprisonment. He was successful and the State sought leave to appeal in the Court of Appeal. The court held that all that was involved was "a brief interruption of the respondent's intended progress … a temporary detention". In this situation, the court's task is to "assess what a reasonable person … would have inferred from the conduct of the officer." In the circumstances, the court held that the officer was justified in detaining the respondent while the necessary checks were made. The appeal was upheld.

State of NSW v Exton

In *State of NSW v Exton* [2017] NSWCA 294, the issue related to a police officer directing a young Aboriginal man to exit a motor vehicle. Eventually the young man was arrested and charged with assault and resist arrest. The trial judge awarded damages to the respondent, relying in particular on the police officer's direction "to exit the vehicle". The Court of Appeal disagreed with the trial judge's finding that the direction, without more, constituted the arrest of the respondent. In the circumstances, this finding was not open and should not have been made.

Lewis v ACT

In *Lewis v ACT* (2020) 271 CLR 192, the appellant was convicted and sentenced for recklessly or intentionally inflicting actual bodily harm, to be served by periodic detention rather than full-time imprisonment. The Supreme Court of the ACT found that he was unlawfully imprisoned in full-time detention for 82 days by reason of an invalid decision of the Sentence Administration Board to cancel his periodic detention after he failed to report on numerous occasions. He sought substantial damages to compensate him or "vindicatory damages". The primary judge assessed damages at $100,000 but ordered that only $1 be paid because the periodic detention order would have been inevitably cancelled. The Supreme Court and the High Court dismissed an appeal. Despite the unlawful detention, it was decided since the same imprisonment would have occurred lawfully even if the Board had not made an invalid decision, there was no loss for which to compensate the appellant. Two justices (Kiefel CJ and Keane J) considered that this particular appeal failed at a point anterior to the application of the compensatory principle because the appellant's right to be at liberty was already so qualified and attenuated, due to his sentence of imprisonment together with the operation of the Act, that he suffered no real loss. In separate reasons, Gageler, Gordon and Edelman JJ agreed that while the imprisonment was unlawful, the appellant was not entitled to compensation. The court also held there is no basis in principle or practice for the development of a new head of "vindicatory damages" separate from compensatory damages.

[5-7115] Justification

Last reviewed: June 2025

In proceedings for false imprisonment, it is necessary to consider first whether the plaintiff was detained; and second, if so, whether there was a justification for the detention. The two issues need to be addressed separately. The applicant must first show that the imprisonment had occurred. If that is established, the onus then shifts to the respondent to show that the imprisonment had some lawful justification : *Lewis v ACT* (2020) 271 CLR 192 at [140]; *Darcy v State of NSW* [2011] NSWCA 413 at [141]–[148].

Where there is a requirement for a detaining officer or person to have "reasonable grounds" for suspicion or belief, there must be facts sufficient to induce that state of mind in a reasonable person: *George v Rockett* (1990) 170 CLR 104 at [112]. In addition, there must be some factual basis for

either the suspicion or belief. The state of mind may be based on hearsay materials or materials which may otherwise be inadmissible in evidence. "[T]he assent of belief is given on more slender evidence than proof": *George v Rockett* at [112].

What constitutes reasonable grounds for forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor* (2005) 222 CLR 612 at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ. In that sense, the criterion has an objective element to it: *Anderson v Judges of the District Court of NSW* (1992) 27 NSWLR 701 at 714.

The question of identifying the material sufficient to support an objective finding that an arresting officer had reasonable grounds for his or her belief has to be approached with practical considerations as to the nature of criminal investigations in mind: *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571 at [18]–[19] per McColl JA.

An example of wrongful arrest appears in *State of NSW v Smith* (2017) 95 NSWLR 662. Two police officers had arrested the respondent at his home, asserting that he had committed a "domestic incident". The respondent was taken to the police station and retained there until his release on bail.

The State of NSW relied on two critical defences. The Court of Appeal agreed with the trial judge that neither of these defences had been made out. The first issue related to the police officer's failure to state adequately the reason for the arrest. To describe the reason as "a domestic incident" was insufficient. This constituted a breach of *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) s 201.

The second issue concerned a breach of s 99(3) LEPRA, as it then was, which required the police officer to suspect "on reasonable grounds" that it was necessary to arrest the person to achieve the purposes listed in s 99(3). There had been no basis to suspect, on reasonable grounds, that the arrest was necessary. In this regard the court accepted that the police officer's decision to arrest the respondent was made essentially — for reasons of "administrative convenience" — namely to facilitate the process of issuing an AVO.

In *State of NSW v Robinson* (2016) 93 NSWLR 280, the Court of Appeal held that for an arrest to be lawful, a police officer must have honestly believed the arrest was necessary for one of the purposes in s 99(3) (rep, substituted by s 99(1)(b)) and the decision to arrest must have been made on reasonable grounds: at [27], [44]. The word "necessary" means "needed to be done", "required" in the sense of "requisite", or something "that cannot be dispensed with": at [43]. The first limb of the LEPRA test in s 99(1)(a) provides that the officer *suspects* on reasonable grounds that the person is committing or has committed an offence. The second limb in s 99(1)(b) provides that the police officer is *satisfied* that the arrest is reasonably necessary for one or more of the reasons in the subsection. A challenge to the existence of a state of satisfaction will only be available where it can be shown that the state of satisfaction was manifestly unreasonable, or "arbitrary, capricious, irrational or not bona fide": *State of NSW v Randall* [2017] NSWCA 88 at [13]; *Emde v NSW* [2025] NSWCA 41 at [82], [83], [97], [100].

In construing s 99 LEPRA as it now stands, see *NSW v Robinson* (2019) 266 CLR 619. In confirming the Court of Appeal's decision (*Robinson v State of NSW* (2018) 100 NSWLR 782), the High Court held by majority, that an arrest under s 99 of LEPRA can only be for the purpose, as soon as reasonably practicable, of taking the arrested person before a magistrate and that the arrest in this case was unlawful. The arresting officer must form an intention at the time of the arrest to charge the arrested person. The majority in *Robinson* held that arrest cannot be justified where it is merely for the purpose of questioning. An arrest can only be for the purpose of taking the arrested person before a magistrate or other authorised officer to be dealt with according to law to answer a charge for an offence and nothing in LEPRA or any previous legislative amendment displaces that single criterion: at [63], [92]–[94], [109]–[111], [114]. See also *Owlstara v State of NSW* [2020] NSWCA 217 at [8], [65], [122].

At common law, a ship's captain has the power to detain or confine a passenger if he or she has reasonable cause to believe, and does in fact believe, that confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or of persons or property on board: *Hook v Cunard Steamship Co* [1953] 1 WLR 682. The existence of a subjective belief that confinement is necessary is an essential element of the master's authority at common law to detain or confine: *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 at [24]–[35]; [115]. In this case the respondent, who was on a cruise, was detained by the ship's captain because he was accused of assaulting another passenger. The respondent claimed damages for wrongful detention and false imprisonment.

The Court of Appeal held that it is a correct statement of the Australian common law with respect to a master's power or authority to detain that it must be established that the master has reasonable cause to believe, and does in fact believe, that the relevant detention or confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board: at [35]. The court held that the justification defence was made out for the whole of the relevant period in which the respondent was detained: at [112].

[5-7118] Judicial immunity

Last reviewed: June 2025

The High Court has held that the common law of Australia affords the same immunity from civil suit to judges of inferior courts as it does to judges of superior courts: *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3 at [12], [99]. The High Court unanimously held that judges of any court referred to in s 71 of the Constitution including any court of a territory and any "court of a State" as referred to in s 77(iii) of the Constitution are immune from civil suit arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity, and as the FCC judge in this case purported to perform such a function in convicting and sentencing the first respondent he could not be liable for false imprisonment: at [12], [113]–[114]. While there are significant differences between inferior courts and superior courts, there is no justification for differentiating between the scope of the immunity from civil suit afforded to judges of all courts: at [2]. Judicial immunity is justified by the protection of judicial independence (at [2], [74]–[75]) and the need to achieve finality in the quelling of disputes by the exercise of judicial power (at [76]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [25]) but does not eliminate judicial accountability (at [3], [74], [108]).

At common law, it is well established that a superior court judge is not liable for anything he or she does while acting judicially, which is generally taken to mean when acting bona fide in the exercise of his or her office and under the belief that he or she has jurisdiction.

There was previously authority to the effect that "judges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly (unless the excess of jurisdiction was caused by an error of fact in circumstances where the court had no knowledge of or means of knowing the relevant facts ...)": *Wentworth v Wentworth* [2000] NSWCA 350 at [195]; *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [358], [361], [368].

In NSW and most other jurisdictions, judicial immunity is also conferred on judges and magistrates by statute: see ss 44A-44C of *Judicial Officers Act 1986*.

[5-7120] Malicious prosecution

The tort of malicious prosecution is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another. At the heart of the tort is the notion that the institution of proceedings for an improper purpose is a "perversion of the machinery of justice": *Mohamed Amin v Jogendra Bannerjee* [1947] AC 322.

The tort is, in forensic terms, quite difficult to prove. Its constituent elements were stated by the plurality of the High Court in an extensive decision on the topic in *A v State of NSW* (2007) 230 CLR 500 at [1]. These were succinctly reformulated by the High Court in *Beckett v NSW* (2013) 248 CLR 432 at [4] as follows:

> …the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.

Beckett, above, has laid to rest an anomaly which had existed in Australian law since 1924. In *Davis v Gell* (1924) 35 CLR 275, the High Court stated that where proceedings have been brought to a close by the Attorney-General's entry of a nolle prosequi, the plaintiff in a subsequent malicious prosecution case, is required to prove his or her innocence. The High Court, in *Beckett*, refused to follow *Davis*. The result is that, in all malicious prosecution cases, the plaintiff's guilt or innocence of the criminal charge is not now an issue. All that must be shown is that the proceedings terminated favourably to the plaintiff, for example, where proceedings were terminated by the entry of a nolle prosequi or by a direction from the Director of Public Prosecutions under his statutory powers.

It might be noted that in *Clavel v Savage* [2013] NSWSC 775, Rothman J held that where a charge had been dismissed, without conviction, under the *Crimes (Sentencing Procedure) Act 1999* s 10, this did not constitute a "termination of proceedings favourably to the plaintiff". This was because the ultimate order had been preceded by a finding of guilt. See also *Young v RSPCA NSW* [2020] NSWCA 360, where it was found a s 32 order under the *Mental Health (Forensic Provisions) Act 1990* (now repealed) did not constitute a finding that the charges were proven. A plaintiff must show the prosecution ended in favour of the plaintiff. If it did, it does not matter how that came about: at [76]. It is sufficient if the plaintiff can demonstrate the absence of any judicial determination of his or her guilt: at [77].

In *HD v State of NSW* [2016] NSWCA 85, the CA had under consideration a case where an interim ADVO was obtained by police against a father on behalf of his daughter. The evidence of a physical assault was reported to a friend, to a school teacher and the daughter was taken to hospital by ambulance and treated by doctors and social workers. Later she attended the local police station but denied she had been hit by her father. Nevertheless, the police initiated a serious assault charge against the father. The charge was dismissed in the Local Court, whereupon the father instituted proceedings for unlawful arrest and malicious prosecution. The trial judge dismissed all the father's claims.

This decision was upheld by the CA. The prosecution was not activated by malice. Indeed the prosecution had no personal interest in the outcome and had been exercising a public duty. Secondly the trial judge had not erred in finding that the investigating police honestly concluded that the evidence warranted the institution of proceedings against the father. Thirdly, the whole of the circumstances demonstrated that this was not a case where there was an absence of reasonable and probable cause. This was not a case where a reasonable prosecutor would have concluded that the prosecution could not succeed. Reference was made to Gyles AJA's decision in *Thomas v State of NSW* (2008) 74 NSWLR 34 which emphasised that a reasonable basis for a decision by an investigating officer to lay a charge is not to be equated with a magistrate's decision or a judge's ruling. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law.

In 2008 Gordon Woods was convicted of the murder of Caroline Byrne. He served a number of years in prison before the NSW Court of Appeal acquitted him on the murder charge. The court found that the verdict had been unreasonable. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown's expert witness.

The plaintiff brought proceedings for damages on the basis of malicious prosecution. (See *Wood v State of NSW* [2018] NSWSC 1247.) He argued that the proceedings had been maintained without

reasonable and probable cause and that the prosecution had been brought "with malice for an ulterior purpose". The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor.

Fullerton J agreed with the plaintiff's contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause.

Central to the Crown case had been the expert witnesses' evidence that the deceased must have been thrown from the cliff to land where her body had been located. However, the theory and conclusion had been fundamentally flawed and left open the reasonable possibility of suicide. After an exhaustive analysis, Fullerton J concluded that neither the lead detective nor the expert witness could properly be categorised as "prosecutors".

The primary judge was trenchantly critical of the Crown Prosecutor. She found that he had a profound lack of insight into the flawed approach he took to the plaintiff's prosecution and that this caused great unfairness in the trial. Nevertheless, she dismissed the plaintiff's case on the basis that the prosecutor's failures, extensive though they were, were not driven by malice. An appeal to the Court of Appeal was dismissed: see *Wood v State of NSW* [2019] NSWCA 313.

[5-7130] Proceedings initiated by the defendant

Last reviewed: June 2025

Who is the prosecutor?

Identification, for the purposes of the first element of the tort, of the proper defendant ("the prosecutor") in a suit for malicious prosecution is not always straightforward. It is necessary that the plaintiff show that the named defendant played "an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion": *A v State of NSW* (2007) 230 CLR 500 at [34]: *Stanizzo v Fregnan* [2021] NSWCA 195 at [170]. Neither providing a statement in corroboration of events nor providing a witness statement (of itself) is playing an active role in the conduct of proceedings. Significantly more than that is required: *Stanizzo v Fregnan* at [224]. See further *Burton v Babb* [2023] NSWCA 242 at [37]–[40].

In *A v State of NSW*, the plurality of the High Court gave a detailed and historical narrative of the development of the tort of malicious prosecution. In the past, informations were laid privately, whereas in modern times prosecutions are generally in the hands of the police and subsequent prosecuting authorities, such as the Director of Public Prosecutions.

There is a "large question" as to the extent to which the tort of malicious prosecution can apply to the commencement and carrying on of civil proceedings. In *A v State of NSW*, above, the High Court expressed the first element of the tort as being "that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant". See also *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2019] NSWCA 10 at [16] in which an appeal against the dismissal of an action for malicious prosecution in civil proceedings was refused. See also *Rock v Henderson (No 2)* [2025] NSWCA 47, in which the dearth of authority in Australia on the extent to which the tort applies to civil proceedings was noted. The Court stated that there are limited established categories of civil proceedings to which the tort can apply (such as bankruptcy, winding up and arrest of a ship), and any extension of those categories requires significant justification given the tension that exists between application of the tort and the principle of finality, together with related principles: at [102]–[104], [165].

The present position may be best comprehended by contrasting the situation in that case (*A v State of NSW*) with the facts in *Coles Myer Ltd v Webster* [2009] NSWCA 299 (although the latter case was concerned with wrongful imprisonment). In *A v State of NSW*, as is most often the case, it was a police officer who was the informant who laid charges against the defendant. It was his conduct and his state of mind at the relevant time that formed the basis of the plaintiff's case against the State. On the other hand, in the *Coles Myer* case, the police had acted lawfully in detaining two men identified

by a store manager as acting fraudulently in a department store. It was held that the store manager, however, had acted maliciously and had, without reasonable cause, procured, and brought about the arrest by involving the police. (See also *Martin v Watson* [1996] AC 74 at 86–7.) Consequently, the manager's employer was vicariously responsible for the wrongful detention.

Generally, however, a person who provides the police with information, believing it to be true, will be held not to have initiated the proceedings. Rather, the proceedings will be regarded as instituted by and at the discretion of an independent prosecuting authority: *Commonwealth Life Assurance Society Limited v Brain* (1935) 53 CLR 343 at 379 per Dixon J. Additionally, in circumstances where a prosecuting authority has an independent means of assessing the truth of the defendant's claims, the defendant is unlikely to be considered a prosecutor because the prosecutor has been able to properly exercise their independent discretion. For example, in *Sahade v Bischoff* [2015] NSWCA 418 at [137], it was considered that the availability of CCTV footage of the alleged incident meant that the relevant facts were "not so exclusively within the [defendants'] knowledge that it was virtually impossible for the police to exercise any independent discretion to prosecute the appellants"; see also *Kohkanzada v Amiri* [2024] NSWSC 492 at [62]–[63].

A number of cases have held, or at least assumed, that an application for an ADVO is in the class of civil proceedings that may found a claim for malicious prosecution: *HD v State of NSW* [2016] NSWCA 85 at [69]; *Rock v Henderson* [2021] NSWCA 155 at [34]; [110]. See also *Li v Deng (No 2)* [2012] NSWSC 1245 at [169]; *Clavel v Savage* [2013] NSWSC 775 at [43]–[45]. However in *Rock v Henderson (No 2)*, the Court held that the paradigm for application of the tort of malicious prosecution is criminal proceedings and there are limited established categories of civil proceedings to which the tort can also apply, and any extension of those categories requires significant justification. Extension of the tort to encompass AVO proceedings would inevitably spawn satellite litigation and the potential for such litigation would tend substantially to undermine the objects and efficacy of the *Crimes (Domestic and Personal Violence) Act 2007*: at [165]. In this case, the case for extending the tort of malicious prosecution to encompass proceedings seeking an AVO under the Act was not established: at [166].

[5-7140] Absence of reasonable and probable cause

This, together with the concept of malice, are the components of the tort most difficult to prove. This is especially so where a member of the public has given apparently credible information to the police and the police have then charged the plaintiff with a criminal offence. The question arises: how does a plaintiff go about establishing the negative — an absence of reasonable and probable cause?

Prior to illustrating the answer to this question by reference to decided cases, it is necessary to emphasise the High Court's general strictures on the subject (*A v State of NSW* (2007) 230 CLR 500):

- the question of reasonable and probable cause has both a subjective and an objective element
- if the defendant did not subjectively believe the prosecution was warranted — assuming that could be proved on the probabilities — the plaintiff will have established the negative proposition,
- however, even when the prosecutor did believe the prosecution was justified, the plaintiff may yet succeed if it can be shown that, objectively, there were no reasonable grounds for the prosecution.

As has been pointed out (Barker et al p 91) there is an important temporal element in determining whether the defendant commenced or maintained the proceeding without reasonable or probable cause. This will first focus on the matters known at the time of institution of the proceedings, and then subsequently on fresh matters known as the proceedings continue. A prosecutor who learns of facts only after the institution of proceedings which show that the prosecution is baseless may be liable in malicious prosecution for continuing the proceedings: *Hathaway v State of NSW* [2009] NSWSC 116 at [118] (overruled on appeal [2010] NSWCA 184, but not on this point); *State of NSW v Zreika* [2012] NSWCA 37 at [28]–[32].

[5-7150] Some examples

Last reviewed: December 2023

State of NSW v Zreika

In *State of NSW v Zreika* [2012] NSWCA 37, the plaintiff succeeded in assault, wrongful arrest and malicious imprisonment claims against police. There had been a shooting at a home unit in Parramatta. Shortly after the shooting, the plaintiff was reported as having made some bizarre remarks at a nearby service station. The police officer investigating the shooting, when informed of this, became convinced that the plaintiff was the shooter and, five days later, arranged for his arrest and charging. However, a description of the shooter and his vehicle could not conceivably have matched the plaintiff. After the arrest, police learned the plaintiff had a credible alibi and that a witness had taken part in a "photo array" but had not identified the plaintiff. Despite all this, the plaintiff was refused bail (on the application of the police) and remained in custody for two months before the Director of Public Prosecutions withdrew all charges against him.

A v State of NSW

In *A v State of NSW* (2007) 230 CLR 500, the plaintiff had been arrested and charged with sexual offences against his two stepsons. The High Court agreed with the trial judge that the evidence demonstrated that the plaintiff had shown an absence of probable belief in the case of the charge relating to the younger child but had failed to do so in the case of the older boy. In the first situation, the police officer did not form the view that the material he possessed warranted laying the charge; or, alternatively, if he had in fact formed that view, there was no sufficient basis for his doing so. The evidence suggested a strong possibility that the younger boy was "making up" a story to support his older brother in circumstances where there was substantial animosity on the part of the older boy towards the plaintiff.

Finally, as the High Court pointed out in *A v State of NSW*, there is a need for the court to decide "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause." (*Commonwealth Life Assurance Society Limited v Brain*, above, at 74 per Dixon J.)

This may often require the court to consider the proper response of the "ordinarily prudent and cautious man, placed in the position of the accuser," to the conclusion that the person charged was probably guilty. The enquiry is to an "objective standard of sufficiency".

In this regard, it is not enough to show the prosecutor could have made further or different enquiries. His duty is "not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution": *Herniman v Smith* [1938] AC 305 at 319 per Lord Atkin.

Spedding v NSW

In *Spedding v NSW* [2022] NSWSC 1627, the plaintiff successfully claimed damages for malicious prosecution and related torts of misfeasance in public office and collateral abuse of process and was awarded $1,484,292 in damages plus interest and costs. The defendant was held to be vicariously liable for the conduct of three police officers in respect of all the torts, and for the conduct of the Office of the Director of Public Prosecutions (ODPP) in respect of the malicious prosecution tort.The plaintiff had become a suspect in the William Tyrrell case as a result of having visited the home where the child was last seen, but his alibi had been "unreasonably and inexplicably ignored" by investigators (at [199]) and he was placed in a cell with a known offender in order to obtain evidence about the child's disappearance (none was forthcoming).

A subsequent appeal was dismissed: *State of NSW v Spedding* [2023] NSWCA 180. However, it was held the primary judge erred in holding the DPP and various members of the ODPP liable for malicious prosecution: at [259]. The improper or unauthorised purpose of the police officers in arresting and charging the respondent, from which the judge inferred malice on their part, was never disclosed to the ODPP: at [257]. Further, the fact that, by the time of the trial, it was clear that the case against the respondent was "doomed to fail" does not establish malice on the part of the DPP.

As it was not pleaded that malice could be inferred from the absence of reasonable and probable cause for maintaining the prosecution, it would be unfair to infer this on appeal: [258]. However, the judge was correct to conclude the police officers lacked a reasonable and probable basis for arresting and charging the respondent with the child sexual abuse offences. The investigation was far from complete. The arrest and charging were rushed due to the officers' anxiety to further their investigation into the child's disappearance, subject the respondent to covert surveillance while in custody, and increase pressure on him and his wife. The officers were aware of earlier Family Court proceedings (in which unsubstantiated allegations of sexual assault were made against the appellant) but had not explored them and had also not contacted relevant witnesses: at [238]. See further **[5-7190] Damages for malicious prosecution**.

[5-7160] Malice

Last reviewed: March 2025

In *A v State of NSW* (2007) 230 CLR 500, the plurality examined the types of "extraneous purpose" that will suffice to show malice in malicious prosecution proceedings. They approved a general statement in Fleming at 685:

> At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.

The plurality instanced cases of spite and ill-will; and cases where the dominant motive was to punish the alleged offender. Generally, there must be shown a purpose other than a proper purpose. However, strict proof will be required, not conjecture nor mere suspicion. The tort "is available only upon proof of absence of reasonable and probable cause and pursuit by the prosecutor of some illegitimate or oblique motive": *A v State of NSW* at [95]. In *NSW v JR* [2024] NSWCA 308 at [136]–[139], the Court of Appeal found the trial judge erred in making a finding of malice with respect to a malicious prosecution (and misfeasance in public office) claim. The trial judge drew an inference of malice on the basis that the prosecutor's "conduct" was so egregious that it could only be explained by "improper motives", but these improper motives were not stated, there was no finding of spite or ill will or an intention to punish, and no such proposition was put to the prosecutor in cross-examination. While there was no reference to any of the material said to be exculpatory in the Facts Sheet created at the time the appellant was charged, it did not follow that the investigating officer did not have an honest belief that there was a proper case for prosecution of JR at that time: [139].

The plaintiff succeeded in *A v State of NSW* (on the malice issue) because he was able to show that the proceedings were instituted by the police officer essentially because he had been under extreme pressure from his superiors to do so, not because he wished to bring an offender to justice. In *State of NSW v Zreika* [2012] NSWCA 37, the police officer was motivated by an irrational obsession with the guilt of the plaintiff, despite all the objective evidence pointing to his innocence.

However, it is necessary to stress that the presence of malice will not of itself be sufficient to establish the tort, there must also be an absence of reasonable and probable cause. See also, *HD v State of NSW* [2016] NSWCA 85 at **[5-7120]**.

In *Spedding v NSW*, above, the inference of malice could be more readily drawn in circumstances where the then Director and/or his delegates involved in the prosecution had not provided evidence addressing the allegation of malice, or any allegation for that matter: at [204]. On appeal, (in *State of NSW v Spedding* [2023] NSWCA 180), the Court held that the Office of the Director of Public Prosecutions, although found to be one of the "prosecutors" for the purposes of the tort of malicious prosecution, did not have the requisite malice, the improper purpose being confined to the police officers who had commenced proceedings.

Note: a comprehensive and practical summary of all the relevant legal principles stated in *A v State of NSW* is to be found in the judgment of Tobias AJA in *State of NSW v Quirk* [2012] NSWCA 216 at [69]–[70].

[5-7180] Intimidation

The elements of the tort of Intimidation were identified in *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assoc of Australia* [1971] 1 NSWLR 760. These were identified as:

1. A intends to injure C
2. A gives effect to his intention by threatening B that A will commit an unlawful act as against B
3. The unlawful act is threatened, unless B refrains from exercising his legal right to deal with C, and
4. B is thereby induced to refrain from exercising his legal right to deal with C.

In *Uber BV v Howarth* [2017] NSWSC 54, Slattery J issued a permanent injunction to restrain a litigant in person who had engaged in the unusual tort of intimidation. His actions were made against Uber and consisted of a series of "citizens arrests".

[5-7185] Collateral abuse of process

Last reviewed: December 2023

The tort of collateral abuse of process was discussed by the High Court in *Williams v Spautz* (1992) 174 CLR 509. The tort has not established a large foothold in the jurisprudence of Australia or England, and examples of parties succeeding on the basis of the tort are rare: see *Williams v Spautz* at 553 for examples and the discussion in *Burton v Office of DPP* (2019) 100 NSWLR 734 at [14]–[42]; [48]–[49], [60]; [124]. The exact shape of the tort remains uncertain and even its existence has been viewed with scepticism: A Burrows, *Oxford Principles of English Law: English Private Law*, 2nd edn, cited in *Burton v DPP* [2019] NSWCA 245 at [17].

The tort was established in *Grainger v Hill* (1838) 132 ER 769. That case "has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution": *Willers v Joyce* [2018] AC 779 at [25]. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: a) that the initial proceedings has terminated in his or her favour; and b) want of reasonable and probable cause for institution of the initial proceedings. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. While an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process: *Williams v Spautz*, above at 520, 522-523 citing *Grainger v Hill*. See also *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 123.

The majority in *Burton v Office of DPP*, above, found it unnecessary to decide on an authoritative formulation of the elements of the tort (cf Bell P at [42]) in what was an appeal from the summary dismissal of proceedings seeking damages for breach of the tort. The matter was remitted to the District Court as the appellant's claim ought not to have been summarily dismissed because it was arguable he had an underlying cause of action, albeit one that has not been sufficiently pleaded. However, in *NSW v Spedding* [2023] NSWCA 180, the Court of Appeal in a joint judgment upheld the trial judge's finding of collateral abuse of process. The Court found that central to the establishment of this tort was the finding that the proceedings had been commenced for the dominant purpose which was outside the scope of the criminal process invoked: at [278]. The State was

vicariously liable for the police officers' conduct: at [276]. It was open to the Court to infer that the police officers shared the collateral and improper purpose in the commencement of proceedings, and that this was the dominant reason for the commencement of proceedings: at [274].

[5-7188] Misfeasance in public office

The tort of misfeasance in public office has a "tangled" history and its limits are undefined and unsettled. Aronson suggests that what has emerged over the last 50 or so years is in reality nothing less than a new tort to meet the needs of people living in an administrative State. Most of the modern changes to the tort have occurred through a series of cases in which judges have diluted the requirement of malice at the same time as they have expressed confidence that their changes leave sufficient protection for public officials against liability to an indeterminate class to an indeterminate extent: M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427.

Only public officers can commit the tort, and only when they are misusing their public power or position. It is an intentional tort: it is not enough to prove gross incompetence, neglect, or breach of duty.

In *Northern Territory v Mengel* (1995) 185 CLR 307, Deane J summarised the elements of the tort as:

(i) an invalid or unauthorised Act;

(ii) done maliciously;

(iii) by a public officer;

(iv) in the purported discharge of his or her public duties;

(v) which causes loss or damage to the plaintiff.

The authorities to date have not elucidated the boundaries of Deane J's fourth element of the tort: *Ea v Diaconu* [2020] NSWCA 127 per Simpson JA at [147], [153].

The principles regarding the tort emerge from a number of decisions from Australia, the UK and New Zealand; see particularly: *Northern Territory v Mengel*, above; *Sanders v Snell* (1998) 196 CLR 329; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263; *Sanders v Snell* (2003) 130 FCR 149 ("*Sanders No 2*"); *Commonwealth of Australia v Fernando* (2012) 200 FCR 1; *Emanuele v Hedley* (1998) 179 FCR 290; *Nyoni v Shire of Kellerberrin (No 6)* (2017) 248 FCR 311: *Hamilton v State of NSW* [2020] NSWSC 700.

Regarding the meaning of a "public officer" for the purpose of misfeasance, Bathurst CJ stated in *Obeid v Lockley* (2018) 98 NSWLR 258 at [103]:

> The review of the Australian authorities demonstrates two matters. First, the tortfeasor must be a "holder of a public office". Second, the act complained of must be the exercise of a public power. However, the cases provide no clear statement of what constitutes the "holding of a public office", or whether the power exercised has to be "attached" to the public office, or whether it is sufficient that the public officer by virtue of their position is entitled or empowered to perform the public acts in question. However, in my view, the power does not have to be expressly attached to the office.

It is also necessary to identify any public power or duty invoked or exercised by the public officer. In circumstances where what is alleged is acting in excess of power, it is necessary for the claimant to establish (amongst other things) that the public officers in question were acting beyond power, and that they actually knew or were recklessly indifferent to the fact that they were doing so: *Toth v State of NSW* [2022] NSWCA 185 at [51].

In *Ea v Diaconu* [2020] NSWCA 127, the applicant claimed the first respondent (an officer of the Australian Federal Police) committed misfeasance in public office by reason of her conduct in the court public gallery in view of the jury during his trial, including laughing, gesturing, rolling her

eyes and grinning, which attempted to influence the outcome of the proceedings. As White JA held in *Ea v Diaconu*, the respondent's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence: at [76]. It is arguable that the abuse of de facto powers, ie the capacity to act, derived from the conferral of powers that make the office a public office, are within the scope of the tort: at [127].

Further, as *Mengel* made clear, the tort is one for which a public officer is personally liable. Before one reaches the issue of the vicarious liability of the State, it is necessary for the plaintiff to identify which individual officer or officers performed the unauthorised act: *Doueihi v State of NSW* [2020] NSWSC 1065 at [32]. Damage is an essential element of the tort. It may be reputational harm as in *Obeid v Lockley* at [153]; *Cornwall v Rowan* (2004) 90 SASR 269 at [729]–[734]; *Spedding v NSW*, above, at [213]–[214]. Psychological injury is enough: *De Reus v Gray* (2003) 9 VR 432; *Spedding v NSW*, above, at [213].

Misfeasance in public office was made out in *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732. Minister for Agriculture, the Hon Joe Ludwig MP, made a control order in June 2011 that Australian cattle could not be exported to various Indonesian abattoirs that had been engaging in inhumane practices, unless the abattoir satisfied the Minister that its practices met internationally recognised animal welfare standards ("**First Order"**). Political pressure led to the Minister making a second control order that banned the export of livestock to Indonesia for a period of 6 months ("the Ban**"**). There was no "exceptions power" which would allow the Minister to make an exception if needed. Brett Cattle Company Pty Ltd ("BCC") was a cattle exporter affected by the Ban. BCC claimed it lost the opportunity to sell more than 2,700 head of cattle into Indonesia in 2011 because of the Ban, and suffered losses of $2.4 million. BCC was the representative in a class action against the Minister. Both the First Order and the Ban were enacted under delegated legislation pursuant to s 7, *Export Control Act* 1982 (Cth).

Rares J held that the Ban was invalid as an absolute prohibition was not necessary nor reasonably necessary and it imposed unnecessary limitations on the common law right of persons to carry on their lawful business: at [329], [348]–[354], [358]-[361]. Rares J further held the Minister committed misfeasance in public office as he was recklessly indifferent as to: (i) the availability of his power to make the control order in its absolutely prohibitory terms without providing any power of exception, and (ii) the injury which the order, when effectual, was calculated to produce: at [373]–[386], [391]–[395]. To satisfy the test for the tort of misfeasance in public office, the office holder must have known, or been recklessly indifferent to, the fact that the plaintiff/applicant was likely to suffer harm. It does not suffice that there is only a foreseeable risk of harm. In addition, a finding that a Minister has committed misfeasance in public office should only be reached having regard to the seriousness of such a finding based on evidence that gives rise to a reasonable and definite inference that he or she had the requisite state of mind: at [280]–[284].

[5-7190] Damages including legal costs

Last reviewed: December 2023

Proof of damages

As has been said, proof of damage is not an element of the three "trespass to the person" torts. However, specific damage or loss may be claimed and, if proven, damages will be awarded. These torts allow for the amount of aggravated damages and, where appropriate, exemplary damages: *State of NSW v Ibbett* (2005) 65 NSWLR 168.

Where a party claims damages for harm suffered due to an intentional tort, the loss must be the intended or natural and probable consequence of the wrong: *State of NSW v Cuthbertson* (2018) 99 NSWLR 120 at [40]; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; *TCN Channel Nine v Anning* (2002) 54 NSWLR 333 at [100].

In *Lewis v ACT* [2020] HCA 26, regarding a claim for false imprisonment, the High Court held that an independent species of "vindicatory damages", or substantial damages merely for the infringement of a right, and not for other purposes including to rectify the wrongful act or compensate for loss, is unsupported by authority or principle. The notion that "vindicatory damages" is a species of damages that stands separately from compensatory damages draws no support from the authorities and is insupportable as a matter of principle: at [2]; [22]; [51]; [98].

The legal costs incurred in defending a charge of resisting an officer in the course of duty are not the "natural and probable consequence" of the tortious conduct of wrongful arrest. Although harm suffered in resisting arrest, such as physical injury or property damage, is a natural and probable consequence of the wrong, the resistance being directly related or connected to wrongful arrest, the costs incurred in what ultimately turns out to be a failed prosecution are not: *State of NSW v Cuthbertson*, above at [44]–[45]; [135]. The costs of successfully defending a criminal proceeding can only be recovered in a proceeding which alleges that the laying of a charge was an abuse of process: *Berry v British Transport Commission* [1962] 1 QB 306 at 328.

Damages for malicious prosecution

Traditionally, damages for malicious prosecution have been regarded as confined to:

1. … damage to a man's fame, as if the matter whereof he is accused be scandalous …
2. … such [damages] as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty … 3. Damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused." *Savile v Roberts* (1698) 1 LdRaym 374 at 378, cited in *Rock v Henderson* [2021] NSWCA 155 at [13].

However, once damage under any of those three heads is proved, the award of damages is at large, subject to the limitation that they must not be unreasonably disproportionate to the injury sustained. Consequential economic loss is recoverable if not too remote, as are damages for mental distress (as where occasioned by a serious criminal charge). Aggravated and exemplary damages may be awarded: *Rock v Henderson* at [14]. A successful plaintiff in a malicious prosecution suit can recover as damages the costs of defending the original proceedings the incurring of which is the direct, natural, and probable consequence of the malicious bringing of those proceedings, and which is conventionally one of the heads of actionable damage required to found a claim for malicious prosecution: *Rock v Henderson* at [19]. Costs may be recovered as damages even where the court in which the original proceedings were brought has no power to award costs: *Coleman v Buckingham's Ltd* (1963) 63 SR (NSW) 171 at 176; *Rock v Henderson* at [20].

In *State of NSW v Spedding* [2023] NSWCA 180, the State challenged an award of $300,000 exemplary damages as excessive and "double counting". The Court of Appeal dismissed the appeal, finding "the egregiousness of the conduct for which the State is vicariously liable also 'beyond compare'" and had "no relevant comparator in the reported cases in New South Wales. One can only hope that its standing as the worst case is never repeated and is never superseded by conduct that is even worse": at [319].

Damages for sexual assault

Sexual assault is an intentional tort; as such damages must be assessed under the common law. The restrictions and limitations on awarding of damages in the *Civil Liability Act 2002* do not apply: s 3B(1), *Civil Liability Act 2002*, except that ss 15B and 18(1) as well as Pts 7 and 2A continue to apply: see further *Miles v Doyle (No 2)* [2021] NSWSC 1312 at [45].

Legal costs

The legislative scheme in NSW for the award of costs in criminal proceedings is provided for by s 70, *Crimes (Appeal and Review) Act 2001*. Section 70 limits the circumstances in which costs in favour of a party who successfully appeals a conviction may be ordered and for the appeal to be

the forum in which that determination is made. A party cannot avoid the constraints of s 70 by later claiming costs incurred in conducting a criminal appeal in later civil proceedings: *State of NSW v Cuthbertson* at [63]–[67]; [114]; [144]–[145]; [161].

The legal costs incurred in defending a charge of resisting an officer in the course of duty are not the "natural and probable consequence" of the tortious conduct of wrongful arrest. Although harm suffered in resisting arrest, such as physical injury or property damage, is a natural and probable consequence of the wrong, the resistance being directly related or connected to wrongful arrest, the costs incurred in what ultimately turns out to be a failed prosecution are not: *State of NSW v Cuthbertson*, above at [44]–[45]; [135]. The costs of successfully defending a criminal proceeding can only be recovered in a proceeding which alleges that the laying of a charge was an abuse of process: *Berry v British Transport Commission* [1962] 1 QB 306 at 328.

Damages may not be reduced on account of contributory negligence

Contributory negligence does not operate at common law as a defence to an intentional tort, subject to the possible application of contributory negligence to the indirect consequences of intentional conduct. By virtue of s 3B of the *Civil Liability Act*, s 5R (contributory negligence) does not apply to an intentional act that was done with intent to cause injury. Thus damages may not be reduced on account of any contributory negligence. See *Irlam v Byrnes* [2022] NSWCA 81 at [19]; [58]; [237]–[238].

Legislation

- *Casino Control Act 1992*
- *Civil Liability Act 2002* Pt 7, ss 3B, 5R, 52
- *Crimes Act 1914* (Cth) s 3W
- *Crimes (Domestic and Personal Violence) Act 2007*
- *Crimes (Sentencing Procedure) Act 1999* s 10
- *Defence Force Discipline Act 1982*
- *Law Enforcement (Powers and Responsibilities) Act 2002* ss 99(1), 99(3) (rep), 201
- *Migration Act 1958* (Cth) s 5, s 233C(1)

Further references

- M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427
- J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998
- T Tsavdaridis and D Luo, "Immunity of administrative decisions by judicial officers" (2023) 35(2) *JOB* 14
- K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011.

[The next page is 5901]

Child care appeals

[5-8000] The nature of care appeals

Last reviewed: September 2024

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].

The jurisdiction conferred on the Children's Court should be understood as limited to its exercise with respect to children who are present, or ordinarily living, in the jurisdiction of the court, that is, NSW, when the relevant order is made: see *DN v Secretary, Department of Communities and Justice* (2023) 113 NSWLR 257 at [73]–[78], in which Basten AJA (Mitchelmore JA and Stern JA agreeing) held that, pursuant to Care Act, s 4 and *Children's Court Act 1987* (NSW), s 12, the Children's Court had no power to allocate parental responsibility for children who no longer lived in NSW but were resident in the UK to the carers, who were also resident in the UK and had no existing right to reside in NSW.

[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

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.

- parental responsibility
- permanency planning
  - involving restoration
  - involving out-of-home care
  - involving guardianship
  - involving adoption
- contact.

[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.)

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Applications for judicial review of administrative decisions

[5-8500] Introduction

The Supreme Court exercises statutory and supervisory jurisdiction by way of judicial review with respect to public bodies and officials and various tribunals either by way of appeal or by application. UCPR Pt 59 applies to judicial review proceedings in this court. Proceedings of this nature are allocated to the Administrative Law List of the Common Law Division (see Practice Note SC CL 3 — Common Law Division — Administrative and Industrial Law List).

The two main bases for the court's jurisdiction to review administrative decisions are:

1. statutory appeals (where the jurisdiction of the court depends on an error of law, or a question of law), other than appeals from the Local or District Courts; and
2. proceedings under s 69 of the *Supreme Court Act 1970* (NSW): specifically challenges based on an error of law on the face of the record or jurisdictional error.

[5-8505] Jurisdiction

Last reviewed: June 2024

The court's jurisdiction in these cases is not based on the merits of the decision, but rather on its legality: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–37 per Brennan J.

In the case of statutory appeals, a plaintiff must identify an error of law or a question of law in the decision sought to be challenged. It is also important to identify the source of the court's jurisdiction. By contrast, proceedings under s 69 of the *Supreme Court Act* require either an error of law on the face of the record or a jurisdictional error to be identified.

The limitations on a statutory appeal depend on the wording of the statute which confers the right of appeal to this court. For example, a statutory appeal from the NSW Civil and Administrative Appeals Tribunal requires the plaintiff to identify a "question of law": see s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW).

Section 69 of the *Supreme Court Act* is an important source of this court's jurisdiction to review decisions of tribunals and other decision-makers in NSW. It creates a statutory jurisdiction which replaces the court's former jurisdiction to grant relief by way of prerogative writ.

Section 69(3), in its terms, confines the court's jurisdiction to errors of law that appear on the face of the record. However, the High Court has held that it is not open to Parliament to take away the court's jurisdiction to grant relief in respect of jurisdictional error. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond State legislative power: *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [100]. Accordingly the Supreme Court's jurisdiction with respect to jurisdictional errors is not confined to those errors of law which are on the face of the record.

Section 69(3) was amended in 2018 (by the *Justice Legislation Amendment Act 2018*, Sch 1 cl 21) to address a concern raised in *Morgan v District Court of NSW* [2017] NSWCA 105 relating to the limitation on the power of the Court of Appeal to make orders finally disposing of a matter (rather than remitting the matter to the lower court concerned).

As to the bodies or persons amenable to certiorari in judicial review proceedings, Rothman J concluded that if a person is acting as a "court or tribunal" within the terms of s 69(3), and therefore within the terms of s 69(4), they are amenable to the writ of certiorari: *Malek Fahd Islamic School Ltd v Minister for Education and Early Learning* [2022] NSWSC 1176 at [155]–[156].

The distinction between those errors of law that amount to jurisdictional errors and those that do not is not easy to draw or to articulate: see the discussion in *Kirk v Industrial Court of NSW*, above, at [66]–[73]. Various authoritative statements of the distinction have been made but do not remove the difficulty of classification. Under s 69 of the *Supreme Court Act*, this court has jurisdiction only to grant relief in respect of errors of law that are either on the record or which constitute jurisdictional errors.

For this reason it is necessary for a plaintiff to form a view as to whether he or she relies on a particular error as amounting to a jurisdictional error or merely as an error of law on the face of the record. If it is latter, there will rarely be any justification for tendering anything beyond the record, which includes the reasons, if any, of the tribunal or other decision-maker: s 69(4) of the *Supreme Court Act*.

Although the following is not exhaustive, it provides an indication of the types of errors that can amount to errors of law:

- failing to take into account a mandatory relevant consideration
- taking into account an irrelevant consideration
- failure to give reasons, or adequate reasons
- applying the incorrect statutory test or otherwise failing to comply with the terms of the applicable legislation
- failing to give the unsuccessful party an opportunity to be heard (otherwise known as a denial of procedural fairness, or of natural justice)
- legal unreasonableness, and
- lack of evidence to support a finding (also known as the "no evidence ground").

The jurisprudence in this area is considerable. It is not possible to summarise it here. However, practitioners and litigants are referred to M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn, Thomson Reuters, 2017, which provides a comprehensive review of the relevant principles and case law. The leading cases in administrative law include the following:

- *Craig v State of South Australia* (1995) 184 CLR 163 (what the "record" includes; jurisdictional error)
- *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 (identification of mandatory relevant considerations and generally)
- *Kioa v West* (1985) 159 CLR 550 (principles of natural justice)
- *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 (jurisdiction of State Supreme Courts with respect to jurisdictional error, notwithstanding wording of privative clauses; distinction between jurisdictional error and errors of law which are not jurisdictional errors)
- *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (the concept of legal unreasonableness)
- *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 (basis for impuging a decision through judicial review; relevance of irrationality)
- *Frost v Kourouche* (2014) 86 NSWLR 214 (procedural fairness); see also Adamson JA's comments in *AAI Ltd t/a GIO v Amos* [2024] NSWCA 65 at [53] on the requirements of procedural fairness depending, in part, on context (ie different in the context of a Review Panel compared to a contested hearing)

- *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; *Mifsud v Campbell* (1991) 21 NSWLR 725; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (adequacy of reasons); *Ming v DPP (NSW)* (2022) 109 NSWLR 604 at [45]–[46] (adequacy of reasons by a non-superior court)
- *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (scope of statutory obligation to give reasons)
- *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26 (failure to exercise jurisdiction),
- *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (apprehension of bias).
- See also, *Li v AG for NSW* (2019) 99 NSWLR 630, where in dismissing an application for judicial review pursuant to s 69, it was doubted the aphorism that justice must be "seen to be done" was ever intended to be a test of the validity of judicial, let alone administrative, decision-making and does not constitute a separate ground of review or a freestanding test for validity of that decision-making: at [56]–[58], [63], [66]–[67]; [77]–[78].

The statutes under which decisions are commonly the subject of statutory appeals or applications for judicial review include the following, of which the following recent decisions of the NSW Court of Appeal are referred to by way of example:

1. *Motor Accidents Compensation Act* 1999 (NSW)
    - *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 (failure to exercise statutory function)
    - *Jubb v Insurance Australia* [2016] NSWCA 153 (constructive failure to exercise jurisdiction)
    - *Ali v AAI Ltd* [2016] NSWCA 110 (scope of statutory duty to give reasons; whether there was a failure to consider relevant evidence)
    - *Rodger v De Gelder* [2015] NSWCA 211 (failure to take into account relevant considerations),
    - *Alliance Australia Insurance Ltd v Cervantes* [2012] NSWCA 244 (failure to take into account relevant considerations; whether a failure to refer to particular evidence can constitute failure to take into account a relevant consideration).
2. *Motor Accidents (Lifetime Care and Support Act)* 2006 (NSW)
    - *Insurance Aust Ltd t/a NRMA Insurance v Milton* [2016] NSWCA 156 (scope of statutory obligation to provide reasons; whether constructive failure to exercise functions).

[5-8510] Practical aspects of commencing and conducting proceedings for judicial review

Time limit for commencing proceedings

Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by UCPR Pt 50. Such appeals must be instituted within 28 days: UCPR r 50.3. In such cases a statement of the grounds relied on must be served with the summons: UCPR r 50.4.

Parties

Unless there is a statutory provision to the contrary, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons. Where such tribunal or public body or official files a submitting appearance such tribunal, public body or official need not

be represented at any directions hearing or substantive hearing and is automatically excused from further attendance: UCPR rr 6.10 and 6.11. If another party wishes to seek an order for costs against a submitting defendant, it must prior to such directions hearing, or within such further time as the court may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought: UCPR r 6.11.

Evidence

Statutory appeals concerning errors, or questions of law

In the case of statutory appeals concerning errors of law the parties are referred to UCPR r 50.14. Where there is no allegation of denial of procedural fairness, in the ordinary course the only evidence necessary is a copy of the reasons below, a copy of the transcript in the proceedings in the court below and a copy of any exhibit or affidavit or other documents from the proceedings below "that the plaintiff wishes to be considered at the hearing of the appeal" (UCPR r 50.14(1)(c)) bearing in mind the limited nature of the appeal.

Appeals limited to errors of law on the face of the record

In proceedings where the grounds of review are limited to errors of law on the face of the record (such as proceedings under s 69 of the *Supreme Court Act*), the evidentiary material should be limited to material that constitutes the "record": *Craig v State of South Australia* (1995) 184 CLR 163 at 180–183. Usually the record does not include the evidence that was adduced before the decision-maker or the transcript of the hearing, but does include the reasons, if any, of the "court or tribunal for its ultimate determination": s 69(4) of the *Supreme Court Act*.

Appeals based on jurisdictional error

If a plaintiff contends that a decision or action is affected by jurisdictional error then that error should be identified as such in the summons. If reliance is sought to be placed on material beyond that which constitutes the record, the body of the affidavit to which such material is annexed or exhibited must identify the jurisdictional error alleged and the connection between the additional material and the alleged error.

"No evidence" ground

Where the plaintiff relies on a "no evidence" ground, it is not necessary, in the absence of a direction to that effect, for the plaintiff to tender all the evidence before the decision maker in order to prove the absence of evidence to support a finding. Instead, in the summons, the plaintiff should identify with particularity the finding of the tribunal or decision-maker which the plaintiff contends was not supported by any evidence.

Legislation

- *Civil and Administrative Tribunal Act 2013*, s 83(1)
- *Motor Accidents Compensation Act 1999*
- *Motor Accidents (Lifetime Care and Support Act)* 2006 (NSW)
- *Supreme Court Act 1970*, s 69
- UCPR rr 6.10, 6.11, Pt 50, rr 50.3, 50.4, 50.14, Pt 59

Further references

- M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn, Thomson Reuters, 2017

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Personal injuries

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The legal framework for the compensation of personal injury in NSW

Acknowledgement: the following material was originally based on an extract from the NSW Law Reform Commission, Report 131 Compensation to relatives, Sydney, 2011, and is reproduced with permission. This has been updated by his Honour Judge Scotting of the District Court of NSW. This chapter was updated by the Personal Injury Commission in 2022 and is maintained by Judicial Commission staff.

Note: The figures in this chapter are current as at 1 April 2025. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act 1987*, Pt 3, Div 6–6B.[1]

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).[2]

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.[3]

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 For the current amounts see Workers Compensation (Indexation) Order 2025.

2 *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)).

3 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.[4] Certain volunteers (fire fighters, emergency and rescue workers) are covered under their own scheme.[5]

[6-1010] General workers

Last reviewed: June 2025

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:[6]

- 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 $225 per week (for the 2024–2025 financial year).[7]
- 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.[8]
- 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 weekly payment of $1,020 per week (as at 1/4/2025).[9] 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.

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4 *Workers' Compensation (Dust Diseases) Act 1942*.
5 *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*.
6 *Workers Compensation Act 1987*, Pt 3, Div 2, Subdiv 2.
7 Workers Compensation (Indexation Order) (No 3) 2024, s 4.
8 *Workers Compensation Act 1987*, s 38(3A).
9 *Workers Compensation Act 1987*, s 82BA.

- weekly payments are capped at the maximum amount of $2,569.60 (as at 1/4/2025).[10]

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 $2,341.70 for the first 26 weeks,[11] 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.[12]

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[13]
- lump sum permanent impairment compensation dependent on the degree of the impairment[14]
- any reasonably necessary domestic assistance[15]
- compensation, in some circumstances, for gratuitous domestic assistance provided to the worker, and[16]
- compensation for property damage.[17]

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.[18] This is currently $955,950 (as at 1/4/2025), and is to be apportioned between dependents,[19] or otherwise paid to the worker's legal personal representative.[20] Provision is also made for weekly payments for dependent children[21] and funeral expenses.[22]

This compensation scheme is regulated by State Insurance Regulatory Authority.[23] Insurance and Care NSW (icare)[24] acts on behalf of the Workers Compensation Nominal Insurer, the statutory insurer in NSW.[25]

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.[26]

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10 *Workers Compensation Act 1987*, s 34.
11 *Workers Compensation Act 1987*, s 35 prior to amendments made by Act 53 of 2012.
12 *Workers Compensation Act 1987*, s 37 prior to amendments made by Act 53 of 2012.
13 *Workers Compensation Act 1987*, s 60.
14 *Workers Compensation Act 1987*, s 66.
15 *Workers Compensation Act 1987*, s 60AA.
16 *Workers Compensation Act 1987*, s 60AA(3).
17 *Workers Compensation Act 1987*, Div 5 Pt 3.
18 See generally *Workers Compensation Act 1987*, Pt 3 Div 1.
19 *Workers Compensation Act 1987*, s 25(1)(a).
20 *Workers Compensation Act 1987*, s 25(1).
21 *Workers Compensation Act 1987*, s 25(1)(b) which sets a sum of $66.60 subject to indexation ($171.10 as at 1/4/2025) in accordance with *Workers Compensation Act 1987*, Pt 3 Div 6.
22 *Workers Compensation Act 1987*, s 26.
23 *State Insurance and Care Governance Act 2015*, Pt 3.
24 *State Insurance and Care Governance Act 2015*, Pt 2.
25 *Workers Compensation Act 1987*, Div 1A Pt 7.
26 *District Court Act 1973*, Div 8A Pt 3.

[6-1020] Dust disease workers

Last reviewed: June 2025

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 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").[27]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[28] 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.[29]

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;[30]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[31]
- payment for the commercial provision of domestic assistance;[32] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[33]

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 $427,800 (as at 1/4/2025);[34] and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $352.80 per week (as at 1/4/2025),[35] which continues until re-marriage or the commencement of a de facto relationship,[36] or until the death of the spouse; and [37]
- a weekly payment to each surviving dependent child, currently payable at $178.30 per week (as at 1/4/2025),[38] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[39]

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.

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27 *Workers' Compensation (Dust Diseases) Act 1942*, s 5.
28 *Workers' Compensation (Dust Diseases) Act 1942*, ss 7–8.
29 *Workers' Compensation (Dust Diseases) Act 1942*, s 8I.
30 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2).
31 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2)(d).
32 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2)(d).
33 *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.
34 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2B)(b)(i)(C).
35 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2B)(b)(ii) which sets an amount of $137.30 per week subject to indexation ($352.80 as at 1/4/2025) in accordance with s 8(3)(d).
36 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2B)(bb).
37 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2B)(b)(ii).
38 *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).
39 *Workers' Compensation (Dust Diseases) Act 1942*, s 8(2B)(ba) .

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").

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.[40] 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.[41] 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.[42]

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[43]) or independent contractors who were not covered by the workers' compensation scheme.[44] 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*

40 *Workers' Compensation (Dust Diseases) Act 1942*, s 8A.
41 *Workers' Compensation (Dust Diseases) Act 1942*, s 8AA(4).
42 *Workers' Compensation (Dust Diseases) Act 1942*, s 8AA(3).
43 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60.
44 Although, see *Workers Compensation Act 1987*, s 20.

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.

[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 $5,461;[45]
- 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%;[46]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[47]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[48]
- an exclusion of the damages payable for the loss of the services of a person;[49]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[50] 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;[51] and
- an exclusion of the award of exemplary or punitive damages.[52]

The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim resolution,[53] and that provide for an assessment process as a precondition to commencement of court proceedings.[54]

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.[55]

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45 *Motor Accidents Compensation Act 1999,* s 125; Motor Accidents Compensation (Determination of Loss) Order 2009, O 3.

46 *Motor Accidents Compensation Act 1999*, ss 131, 132.

47 *Motor Accidents Compensation Act 1999*, s 134; Motor Accidents Compensation (Determination of Loss) Order 2009, O 4.

48 *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.

49 *Motor Accidents Compensation Act 1999*, s 142.

50 *Motor Accidents Compensation Act 1999*, s 127(2).

51 *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.

52 *Motor Accidents Compensation Act 1999*, s 144.

53 *Motor Accidents Compensation Act 1999*, Pt 4.3.

54 *Motor Accidents Compensation Act 1999*, s 108. See Pt 4.4 for details of the claims assessment process.

55 *Motor Accidents Compensation Act 1999*, s 109.

For a summary of the relevant authorities on what constitutes a "full and satisfactory explanation" under s 109 see *Stein v Ryden* [2022] NSWCA 212 at [33]–[38]. The applicant's explanation for the delay is the central focus: at [39].

Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or where the injury or death arose as the result of a blameless accident.[56] 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.[57] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[58]

[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.[59] Statutory benefit payments are reduced after 52 weeks for contributory negligence, if applicable.[60] A claim for statutory payments must be made within 3 months of the motor accident.[61]

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.[62] 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.[63]

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.[64]

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%.[65]

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56 *Motor Accidents Compensation Act 1999*, Pt 1.2.

57 *Motor Accidents (Lifetime Care and Support) Act 2006*, s 4.

58 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.

59 Note that journey claims were removed by the 2012 workers' compensation amendments.

60 *Motor Accident Injuries Act 2017*, s 3.38(1) (previously 26 weeks, amendment commenced 1 April 2023).

61 *Motor Accident Injuries Act 2017*, s 6.13(1).

62 *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).

63 *Motor Accident Injuries Act 2017*, ss 4.11, 4.13, 4.22, as at 1 October 2022.

64 *Motor Accident Injuries Act 2017*, s 3.4(4), commenced 29 March 2022.

65 Sections 6.14(1), 7.33 and 6.23(1) were repealed on 28 November 2022.

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 a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[66] 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.[67] 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.[68] 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.[69] 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.[70] 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.[71]

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;[72]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[73]

66 *Motor Accident Injuries Act 2017*, s 7.23.
67 *Motor Accident Injuries Act 2017*, ss 4.11 and 4.13.
68 *Motor Accident Injuries Act 2017*, s 6.31.
69 *Motor Accident Injuries Act 2017*, s 6.32.
70 *Motor Accident Injuries Act 2017*, s 6.33.
71 *Motor Accident Injuries Act 2017*, s 6.34.
72 *Civil Liability Act 2002*, s 12, (approximately $3,617).
73 *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).

- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[74]
- 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;[75]
- 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;[76]
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[77]
- 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;[78] and
- exemplary, punitive or aggravated damages cannot be awarded.[79]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[80] 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.[81]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[82]

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.[83]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[84]

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.[85]

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74 *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).

75 *Civil Liability Act 2002*, s 15C.

76 *Civil Liability Act 2002*, s 16; Civil Liability (Non-economic Loss) Order 2010, O 3.

77 *Civil Liability Act 2002*, s 14.

78 *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.

79 *Civil Liability Act 2002*, s 21.

80 *Civil Liability Act 2002*, s 29.

81 *Civil Liability Act 2002*, s 30.

82 *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.

83 *Workers Compensation Act 1987*, s 151E.

84 *Workers Compensation Act 1987*, s 151H.

85 *Workers Compensation Act 1987*, s 151G.

Future losses are currently calculated according to the 5% actuarial discount rate.[86]

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.[87]

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.[88]

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;[89]
- 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;[90] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[91]

[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;[92]
    - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[93]
    - 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.[94]

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

86 *Workers Compensation Act 1987*, s 151J.
87 *Workers Compensation Act 1987*, s 151I.
88 *Workers Compensation Act 1987*, s 151M.
89 *Workers Compensation Act 1987*, s 151A(1)(a).
90 *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.
91 *Workers Compensation Act 1987*, s 151A(1)(c).
92 *Civil Liability Act 2002*, ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
93 *Civil Liability Act 2002*, s 15B. These are also known as *Sullivan v Gordon* damages.
94 See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].

claims by that person's estate, or by his or her dependants.[95] 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,[96] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, and non-exclusive jurisdiction in proceedings for contribution between defendants, and questions arising under relevant policies of insurance.[97] 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.[98]

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".[99] 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;[100]

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95 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.

96 *Workers Compensation Act 1987*, s 151A(1)(a). See above, para 1.54.

97 *Dust Diseases Tribunal Act 1989*, s 10.

98 *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.

99 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.

100 *Dust Diseases Tribunal Act 1989*, s 25(3).

- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;[101]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[102]
- 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;[103]
- the calculation of future losses by reference to a 3% actuarial discount table;[104]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[105]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[106] 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.[107]

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[108]
- 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.[109]

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.[110] 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.[111] In addition, unlike the general workers' compensation scheme,[112] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

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101 *Dust Diseases Tribunal Act 1989*, s 25A.
102 *Dust Diseases Tribunal Act 1989*, s 25B.
103 *Dust Diseases Tribunal Act 1989*, s 41.
104 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.
105 *Dust Diseases Tribunal Act 1989*, s 12A.
106 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)).
107 *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.
108 *Dust Diseases Tribunal Act 1989*, s 12B
109 *Dust Diseases Tribunal Act 1989*, s 11A.
110 See *Workers' Compensation (Dust Diseases) Act 1942*, s 8AA(4).
111 *Workers Compensation Act 1987*, s 151A(1)(b).
112 See *Workers Compensation Act 1987*, s 151A(1)(a).

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[113]

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.[114] In addition, where a worker has an entitlement to statutory workers' compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[115]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[116]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[117] 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).[118]

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").[119] 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.[120]

In an estate action, the economic loss damages recoverable comprise:[121]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[122] and provided by, the deceased to other people, prior to death;[123]
- the loss of the deceased's earning capacity to the date of death; and

113 *Workers' Compensation (Dust Diseases) Act 1942*, s 8E.
114 *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.
115 See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.
116 *Dust Diseases Tribunal Act 1989*, s 12D.
117 *Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.
118 *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.
119 *Law Reform (Miscellaneous Provisions) Act 1944*, s 2(1).
120 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).
121 See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.
122 *Civil Liability Act 2002*, s 15A, also known as *Griffiths v Kerkemeyer* damages.
123 *Civil Liability Act 2002*, s 15A, also known as *Griffiths v Kerkemeyer* damages.

- funeral expenses.[124]

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"),[125] nor do they include exemplary damages.[126]

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[127]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[128] 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.[129] 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.[130]

[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,[131] 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.[132] Only one such dependency action can be brought.[133]

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,[134] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[135] Although the relevant provision does not explicitly limit the damages recoverable in this way,[136] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[137] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[138]

The measure of damages available is the extent of the support that is lost by the dependant from the time of death, reduced by benefits obtained by the dependant as a consequence of the death, other than those benefits that are specifically excluded under s 3(3) of the 1897 Act.

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court

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124 *Law Reform (Miscellaneous Provisions) Act 1944*, s 2(2)(c).
125 *Law Reform (Miscellaneous Provisions) Act 1944*, s 2(2)(a)(ii).
126 *Law Reform (Miscellaneous Provisions) Act 1944*, s 2(2)(a)(i).
127 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).
128 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.
129 *Dust Diseases Tribunal Act 1989*, s 12B.
130 *Motor Accidents Compensation Act 1999*, s 137(4); *Workers Compensation Act 1987*, s 151M(4); *Civil Procedure Act 2005*, s 100(4).
131 *Compensation to Relatives Act 1897*, s 4.
132 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).
133 *Compensation to Relatives Act 1897*, s 5.
134 *De Sales v Ingrilli* (2002) 212 CLR 338 at [91].
135 *Compensation to Relatives Act 1897*, s 3(2).
136 *Compensation to Relatives Act 1897*, s 3(1).
137 For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.
138 *Compensation to Relatives Act 1897*, s 4(1).

—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[139] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[140]

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.[141]

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.[142]

[The next page is 7001]

139 *Compensation to Relatives Act 1897*, s 3(1).

140 *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.

141 *Walden v Black* [2006] NSWCA 170 at [96].

142 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.

Damages

para

Damages

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Damages

Acknowledgement: *The following material has been updated by his Honour Judge Andrew Scotting, District Court of NSW. It is otherwise updated by Judicial Commission staff.*

[7-0000] General principles

Many of general principles referred to in this chapter have been drawn from H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021. This is an excellent general text that deals in detail with the assessment of damages in personal injury cases and provides examples of the practical application of these principles. Other texts used for reference purposes in the preparation of this chapter were D Villa, *Annotated Civil Liability Act 2002*, 3rd edn, Thomson Reuters, Sydney, 2018; and J A McSpedden and R Pincus, *Personal Injury Litigation in NSW*, LexisNexis, Sydney, 1995.

The application of the principles discussed below is subject to any relevant statutory provisions. One such provision is the *Motor Accident Injuries Act 2017* which applies to motor accidents that occur after 1 December 2017: see [7-0085].

The first basic principle requires that a distinction be recognised between the term *damage* and *damages*. Damage is an essential element of a claim in most tortious actions. It is only if a plaintiff is able to establish that he or she has suffered damage that a cause of action becomes available. The position is different with intentional torts, see [7-0130].

Damages are the sums assessed in monetary terms that are paid to a successful plaintiff. Damages may be awarded as compensatory damages for damage sustained, or as aggravated or exemplary damages, although in *State of NSW v Corby* (2009) 76 NSWLR 439 aggravated damages were described as a form of compensatory damages.

The fundamental principle is that of restitutio in integrum, meaning that damages should be assessed so that they represent no more and no less than a plaintiff's actual loss: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, Lord Blackburn at 39. See also *Haines v Bendall* (1991) 172 CLR 60 at 63; *Arsalan v Rixon* [2021] HCA 40 at [25].

In personal injury matters, it has been recognised that in most cases it is not possible to measure accurately that part of the award that deals with non-economic loss so as to restore a plaintiff to the health enjoyed pre-injury. The principle has been qualified by the term "so far as money can do so": *Robinson v Harman* [1848] All ER Rep 383.

The law recognises that an award will not necessarily be perfect. In *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13–14, Dixon J said:

> No doubt it is right to remember that the purpose of damages for personal injuries is not to give a perfect compensation in money for physical suffering. Bodily injury and pain and suffering are not the subject of commercial dealing and cannot be calculated like some other forms of damage in terms of money.

The amount awarded is, however, required to be fair to both parties, although fairness to the defendant does not require that the award be less than full or adequate. At common law, general damages for pain and suffering resulting from personal injury are "almost entirely [a] matter of impression and of common sense, and are only subject to review in very special cases" (*Miller v Jennings* (1954) 92 CLR 190 at 195), and the caution as to appellate review in relation to such an award is well-known: *El Assaad v AI Haje* [2024] NSWCA 306 at [84].

There are some qualifications that may have the result that the plaintiff recovers less than his or her actual loss. They arise out of the principles that govern remoteness of damage, the requirement to

mitigate and the modifications to common law made by the *Workers Compensation Act 1987*, *Motor Accidents Compensation Act 1999* , *Civil Liability Act 2002* and *Motor Accident Injuries Act 2017* . In addition, claims arising out of the death of a relative are limited to the recovery of pecuniary loss.

Conversely, principles relating to aggravated or exemplary damages allow the recovery of greater than actual loss in appropriate circumstances.

In *Todorovic v Waller* (1981) 150 CLR 402 at 412 Gibbs CJ and Wilson J identified the following four basic principles that they said were so well established that it was unnecessary to cite authority to support them.

1. Damages are compensatory in character.
2. Damages for one cause of action must be recovered once and forever and in a lump sum, there being no power to order a defendant to make periodic payments.
3. The plaintiff is free to do what he or she wishes with the sum awarded; the court is not concerned to see how it is applied.
4. The onus is on the plaintiff to prove the injury or loss for which damages are sought.

The plaintiff bears the onus of proving that the defendant's conduct caused the losses claimed. At common law, the defendant bears the onus of proving:

- failure to mitigate on the plaintiff's behalf
- contributory negligence.

The onus is on the plaintiff throughout to quantify damages. This does not necessarily require proof of the loss in actual monetary terms. Evidence in the form of comparable wages is commonly provided to establish loss of wages. Medical expenses and care costs for the past are rarely disputed and those expected in the future are normally capable of reasonable estimation.

Once a loss is proved, the court is required to do its best to put a value on that loss even if the evidence is less than satisfactory. In the absence of evidence, a plaintiff cannot complain that inadequate damages have been awarded: *Dessent v Commonwealth* (1977) 51 ALJR 482. See *Ashford v Ashford* (1970) 44 ALJR 195, where the court dealt with the assessment of income loss in the absence of evidence of likely earnings from planned pre- and post-accident careers. See also *Layton v Walsh* (1978) 19 ALR 594 (FC) where the court drew inferences concerning the cost of medical treatment.

It is standard practice to itemise amounts awarded to a plaintiff under various heads of damage and to give reasons for arriving at each of the stated figures. Care needs to be taken to avoid the possibility that the amounts assessed under the various heads of damage might be duplicated. For instance, a court must balance, in assessing general damages, the effect on a plaintiff of any incapacity to undertake domestic responsibilities for his or her family against making allowance for the provision of voluntary or commercial carers.

The recognised heads of damage are:

1. **General damages:** this is the term applied to non-pecuniary damages or non-economic loss suffered as a result of pain, disability, loss of enjoyment and amenities of life, disfigurement or loss of expectation of life.
2. **Pecuniary loss:** this term covers out-of-pocket expenses involved in medical and other treatment expenses; aids and appliances, domestic and personal care.
3. **Income loss:** covering actual income loss to the date of trial and loss of income-earning capacity thereafter.
4. **Aggravated damages:** awarded to a plaintiff who suffers increased distress as a result of the manner in which a defendant behaves when committing the wrong or thereafter.

5. **Exemplary damages:** awarded to mark the court's disapproval of the conduct of the defendant and to deter its repetition by the defendant or others.
6. **Nominal or contemptuous damages:** this head of damage is of little relevance to claims in tort involving personal injury where actual damage is a necessary part of the cause of action. It commonly arises in cases of trespass to the person where the options available to the court range between nominal damages and a more substantial award depending on the circumstances.

Exceptions to these basic principles are found both in the common law and in legislation.

It should be noted that the law of damages is governed by the law of the place of the tort, and different provisions may apply in different States or territories or for different damage: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [100]. For example, a person exposed to substance in different States who subsequently develops a substance-related disease may be entitled to different damages awards for the same damage. In *Kennedy v CIMIC Group Pty Ltd and CPB Contractors Pty Ltd* [2020] NSWDDT 7, the plaintiff, who suffered from mesothelioma, was exposed to asbsestos in NSW by the first defendant and in Western Australia by the second defendant. Ultimately, the plaintiff was entitled to a different award of damages against each defendant.

When it came to assessing damages, the Dust Diseases Tribunal (DDT) was required to apply the statutory provisions relevant to each defendant including:

- s 10A *Civil Liability Act 2002* (WA) that allowed the comparison of other awards when assessing general damages (which is not permitted by the common law applicable in NSW);
- s 15A *Civil Liability Act 2002* (NSW) that restricts the quantum of damages that can be awarded for gratuitous attendant care services (which did not apply in WA, such damages being assessed by reference to the commercial cost of the services provided), and
- s 15B *Civil Liability Act 2002* (NSW) that allows damages to be awarded for a loss of capacity to provide domestic services (which does not exist at common law, applicable in WA *CSR Ltd v Eddy* (2005) 226 CLR 1 at [71]).

As noted in [2-6330] the generally accepted practice is that the court determine all issues in question. This extends to the assessment of damages notwithstanding that the case on liability fails. The purpose of the practice is to avoid the costs of a further hearing in the event that the decision on liability is overturned. In *Gulic v Boral Transport Ltd* [2016] NSWCA 269, the court expressed concern that the trial judge had not adopted this practice and confirmed that a judge should decide all issues to avoid the need for a new trial. On the question of exceptions to the general rule Macfarlan J said at [8]:

> There may of course be good reasons for not dealing contingently with issues that the judge does not consider decisive. One reason might be that the judge considers that because the outcome is so clear or there is so little at stake that there is no reasonable prospect of an appeal. Alternatively, the judge might consider that the expenditure of judicial time and effort required to determine other issues is not justified when balanced against the likely costs of a retrial and the likelihood of a retrial being necessary. Another reason might be that determination of an issue whose resolution is considered not to be decisive might require assumptions as to a party's credit diametrically opposed to the judge's findings. It might be difficult to give effect to this assumption.

[7-0010] The once-and-forever principle

Interim payments

Section 82 of the *Civil Procedure Act 2005* (CPA) makes provision for the award of interim damages when:

- the defendant admits liability or the plaintiff has judgment against the defendant for damages to be assessed, or
- the plaintiff has obtained judgment, or the court is satisfied, if the action proceeded to trial, that the plaintiff would secure judgment against the defendant for substantial damages: s 82(3).

Orders of this nature may only be made against insured defendants, public authorities or persons of sufficient means: s 82(4) CPA. These provisions do not apply to claims that are dealt with under the Motor Accidents legislation.

In *Frellson v Crosswood Pty Ltd* (1992) 15 MVR 343, Sully J held:

- the civil onus of balance of probabilities applies in establishing the plaintiff will recover substantial damages at trial
- caution must be exercised, and it is necessary to take into account the difficulty a defendant might encounter if required to recover from an unsuccessful plaintiff
- if there is more than one defendant, the court can order payment of interim damages against one or more defendants if satisfied the plaintiff will succeed against those defendants.

Section 83 of the *Motor Accidents Compensation Act* imposes on a third party insurer the obligation to pay for reasonable, necessary and properly verified medical, rehabilitation, respite care and attendant care expenses where liability is admitted or determined, wholly or in part, to meet the care needs generated by injuries resulting from the motor accident.

As to the *Motor Accident Injuries Act 2017*, see Pt 3.

Court structured settlements

Section 143 of the *Motor Accidents Compensation Act* permits the parties to apply to the court for approval of a structured settlement agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

Similarly, s 151Q of the *Workers Compensation Act* permits the court, at the request of a plaintiff and having considered the views of the defendant, to make orders for payment of damages by means of a structured settlement rather than a lump sum award.

Lifetime care and support

The *Motor Accidents (Lifetime Care and Support) Act 2006* provides for support for victim of motor accidents who are catastrophically and permanently injured. It imposes on the Lifetime Care and Support Authority the obligation of paying for the expenses incurred in meeting the plaintiff's treatment and care needs.

[7-0020] Actual loss

Once the defendant's liability to the plaintiff is proved, the assessment of the plaintiff's loss and damage must take into account issues that may increase or reduce the amounts awarded under all heads of damages. Considerations to be addressed include: the prospective consequences of the injury; conduct of the plaintiff in failing to mitigate or in aggravating his or her condition; contributory negligence; unrelated conditions that affect the plaintiff before or after injury; causation and aggravated or exemplary damages.

Prospective consequences

Proof of damage and assessment of damages requires calculation of the consequence of events from the date of injury to the date of trial and of the chance that events will or will not occur. In*Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, Deane, Gaudron and McHugh JJ held at [7]:

> A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages

are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99% – or very low – 0.1%. But unless the chance is so low as to be regarded as speculative – say less than 1% – or so high as to be practically certain – say over 99% – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain the prediction which has a 51% probability of occurring, but to ignore altogether a prediction which has a 49% probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded.

Example

Loss of opportunity: As noted in the *Malec* decision, damage and loss suffered to the date of the hearing are reasonably simple to prove and assess. There are, however, occasions when it becomes necessary to assess the effects of injury on, for instance, the opportunity to undertake a particular career path or succeed in a particular business. *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 54 dealt with the recovery of the value of a lost opportunity in circumstances where it was a known fact that the opportunity was lost but there was no certainty that availability of the opportunity would have resulted in a successful outcome. Deane J at [8] said it might be necessary to modify the conventional approach, when assessing damages for past income loss, of deciding an issue on the balance of probabilities and then proceeding on the basis of a certainty where none in fact existed. The *Amann Aviation* case involved a breach of contract claim but it was made clear that the same principles applied to claims in tort.

Extras and discounts

Damages may also be reduced for a number of reasons. The common law principle is that a defendant, who asserts that a reduction in damages is warranted, must provide evidence to support the claim. This principle has been modified in some circumstances by legislation.

Mitigation

The courts have accepted the following principles, as set out in H McGregor, *McGregor on Damages*, 16th edn, Sweet & Maxwell Ltd, UK, 1997 at [283]–[288], as an accurate statement of the law concerning mitigation.

1. The law disallows recovery of damages in respect of any loss that could have been avoided but which the plaintiff has failed to avoid through unreasonable action or inaction.
2. The plaintiff may recover loss or expense incurred in a reasonable attempt to mitigate.
3. The plaintiff may not recover loss in fact avoided, even though damages for that loss would have been recoverable because the efforts that went to mitigation went beyond what was required of the plaintiff under the first principle.

In NSW in motor accident and workplace accident cases, the first rule is embodied in statute: s 4.15 *Motor Accident Injuries Act 2017* and s 151L *Workers Compensation Act 1987*. In workplace accident cases, the onus is on the plaintiff (s 151L(3)), in motor accident cases the onus is on the person alleging that there has been a failure to mitigate (s 4.15(4)).

At common law, the failure of a plaintiff to take steps to mitigate a claimed loss may be raised as a defence to the claim and the onus of proof rests with the defendant.

If the defendant succeeds, damages are reduced to take account of the failure to mitigate. The extent of the reduction is assessed by calculating the value of the plaintiff's loss on the basis of the condition that he or she would be in, had reasonable steps to mitigate been taken.

section 4.15(3) *Motor Accidents Injuries Act 2017* requires consideration of the steps the injured person could have taken to mitigate damages by: undergoing medical treatment, undertaking rehabilitation, pursuing alternative employment opportunities and giving the earliest practicable notice of claim to enable the assessment and implementation of the other matters.

Section 151L *Workers Compensation Act* imposes a burden on the claimant to establish that all reasonable steps to mitigate have been taken, including as to treatment, employment and rehabilitation by the injured worker, except where it is established that the injured worker was not told by his or her employer or the insurer that it was necessary to take steps to mitigate before it could reasonably be expected that any of those steps would be taken: *ACN 096 712 337 Pty Ltd v Javor* [2013] NSWCA 352, per Meagher JA.

At common law, what is reasonable for the plaintiff to do is dependent on the consequences of the injury: *Grierson v Roberts* [2001] NSWCA 420 at [19]. It does not require a plaintiff to engage in rituals or exercises in futility, including embarking on complex litigation, pleading the statute of limitations to avoid liability for hospital expenses (*Lyszkowicz v Colin Earnshaw Homes Pty Ltd* [2002] WASCA 205 at [64]), continuing to work when their injuries make it reasonable for them to retire (*Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 23 per McHugh J), or failing to accept a voluntary redundancy payment (*Morgan v Conaust Pty Ltd* [2000] QSC 340). The extent of the plaintiff's injuries may make it reasonable for them not to try to find work during the lead-up to contested litigation: *Arnott v Choy* [2010] NSWCA 259 at [161].

A claimant's failure to undergo medical and/or rehabilitative treatment can amount to a failure to mitigate loss. Examples include, failing to take prescribed medications (*State of NSW v Fahy* [2006] NSWCA 64), in particular where the adverse impacts of the medication are expected to be temporary and reversible. There have been a few cases where the failure to undergo surgery has been decided to constitute a failure to mitigate, but the general rule is that it is not unreasonable to refuse to undergo seriously invasive and/or risky treatment such as spinal surgery: *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345. The benefits and costs of the action must be weighed against the risk of death, aggravation of the condition and the inconvenience or discomfort involved: *Radakovic v R G Cram & Sons Pty Ltd* [1975] 2 NSWLR 751 at 768 per Mahoney JA (the disfigurement of amputation must be outweighed by substantial advantages) and *Mantle v Parramatta Smash Repairs Pty Ltd* (unrep, 16/2/79, NSWCA) (plaintiff's subjective view against amputation was relevant in deciding the refusal was not unreasonable). Conflicting medical opinion about the efficacy of medical treatment will usually make it reasonable to refuse treatment: *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500. The plaintiff's subjective views based on their understanding of the treatment, risks and benefits are relevant, notwithstanding that the test is objective. A baseless refusal will usually be unreasonable: *Fazlic v Milingimbi Community Inc*. Religious beliefs are relevant: *Walker-Flynn v Princeton Motors Pty Ltd* [1960] SR(NSW) 488, cf *Boyd v SGIO (Qld)* [1978] Qd R 195 (note the doubts expressed by the authors of Luntz at [1.12.5]).

A plaintiff is entitled to recover the reasonable costs of mitigation, even if the attempts are unsuccessful and the consequential loss is greater than if there had been no attempt to mitigate: *Tuncel v Reknown Plate Co Pty Ltd* [1979] VR 501.

Loss of amenity of the use of a chattel

Where a plaintiff's chattel is damaged as a result of the defendant's negligence, the plaintiff will generally be entitled to damages for the costs of repair and for consequential loss: *Talacko v Talacko* [2021] HCA 15 at [45]. An assessment of consequential loss always requires the identification of the manner in which the loss of use of a chattel has adversely affected the plaintiff: *Arsalan v Rixon* [2021] HCA 40 at [18]. In *Arsalan*, the High Court recognised the loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel, as a recoverable head of damage for a tort that involves negligent damage to a chattel: at [17], [25]. It was not unreasonable for the respondents to take steps to mitigate their loss, including loss of amenity consequent on negligent damage to their vehicles by the hire, at a reasonable rate, of an equivalent car for a reasonable period of repair.

Aggravation

The defendant also bears the evidentiary onus of establishing that the plaintiff's conduct positively exacerbated his or her condition. In this respect, it is necessary to consider the following.

1. Whether there has in fact been a failure to mitigate. In *Munce v Vinidext Tubemakers Pty Ltd* [1974] 2 NSWLR 235 the court left open the question of whether refusal of a blood transfusion amounted to a failure to mitigate.

2. Whether the plaintiff's conduct that positively exacerbates the condition is itself the result of injuries caused by the defendant's tortious conduct.

Pre- and post-injury conditions

Damages may be denied or reduced where the symptoms of which a plaintiff complains are the result of a pre-existing condition. In *Watts v Rake* (1960) 108 CLR 158, prior to the accident, the plaintiff suffered from a commonly occurring degenerative spinal condition that might have produced the symptoms suffered after the accident. The High Court settled the issue of onus of proof, deciding that it was for the plaintiff to prove on a prima facie basis the difference between his or her pre- and post-accident condition; once the change in condition was satisfactorily established, the evidentiary onus was then on the defendant "to exclude the operation of the accident as a contributory cause": Dixon CJ at [160].

Purkess v Crittenden (1965) 114 CLR 164 confirmed *Watts v Rake*, above, and its reference to the evidential onus necessary to rebut the prima facie case made by the plaintiff. Barwick CJ, Kitto and Taylor JJ, at 168, said it was insufficient for the defendant merely to suggest that the plaintiff suffered from a progressive pre-existing condition or that there was a relationship between any condition and the plaintiff's present incapacity and that:

> On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (ie substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence.

Where the defendant alleges that the plaintiff would have suffered disability because of a pre-existing condition, even if the compensable injury had not occurred, the evidentiary burden rests on the defendant to establish what the effect of the pre-existing condition would have been: *Watts v Rake* and *Purkess v Crittenden*, above.

The nature of the pre-existing condition, its probable effects, the relationship it has to the ultimate state and any disability, and the time when these effects would have been seen without the tort, must be established with some reasonable measure of precision but not to a standard of near perfection: *Expokin Pty Ltd v Graham* [2000] NSWCA 267 at [50] (Santow AJA) and *Mount Arthur Coal Pty Ltd v Duffin* [2021] NSWCA 49 at [64] per Payne JA. If the disabilities of the plaintiff can be disentangled and one or more traced to a cause in which the tort played no part, it is the defendant who must do the disentangling: *Watts v Rake* at 160 per Dixon J. In this context, the principles stated in *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 may need to be taken into account so that consideration may need to be given as to whether the defendant has established that there was a substantial chance that the plaintiff would have been affected by a pre-existing condition: *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 per Ipp JA (Mason P agreeing).

In *State of NSW v Skinner* [2022] NSWCA 9 the Court of Appeal approved the apportionment of damages by the trial judge to take into account her post-traumatic stress disorder arising from the plaintiff's employment as a police officer and her non-tortious psychiatric conditions.

In *Sampco Pty Ltd v Wurth* [2015] NSWCA 117 the Court of Appeal emphasised that the requirement in s 5D(1)(a) *Civil Liability Act 2002*, that factual causation be established, applies both to the issue of liability and injury.

The apportionment of damages where the plaintiff suffered injury in successive motor vehicle accidents was considered in *Falco v Aiyaz* [2015] NSWCA 202. Emmett JA at [13] set out the principles of *State Government Insurance Commission v Oakley* (1990) 10 MVR 570:

> where the negligence of a defendant causes injury and the plaintiff subsequently suffers further injury, the principles for determining the causal connection between the negligence of the defendant and the subsequent injury are as follows:
>
> - where the further injury results from a subsequent accident that would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by the negligence of the defendant;
> - where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the negligence of the defendant;
> - where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health and the damage sustained includes no element of aggravation of the earlier injury, the subsequent accident and further injury should not be treated as caused by the negligence of the defendant.

Material contribution

Where it is not possible to apportion damages to take account of other causes of damage, the plaintiff is required to establish that the defendant's negligence materially contributed to the loss or damage. The evidentiary onus is then on the defendant and, if the defendant is unable to establish an alternative cause, he or she may be held fully liable.

A commonly occurring scenario arises in cases of injuries suffered as a result of more than one accident or exposure to disease-causing dusts. Again, the plaintiff is required to prove that the defendant's conduct contributed materially to the injury. If this is done and it is not possible to apportion responsibility between one or more potential causes of damage, the plaintiff will recover in full. The onus is on the defendant to establish and quantify the extent of damage caused by another tortfeasor: *Bonnington Castings Ltd v Wardlaw* (1956) AC 613 (House of Lords); *Middleton v Melbourne Tramway & Omnibus Co Ltd* (1913) 16 CLR 572; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 and *Amaca Pty Ltd (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt* [2022] NSWCA 151.

Where it is possible to divide the harm, the court must do its best to apportion the loss between tortious and non-tortious causes: *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR(NSW) 120, per Sugerman AP at 125–126 and *State of NSW v Skinner* [2022] NSWCA 9.

Life expectancy

The defendant bears the evidential onus of establishing that the plaintiff's life expectancy is likely to be shorter than that estimated in standard life-expectancy tables: *Thurston v Todd* [1966] 1 NSWR 321; *Proctor v Shum* [1962] SR (NSW) 511. In *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 229 CLR 498, Gummow, Callinan and Crennan JJ at [4], and Kirby and Hayne JJ at [68]–[70], held "the Court of Appeal was right to conclude that, despite the then prevailing practice in the courts of New South Wales, the primary judge should have used the prospective rather than the historical tables".

The standard life expectancy was reduced by 10% in the case of a plaintiff who, although only 21 years old at the time of assessment, continued to be a heavy smoker and the nature of his injuries and their effect on his psychological condition suggested that he would not give up the habit: *Egan v Mangarelli* [2013] NSWCA 413.

Where the plaintiff's life expectancy is reduced as a result of injury, loss of income during those years is to be assessed by deducting the probable living expenses that would be incurred in maintaining the plaintiff if she or he had survived: *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389. This principle was adopted by Sheller JA in *James Hardie & Co Pty Ltd v Roberts* [1999] NSWCA 314 where he confirmed that compensation was directed at loss of income-earning capacity not wages. Damages of this nature were therefore not a windfall but compensation for the destruction of the asset.

[7-0030] Contributory negligence

Last reviewed: August 2023

At common law a defence of contributory negligence, if successful, defeated a claim, regardless of the extent of any negligence on the part of the defendant. This situation was remedied in NSW by the *Law Reform (Miscellaneous Provisions) Act 1965* where provision was made to apportion liability between the parties and to reduce the plaintiff's damages in accordance with this apportionment.

Contributory negligence must be specifically pleaded as a defence to a claim and, since it is raised by way of defence, the onus is on the defendant to prove that the plaintiff failed to use reasonable care, that had care been taken the plaintiff's damage would have been diminished, and the extent of that diminution.

The principles that apply to the determination of whether the plaintiff was negligent are the same as those that determine the question of the defendant's negligence. This involves the application of the general principles set out in s 5B *Civil Liability Act*. Further s 5R specifically provides that the standard to be applied in determining the issue of contributory negligence is that of a reasonable person in the position of the plaintiff on the basis of what he or she knew or ought to have known at the time. In other words, an objective test is applied without regard to the subjective situation of the plaintiff.

The *Motor Accidents Act* ss 74, 76, *Motor Accidents Compensation Act* ss 138, 140 and *Motor Accident Injuries Act 2017* ss 4.17 and 4.18 compel a finding of negligence by a plaintiff where drugs or alcohol were involved or the plaintiff failed, contrary to the requirements of the law, to use a seatbelt or use other protective equipment. Some of these provisions do not apply to minors. The provisions concerning drugs and alcohol apply not only to an injured passenger's condition at the time of an accident; they encompass the situation where the plaintiff, as a passenger in a vehicle at the time of the accident, knew or ought to have known that the driver's capacity to drive was affected by alcohol.

As to the *Motor Accident Injuries Act 2017*, see [7-0085] under the subheading **Contributory negligence**.

The *Civil Liability Act* goes further in relation to drugs or alcohol. Pt 6 deals with intoxication, defined in s 48 as:

> a reference to a person being under the influence of alcohol or a drug (whether or not taken for a medicinal purpose and whether or not lawfully taken).

These provisions apply to civil liability for personal injury or damage to property, except where excluded by s 3B. Section 49 replaces s 74 *Motor Accidents Act* and s 138 *Motor Accidents Compensation Act* to the extent of any inconsistency.

The court must determine whether s 50 is engaged where there is an issue about intoxication and an allegation of contributory negligence. The section applies where it is established that the capacity of a plaintiff to exercise reasonable care and skill is impaired by intoxication: s 50(1). No damages are to be awarded unless the court is satisfied that the damage is likely to have occurred

even if the injured party had not been intoxicated: s 50(2). If satisfied, contributory negligence is presumed unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage: s 50(3). Otherwise, unless intoxication was not self-induced, the provision mandates a finding of a minimum 25% for contributory negligence on the part of the plaintiff. If s 50(2) is satisfied and the party seeking damages demonstrates that the relevant person's intoxication did not contribute in any way to the cause of death, injury or damage (s 50(3)) then s 50 has no further role to play. In that event, any allegation of contributory negligence falls to be resolved by applying the balance of the provisions of the *Civil Liability Act* and s 9 *Law Reform (Miscellaneous Provisions) Act* 1965. The issues of causation in s 50 and whether the test in s 50(2) is objective or subjective was ventilated without deciding in *Payne (t/as Sussex Inlet Pontoons) v Liccardy* [2023] NSWCA 73 at [43]–[55] (Beech-Jones JA). Note, several Court of Appeal judgments have opined that ss 50(2) and 50(3) are not easily reconciled: *Jackson v Lithgow City Council* [2008] NSWCA 312 at [103]; *NSW v Ouhammi* (2019) 101 NSWLR 160 at [41], [126]; *Payne (t/as Sussex Inlet Pontoons) v Liccardy* at [45].

Section 50 applies to under-age drinkers. *Russell v Edwards* [2006] NSWCA 19 held that inexperience concerning the intoxicating effects of alcohol did not lead to the conclusion that intoxication was not self-induced. Ipp JA stating that "self-induced" equated to "voluntary": at [21].

Apportionment

Once a finding is made that the plaintiff was guilty of contributory negligence, it is necessary to determine the proportions in which each of the parties is to be held liable for the damage suffered by the plaintiff.

The leading authorities on this issue are *Pennington v Norris* (1956) 96 CLR 10 and *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34. In *Podrebersek*, above, at [10] it was said:

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris*, above, at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* (1953) AC 663, at p 682; *Smith v McIntyre* (1958) Tas SR 36, at pp 42–49 and *Broadhurst v Millman* (1976) VR 208, at p 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

In *Wynbergen v Hoyts Corporation* [1997] HCA 52, the High Court decided that it was not possible, where a finding of contributory negligence is made, to conclude that damages recoverable by the injured party should be reduced to nothing because the effect of such a conclusion would be to hold the claimant wholly responsible. Section 5S *Civil Liability Act* now provides for a finding of contributory negligence of 100% with the result that no damages are to be awarded. The claim that a finding of 100% contributory negligence should be made is often coupled with a pleading that the defendant owed no duty of care and is most frequently encountered in motor accident cases where joint illegal purpose or intoxication of both passenger and driver are involved. To date the courts have shown great reluctance to reduce damages by 100% or, except where illegality is concerned, to find no duty of care.

In *Gala v Preston* (1991) 172 CLR 243 at 254, the High Court noted that there might be special and exceptional circumstances where participants could not have had any reasonable basis for expecting that a driver of a vehicle would drive it according to ordinary standards of competence and care. In *Joslyn v Berryman* (2003) 214 CLR 552, McHugh J at [29] accepted that the plea of no breach of duty or a plea of no duty in an extreme case remained open in the case of a passenger who accepted a lift with a driver known to the passenger to be seriously intoxicated.

Similarly in *Imbree v McNeilly* (2008) 236 CLR 510, Gummow, Hayne and Kiefel JJ said at [82]:

> The conclusion that the defendant owed a plaintiff *no* duty of care is open in a case like *Joyce* if, as Latham CJ said, "[in] the case of the drunken driver, *all* standards of care are ignored [because the] drunken driver cannot even be expected to act sensibly". And as indicated earlier in these reasons, it is that same idea which would underpin a conclusion that the plaintiff voluntarily assumed the risk of being driven by a drunken driver.

In *Miller v Miller* (2011) 242 CLR 446, the High Court confirmed that no duty of care to a co-offender is owed by a person committing a crime unless one party withdraws from the joint illegal enterprise and is no longer complicit in the crime. The duty of care is owed from the point of withdrawal. In deciding the issues in that case, the High Court considered in detail prior authority on issues of duty of care in circumstances of illegal conduct: *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Smith v Jenkins* (1970) 119 CLR 397; *Jackson v Harrison* (1978) 138 CLR 438; *Gala v Preston* (1991) 172 CLR 243; *Cook v Cook* (1986) 162 CLR 376; *Imbree v McNeilly* (2008) 236 CLR 510; *Insurance Commissioner v Joyce* (1948) 77 CLR 39.

The issues in *Zanner v Zanner* (2010) 79 NSWLR 702 concerned the extent to which the defendant, at 11 years of age, should be held liable to the plaintiff, his mother, who allowed him to drive his father's car. The defendant raised three issues in defence: the duty of care owed by the defendant when he was too inexperienced and incompetent to be expected to control the vehicle; causation, in circumstances where the plaintiff brought about the risk that eventuated; and whether, that if liability were established, contributory negligence should be assessed at 100%.

Tobias AJA rejected all of these defences. He did, however, reassess the plaintiff's contributory negligence, increasing it from 50% to 80%, a result he considered to be warranted by two aspects of the plaintiff's conduct. The first was allowing the defendant to drive the vehicle; the second was to stand in front of it while directing the defendant.

The NSW Court of Appeal has considered the issue of how the apportionment of liability is to be undertaken having regard to the provisions of the *Civil Liability Act*.

In *Joslyn v Berryman* (2003) 214 CLR 552, the High Court was concerned with the provisions of s 74 *Motor Accidents Act* (subsequently re-enacted as s 138 *Motor Accidents Compensation Act* and now dealt with in s 49 *Civil Liability Act*). Although these provisions differed from those of the *Law Reform (Miscellaneous Provisions) Act* in that they provided for damages in respect of a motor accident to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case, Kirby J at [127] said that they supplemented common law and enacted law. He noted that the *Law Reform (Miscellaneous Provisions) Act* did not address the extent to which the plaintiff's neglect caused the accident and that the responsibility for which it provided:

> is that which is "just and equitable having regard to the claimant's share in the responsibility *for the damage*". Such "damage", as the opening words of s 10(1) make clear, is the damage which the person has suffered as a "result partly of his own fault and partly of the fault of any other person or persons". [Emphasis in original.]

Doubt on whether these principles continue to apply has arisen from the decisions of the Court of Appeal in *Gordon v Truong* [2014] NSWCA 97 and *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235. Both cases involved collisions between vehicles and pedestrians and both involved findings of breach of duty and contributory negligence. Basten JA proposed that s 5R *Civil Liability Act*, in its application of the general principles of negligence described in s 5B of the Act, altered the approach to be taken to apportioning liability. He took the view that the apportionment is now to be made having regard to the causative contributions of the lack of care of each party and not by reference to the extent to which each act of neglect contributed to the damage suffered by the plaintiff. See also his discussion of the inter-relationship between ss 5R and 49 *Civil Liability Act* and their application to motor vehicle accidents in *Nominal Defendant v Green* [2013] NSWCA 219.

Further clarification of the approach to be taken to apportionment was provided in the reasons of Meagher JA, with whom Gleeson JA and Sackville AJA agreed, in *Verryt v Schoupp* [2015] NSWCA 128. The appeal dealt, amongst other things with the trial judge's finding that, although there was negligence on the part of a 12-year-old skateboarder who "skitched" a ride uphill by holding onto the back of the appellant's motor vehicle, the appellant was overwhelmingly responsible and that there should therefore be no reduction in damages for contributory negligence.

Meagher JA noted the difference between the requirement of s 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965* that responsibility be apportioned according to what is just and equitable having regard to the claimant's share in the responsibility for the damage and that of s 138(3) of the *Motor Accidents Compensation Act* that damages recoverable be reduced by such percentage as the court thinks just and equitable in the circumstances of the case. This did not involve reference to s 5D to determine a causal connection between the contributory negligence and the injury. It involved, first, as required by s 5R(1) of the *Civil Liability Act*, the application of the principles of s 5B in determining whether the person who suffered harm has been contributorily negligent.

It was in the apportionment of responsibility that the issue of the extent to which each party was responsible for the accident and the injuries sustained became relevant. In this case, the Court of Appeal accepted that there was no evidence to support the contention that the respondent's failure to wear a protective helmet caused his brain injury, an element where the onus of proof rested with the appellant. There was, however, evidence that the 12-year-old respondent appreciated that the skitching exercise was dangerous and Meagher JA considered that his lack of care for his own safety was adequately reflected by reducing his damages by 10%.

This approach has been adopted in a number of decisions, including *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72 and *Nominal Defendant v Cooper* [2017] NSWCA 280. In the latter case, McColl JA noted that the parties did not suggest that there was any significance in the differences between s 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965* and s 138(1) of the *Motor Accidents Compensation Act 1999*. Her Honour said, using the principles derived from *Podrebersek* and *Pennington*, that both provisions required the court to arrive at an apportionment of the parties' respective shares in the responsibility for the damage by comparing the degree to which they had each departed from the standard of care of the reasonable person and the relative importance of their acts in causing the damage.

Appellate courts consistently note that the facts of earlier cases are rarely of assistance when determining an appropriate apportionment. They also maintain a degree of reluctance to interfere in the first instance determination: *Mobbs v Kain* [2009] NSWCA 301; *Harmer v Hare* [2011] NSWCA 229.

Section 5T *Civil Liability Act* requires the court to take account of the contributory negligence of the deceased in claims under the *Compensation to Relatives Act 1897*. Section 30 *Civil Liability Act* extends this requirement to the contributory negligence of a victim killed, injured or endangered by an act or omission of the defendant when assessing claims for nervous shock.

Blameless accidents

The application of the principles of contributory negligence to blameless accidents was considered by the Court of Appeal in *Axiak v Ingram* (2012) 82 NSWLR 36. A blameless accident is defined in s 7A *Motor Accidents Compensation Act* as follows:

> "blameless motor accident" means a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.

Section 7F of the Act provides for the reduction of damages by reason of contributory negligence on the part of a deceased or injured person.

In *Axiak*, the Court of Appeal held that the words "and not caused by the fault of any other person" referred to tortious conduct of persons other than the plaintiff. In those circumstances the principles of *Podrebersek* had no application where, because of the provisions of the Act, the driver was not at fault so that comparisons of culpability and contributions to the damage suffered were inappropriate. Tobias JA said that contributory negligence was therefore to be assessed by reference to the extent to which the plaintiff departed from the standard of care imposed in taking care for his or her own safety. He rejected, as contrary to the intention of the legislature, the proposition that a plaintiff, guilty of contributory negligence in a blameless accident must always be the sole cause of his or her injuries and therefore guilty of negligence to the degree of 100%.

This decision was not challenged in *Davis v Swift* [2014] NSWCA 458 but the Court of Appeal was unanimous in the view that it required reconsideration. The court was divided on the question of whether, it being accepted that the plaintiff's conduct was the sole cause of the accident, contributory negligence should be assessed at 100%. Meagher and Leeming JJA, held that, since the defendant was, by s 7B(1), deemed to have been at fault, the assessment of culpability for the accident should be 20% to the defendant and 80% to the plaintiff. Adamson J agreed with the trial judge that the plaintiff's contributory negligence should be assessed at 100%. She suggested that the contributory negligence addressed by s 7F related to conduct, such as failure to wear a seatbelt, that aggravated damage but was not causative of the accident.

The approach taken in *Axiak* was adopted in *Nominal Defendant v Dowedeit* [2016] NSWCA 332.

Heads of damage

[7-0040] Non-economic loss

This head of damage is also referred to as general damages or non-pecuniary loss. It covers the elements of pain, suffering, disability and loss of amenity of life, past and future. As already noted, in respect of the future, an element of hypothesis is involved.

There are few remaining areas in personal injury claims where damages remain at large. The *Motor Accidents Compensation Act* and the *Civil Liability Act* impose thresholds to the recovery of non-economic loss and an upper limit on the amounts that may be awarded. Common law damages for non-economic loss are no longer recoverable under the *Workers Compensation Act.*

The maximum sums recoverable for non-economic loss are adjusted annually by reference to fluctuations in the average weekly earnings of full-time adults as measured by the Australian Statistician: s 146 *Motor Accidents Compensation Act*; s 16 *Civil Liability Act*. The adjustment takes effect on 1 October in each year. The maximum sum to be awarded is that which is prescribed at the date of the order awarding damages.

Section 3 *Civil Liability Act* contains the following definition:

> "non-economic loss" means any one or more of the following:
>
> (a) pain and suffering
>
> (b) loss of amenities of life
>
> (c) loss of expectation of life
>
> (d) disfigurement.

The same definition is found in s 3 *Motor Accidents Compensation Act*.

Assessing non-economic loss

The *Motor Accidents Compensation Act* applies to injuries suffered in accidents occurring after midnight on 26 September 1995. Sections 131–134 (and s 135, repealed in 2020) deal with

non-economic loss. To qualify for an award the plaintiff's level of whole-person impairment must be assessed at greater than 10%. If the parties disagree on this question, a medical assessor, whose determination is binding on the parties and the courts, is appointed by the Motor Accidents Authority. Unlike the *Motor Accidents Act* and the *Civil Liability Act*, s 134 does not require that the court assess damages as a proportion of the maximum sum fixed for an award of non-economic loss. Damages are assessed with the application of common law principles up to the maximum provided for in s 134. This was explained by Heydon JA in *Hodgson v Crane* (2002) 55 NSWLR 199 when he said it was not possible to construe the concept of proportionality out of the language of ss 131–134. When the threshold of 10% permanent impairment was passed, the court was required to assess non-economic loss without statutory restraint except for the maximum that may be awarded: at [39].

The *Motor Accidents Act* first introduced the concept of significant impairment to an injured person's ability to lead a normal life as the basis for assessment of non-economic loss and the assessment of the percentage of that impairment against a most extreme case.

As to the *Motor Accident Injuries Act 2017*, see [7-0085] under the subheading **Non-economic loss**.

The *Civil Liability Act* contains provisions similar to those of the *Motor Accidents Act*. The threshold for recovery of non-economic loss is an injury assessed by the court to be at least 15% of a most extreme case: s 16(1). Where the severity of the plaintiff's injuries is assessed to be less than 33% of a most extreme case, the amount to be awarded is to be calculated by reference to the deductibles set out in s 16(3). If the assessment exceeds 33%, the plaintiff is entitled to receive in full the proportion of the maximum sum applicable.

A note appended to s 16 *Civil Liability Act* describes the following method of assessing damages in accordance with the table of deductibles:

> The following are the steps required in the assessment of non-economic loss in accordance with this section:
>
> Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.
>
> Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under s 17.
>
> Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table.
>
> Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.

The issue of what constitutes a most extreme case has been considered in a number of decisions arising out of provisions of the *Motor Accidents Act* that are identical to those now in the *Civil Liability Act*: *Matthews v Dean* (1990) 11 MVR 455; *Dell v Dalton* (1991) 23 NSWLR 528; *Kurrie v Azouri* (1998) 28 MVR 406. In each case, the courts involved confirmed that the use of the indefinite article "a" allowed for questions of fact and degree to be taken into account in determining whether the severity of injury was such that the maximum sum was to be awarded.

In *Dell v Dalton*, above, Handley JA said at 533:

> In my opinion the definition of non-economic loss and the bench mark in s 79(3) do not enact a statutory table of maims which reduces all human beings to some common denominator and require the impact of particular injuries on a given individual to be ignored.

Another issue that has been dealt with on several occasions is the manner in which damages as a proportion of the maximum are to be assessed. Cautions have been expressed against having regard

to the consequences in monetary terms of deciding on a particular percentage, where assessments below 33% may have significant consequences. In *Clifton v Lewis* [2012] NSWCA 229 Basten JA said at [57]:

> It is true that a small variation in the assessment may have significant consequences for the amount of damages to be awarded. In the present case, according to the table provided in s 16 of the *Civil Liability Act*, a 25% assessment as a proportion of a most extreme case will permit an award of 6.5% of the maximum amount fixed by statute; a 33% assessment will result in 33% of the maximum amount. In rough terms, an increase of one-third in the assessment results in an increase of 500% in the award. However, the fact that a small change in the assessment can have a large consequence in monetary terms does not mean that the nature of the assessment changes or can be assumed to be a more precise exercise than it is. The relationship between the assessment and the consequence is fixed by Parliament. To assess the proportion of a most extreme case by reference to the consequence in monetary terms would be to adopt a legally erroneous course.

Consistent with the *Dell* approach, a trial judge, assessing the proportion of a most extreme case, is not required to arrive at an unrealistic level of precision provided the percentage falls within a reasonable range of assessment: *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, Basten JA.

The age of a plaintiff may have an effect on the assessment of non-economic loss under the *Civil Liability Act*. In *Reece v Reece* (1994) 19 MVR 103, the Court of Appeal remarked upon the need, when assessing, on a proportionate basis, the severity of injury, to consider the age of a plaintiff and the likely length of the period over which the pain and suffering of progressive disability would be suffered. The court held that the consequence of particular injuries were likely to be more severe in the case of a younger person than that of an elderly plaintiff who had a much shorter period of life expectancy.

The requirement to consider the age of the plaintiff was confirmed in *Marshall v Clarke* (unrep, 5/7/94, NSWCA) and *Christalli v Cassar* [1994] NSWCA 48 at [3]. In *Varga v Galea* [2011] NSWCA 76, McColl JA noted at [72] that age was only one of numerous matters to be taken into account in assessing non-economic loss by reference to the definition of that term in s 3 *Civil Liability Act*.

The principles adopted in *Reece v Reece* and *Varga*, above, did not apply to claims under the *Motor Accidents Compensation Act* or the *Motor Accident Injuries Act 2017* where damages are not assessed by reference to a proportion of a most extreme case: *RACQ Insurance Ltd v Motor Accidents Authority (NSW) (No 2)* (2014) 67 MVR 551 per Campbell J.

The court is required to assess the totality of the plaintiff's injuries rather than assessing each injury on an individual basis: *Holbrook v Beresford* (2003) 38 MVR 285. However, where the plaintiff suffered injury in multiple accidents, the assessment is to be made by reference to the injuries suffered in each individual accident: *Muller v Sanders* (1995) 21 MVR 309.

The plaintiff in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219 claimed for damages both under the *Civil Liability Act* and the Australian Consumer Law. The issue to be determined was whether her claim for non-economic loss should be calculated according to the more generous provisions of s 16 of the *Civil Liability Act* or in accordance with s 87M of the *Competition and Consumer Act 2010*. Macfarlan JA, with whom Simpson JA and Campbell AJA agreed, rejected the argument that the Commonwealth legislation prevailed. He said the *Competition and Consumer Act* did not purport to, nor did it, have the effect of excluding recovery of non-economic loss under the *Civil Liability Act* notwithstanding that causes of action were available to the plaintiff under both Acts.

The Court of Appeal dealt with the principles to be applied in the assessment of damages for false imprisonment in *State of NSW v Smith* [2017] NSWCA 194. The court referred to texts and authorities that emphasised that "[e]ven apparently minor deprivations of liberty are viewed seriously by the common law" (see *Minister for Immigration and Multicultural and Indigenous*

Affairs v Al Masri (2003) 128 FCR 54 at [88]). Damages in such a case, therefore, are intended to take account of, in addition to the deprivation of liberty, the shock of the arrest and injury to feelings, dignity and reputation.

[7-0050] Pecuniary losses

Last reviewed: June 2024

This head of damage includes income loss, superannuation losses and out-of-pocket expenses such as voluntary and commercially provided care expenses.

Income loss

The authorities make it clear that damages for lost income, past and present, are awarded for impairment to income-earning capacity when the impairment is productive of income loss: *Graham v Baker* (1961) 106 CLR 340; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. There are therefore three questions to be answered in assessing income.

1. What was the plaintiff's income-earning capacity at the time of injury?
2. To what extent was it impaired by the injury?
3. To what extent was the impairment productive of income loss?

A very useful summary of the applicable principles, with reference to authority, was provided by McColl JA and Hall J in *Kallouf v Middis* [2008] NSWCA 61 at [44]–[61].

1. Damages for past and future loss of income are allowed because diminution of earning capacity is or may be productive of financial loss: *Graham v Baker*, above. An alternative way of expressing the principle is that the plaintiff is compensated for the effect of an accident on the plaintiff's ability to earn income: *Medlin v State Government Insurance Commission*, above, McHugh J at [16].
2. Although the exercise involves assessment of lost earning capacity and not loss of earnings, evidence of wage rates, known for the past and likely in the future, provides a basis for assessment.
3. Both the lost capacity and the economic consequences of that loss must be identified before it will be possible to assess the sum that will restore the plaintiff to his or her position but for injury.
4. What was earned in the past may be a useful guide to what might be earned in the future but it does not always provide certain guidance.
5. Assessment of future income loss necessarily involves the consideration of future possibilities or hypothetical events. The exercise is imprecise and carried out within broad parameters.
6. Evaluation of the extent to which a plaintiff may in future lose time from work and of the proper compensation to be allowed depends on the evidence.
7. An error of principle would be involved in concluding, in the absence of evidence, as a matter of certainty that a plaintiff will suffer future income loss.
8. The onus is on the plaintiff to provide evidence in support of the claimed diminution in earning capacity. Past income is relevant to this consideration but is not always determinative.
9. The onus is on the defendant who contends that the plaintiff has a residual earning capacity to provide evidence of the extent of that capacity and of the availability of employment.
10. In both cases the evidence must establish more than a mere suggestion of loss or capacity.
11. Where it is clear that income-earning capacity has been reduced but its extent is difficult to assess, the absence of precise evidence will not necessarily result in non-recovery of damages. The task is to consider a range of what may be possibilities only that a particular outcome might be achieved to arrive at an award that is fair and reasonable.

Tax treatment of a plaintiff's income may be relevant to the assessment of his or her income-earning capacity. There are cases where tax returns do not reflect the full amount of that capacity. For example, the case of a husband and wife partnership, where income is divided equally although one partner performs the work necessary to generate the income while the other undertakes the administrative tasks associated with the operation of the business.

Husher v Husher (1999) 197 CLR 138 was an example of such a case. The plurality of the High Court noted:

- all of the income of the partnership was the result of exploitation of the plaintiff's earning capacity
- the partnership continued at will; it was a matter for the plaintiff if he chose to continue it
- the plaintiff therefore had under his control and at his disposal the whole of the fruits of his skill and labour.

These principles were applied by the Court of Appeal in *Conley v Minehan* [1999] NSWCA 432.

In *Morvatjou v Moradkhani* [2013] NSWCA 157, it was said that it was glaringly improbable that the plaintiff earned only the income disclosed in his tax returns at a time when he was supporting himself, his wife and two children. McColl JA referred to reasons of von Doussa J in *Giorginis v Kastrati* [1988] 49 SASR 371 in which he said that, while such a discrepancy reflected on a plaintiff's credit so that his or her evidence generally needed to be scrutinised with special care, it did not necessarily disqualify him or her from recovering damages based on evidence of actual earnings. McColl JA did not endorse the proposition that a plaintiff must admit failure to disclose income to tax authorities but she continued the Court of Appeal's emphasis on the need to assess diminution of income-earning capacity, acknowledging that evidence of actual income was the most useful guide when undertaking this exercise.

Malec v Hutton and *Medlin v State Government Insurance Commission*, above, were High Court decisions, the result of which was that, where a plaintiff demonstrates some loss of earning capacity extending beyond the date of trial, although difficult to assess, the courts are bound to award something unless, on the material before the court, it can be seen confidently that the damage suffered by the plaintiff will not in fact be productive of income loss.

The task of assessment of future loss, particularly where there is little or no evidence of loss to the date of hearing, was clarified in *State of NSW v Moss* (2002) 54 NSWLR 536 where the plaintiff's injuries clearly pointed to an effect on his capacity to earn and there was therefore evidence of impaired earning capacity. Heydon JA said it was wrong to conclude that damages to compensate for this loss should be minimal. He referred at [69] to authorities that he said contained two uncontroversial themes.

1. In general it was desirable for precise evidence to be called of pre-injury income and likely post-injury income.
2. Absence of that evidence will not necessarily result in an award of no or nominal damages for impaired earning capacity.

His Honour's summary at [89] was:

> In short, where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages. Statements to the contrary such as those made in *Allen v Loadsman* [1975] 2 NSWLR 787 at 792 are not correct: *Baird v Roberts* [1977] 2 NSWLR 389 at 397–8 per Mahoney JA; *J K Keally v Jones* [1979] 1 NSWLR 723 at 732–735 per Moffitt P; *Yammine v Kalwy* [1979] 2 NSWLR 151 at 154–5 and 156–7 per Reynolds JA and Mahoney JA; *Thiess Properties Pty Ltd v Page* (1980) 31 ALR 430; see also *Radakovic v R G Cram & Sons Pty Ltd* [1975] 2 NSWLR 751 at 761 where Samuels JA criticised the "meagre facts" provided but did not say it was not open to the jury to find a substantial sum for

> diminished earning capacity by the "application of their own knowledge and experience". The task of the trier of fact is to form a discretionary judgment by reference to not wholly determinate criteria within fairly wide parameters. Though the trier of fact in arriving at the discretionary judgment must achieve satisfaction that a fair award is being made, since what is involved is not the finding of historical facts on a balance of probabilities, but the assessment of the value of a chance, it is appropriate to take into account a range of possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility.

In *Cupac v Cannone* [2015] NSWCA 114 the Court of Appeal noted the extremely difficult task of assessment of income loss facing the trial judge when dealing with wildly differing medical opinion and the failure to call any medical expert for cross examination. The court rejected the contention that the award for past income loss should be increased to take account of inflation from the date of the plaintiff's injury. This was because the trial judge was required to estimate loss when precise calculation was not possible and the figure arrived at took into account a range of factors, including the changing value of money.

In *Jopling v Isaac* [2006] NSWCA 299 the Court of Appeal confirmed that, notwithstanding the requirement of s 13(1) *Civil Liability Act* that the plaintiff's most likely future circumstances, but for injury, be taken into account, the principles of *State of NSW v Moss*, above, continued to apply when the evidence was deficient and that the option of awarding a cushion or buffer as compensation for future economic loss remained available. This was confirmed in *Black v Young* [2015] NSWCA 71, where the court also confirmed the need to address specifically the provisions of *Motor Accidents Compensation Act 1999* s 126 to the circumstances of each particular case.

In *Thorn v Monteleone* [2021] NSWCA 319 the Court of Appeal upheld the award of a buffer or cushion for economic loss to compensate the plaintiff for the future prospect of becoming a farm manager or operating his own farm. The buffer of $150,000 was awarded on top of an assessment that the plaintiff had an ongoing loss of $900 per week because he unfit to perform his pre-injury duties.

A similar problem arose in *Younie v Martini* (unrep, 21/3/95, NSWCA) when the plaintiff suffered no income loss to the date of trial. The court held, however, that an assessment that the plaintiff suffered significant impairment to the extent of 18% should have resulted in a finding of impaired income capacity. In this case, given the nature of the plaintiff's duties as a nursing assistant, having found that the injury continued to the date of trial, some award ought to have been made for future economic loss. See also *Chen v Kmart Australia Ltd* [2023] NSWCA 96 where the eight-year-old plaintiff was awarded $5,000 as a buffer sum for loss of future earning capacity, the primary judge acknowledging the possibility of "some limitation of career choices" due to some degree of inhibition or diminished self esteem and an only slight chance of rejection or disapproval by others in the workforce on account of her scarring. In this case, where the assessment of the likely future economic loss of the child plaintiff was a "matter of intuition, or guesswork", the scope for appellate intervention was limited: at [51]. However, in *Clancy v Plaintiffs A, B, C and D* [2022] NSWCA 119 at [274]–[278], the court found the primary judge's assessment of C's damages for future economic loss in the sum of $111,000, by way of a buffer, could not be sustained. Not only was it non-compliant with the requirements of s 13 of the *Civil Liability Act*, which are directed to supplying some meaningful and transparent basis for the award of damages for future economic loss, but the fact the damages awarded for this head of loss were identical to those awarded to plaintiff A reinforced the perception that the figure of $111,000 was not calculated by reference to the particular circumstances of C.

Nevertheless, as pointed out by Young AJA at [111] in *Perisher Blue Pty Ltd v Harris* [2013] NSWCA 38, there can be no compensation for loss of income-earning capacity unless it is also established that diminished capacity is productive or is likely to be productive of actual loss.

In *Sharman v Evans* (1977) 138 CLR 563 the High Court dealt with the question of the adjustment to be made to the award for income loss where the plaintiff's injuries were such that she was not

expected to live to retirement age. The court held that she was entitled to recover income loss during the lost years subject to the deduction of an amount to account for the expenses that she would have incurred in self maintenance. No deduction was required for the expense of maintaining dependants.

Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485 set aside any suggestion that a working mother's income should be reduced to account for expenses of providing childcare or domestic help or for the prospect that she "would at some stage (choose) or (be) forced to accept a less demanding job" because she "would be unable or unwilling to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband": Dawson, Toohey, Gaudron, Gummow JJ at [9]. They pointed out that it was necessary to call evidence that suggested a plaintiff was less able than any other career-oriented person, whether male or female, to combine successfully a demanding career and family responsibilities. Childcare and domestic-care responsibilities, they said, did not always involve expenditure. This was a matter of choice for the family and the expense involved was of a private or domestic nature.

White v Benjamin [2015] NSWCA 75 also rejected the proposition that a wife's future income loss should be discounted because her husband's secure employment in a flourishing business might persuade her to abandon her own career ambitions.

Specific evidence is required if a plaintiff proposes to work beyond retirement age: *Roads and Traffic Authority v Cremona* [2001] NSWCA 338. In that case the court accepted a general practitioner's evidence that he would continue to work to the age of 70 years but the assessment of his income loss beyond retirement age was reduced to take account of the likelihood that, as he advanced in age, he would earn less.

A certificate of assessment of whole person impairment issued under *Motor Accidents Compensation Act 1999* s 61 is not conclusive in respect of economic loss: *Pham v Shui* [2006] NSWCA 373, *Brown v Lewis* (2006) NSWLR 587; [2006] NSWCA 87, *Motor Accidents Authority of NSW v Mills* (2010) 78 NSWLR 125, *El-Mohamad v Celenk* [2017] NSWCA 242. While the content of the certificate may have some relevance, extreme caution was required in relying on the content of the certificate in assessing damages for economic loss: *Brown v Lewis*, above, Mason P at [23].

Loss of income from operation of a business

Difficulties arise in valuing a plaintiff's loss when they are self-employed or operate a business through a partnership, trust or company. The starting point is the joint judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ in *Husher v Husher* (1999) 197 CLR 138 at [16], which states that the basic principles for the assessment of damages are well known and should not be obscured by particular factual contexts. These principles require the "identification of what earning capacity has been impaired or lost and what financial loss has been occasioned by that impairment or loss": at [17].

Poor accounting practices, lack of tax returns for previous years, variations in revenue and expenditure from year to year, inability to estimate capacity for expansion and economic downturns (including events such as pandemics) are examples of occurrences that cause particular problems. The problem may be aggravated where a plaintiff intends to start a business but has not done so at the time of injury.

Sometimes a plaintiff's absence through injury may not adversely impact the profits of an established business, and it is difficult to estimate the financial loss incurred by the plaintiff's absence. Conversely, the incurrence of a loss does not necessarily mean that it is recoverable by the plaintiff, or anyone else. Similarly, the wage drawn from a business by a self-employed person may not be a true reflection of earning capacity. A court is required to do its best on the material available to measure the loss that is due to the injury: *Ryan v AF Concrete Pumping Pty Ltd* [2013] NSWSC 113 at [211] and *New South Wales v Moss* (2000) 54 NSWLR 536 at [72] (Heydon JA).

The requirement to mitigate the loss will ordinarily mean that the damages cannot exceed the cost of employing someone to do what the injured plaintiff is unable to do. However, in an appropriate case the entrepreneurial efforts of a business proprietor may need to be rewarded by a percentage uplift on the wages of the replacement employee or employees. Alternatively, a loss of profit is recoverable if it reflects the pecuniary value of the plaintiff's physical and intellectual labour, such as self-employed professionals who are dependent on rendering fees for services.

Vicissitudes

It is an acknowledged principle that life is not always certain and that unpredictable events can affect future income. These events or vicissitudes are dealt with by the application of a discount to the sum assessed as compensation for future income losses.

In *State of NSW v Moss*, above, Mason P at [33], referring to *Wynn v NSW Insurance Ministerial Corporation*, above, at 497, said that the negative consequences or vicissitudes that are normally taken into account are sickness, accident, unemployment and industrial disputes.

In *Norris v Blake (No 2)* (1997) 41 NSWLR 49 Clarke JA confirmed that it was in order to add a sum against the positive contingency of success or income-earning capacity beyond pension age.

In NSW, 15% is the conventional allowance made for vicissitudes. In *FAI Allianz Insurance Ltd v Lang* [2004] NSWCA 413 at [18] Bryson JA described the conventional allowance as "an expedient and approximate resolution of many imponderables, and the difficulty of producing a justification for any greater or lower figure in a particular case tells strongly against departing from the conventional figure". In *State of NSW v Moss* at [100] Heydon JA described it as the starting point and the finishing point in most cases.

The conventional discount of 15% may be varied to take account of particular circumstances. For instance, where the plaintiff is of advanced age with a relatively short period over which the assessment of future income loss is to be made, the percentage applied for vicissitudes may be reduced. It is more common, however, that the percentage is increased, particularly where there is evidence of a pre-existing condition, unrelated to the injury that is the subject of the claim, that is likely to affect the plaintiff's capacity to continue to earn income: *Berkley Challenge Pty Ltd v Howarth* [2013] NSWCA 370. See also, for example, *Palmer v NSW* [2024] NSWSC 179, in which the plaintiff was sexually abused by the third defendant as a child but had also undergone a series of other traumatic events that could not be said to have been caused by the defendant's conduct. Garling J reduced the plaintiff's award by 30% for vicissitudes, finding the other traumatic events contributed (and in a material way) to her mental illnesses and diagnoses and would have been likely to have adversely affected her working career: at [102]–[105].

In *Taupau v HVAC Constructions (Qld) Pty Ltd* [2012] NSWCA 293, Beazley JA at [190]–[192] said that the plaintiff's past record of imprisonment should not have altered the principles on which his past and future income loss was assessed in any way differently from the principles applied to law abiding members of the community. However, it would have been appropriate to take the plaintiff's propensity to crime and imprisonment into account by way of the discount for vicissitudes.

Care should be exercised to avoid double counting. In *Smith v Alone* [2017] NSWCA 287, the plaintiff's pre-accident income had been limited by his pre-existing alcohol dependency. The trial judge took account of this factor in assessing the sum to be awarded for income loss and further decreased the award by 35% for vicissitudes. Macfarlan JA, with whom Meagher and White JJA agreed, said at [58]:

> Both parties accepted that the usual discount to damages for future economic loss that is made for contingencies or "vicissitudes" is 15%. As the plurality said in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497; [1995] HCA 53, this discount is to "take account of matters which might otherwise adversely affect earning capacity" and "death apart, 'sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of the loss of income'" (ibid, citing Harold Luntz, *Assessment of Damages for Personal Injury and Death*, (3rd ed 1990, Butterworths) at 285).

In re-assessing the deduction at 25%, Macfarlan JA at [63] said:

> After all, the average person can hardly be regarded as a paragon of virtue when it comes to heavy drinking.

Care should exercised before departing from the conventional figure to identify and express reasons as to why the plaintiff's future income is likely to be affected by contingencies to any different or greater degree than normal, notwithstanding that a trial judge's conclusion is likely to be evaluative and impressionistic: *Fuller v Avichem Pty Ltd t/as Adkins Building and Hardware* [2019] NSWCA 305 at [69]–[70] (Macfarlan JA) and [105] (Payne JA, White JA agreeing).

Statutory provisions

The *Workers Compensation Act* places stringent limits on the recovery of common law damages from an employer, except where the claim is the result of a motor accident. Section 151G disallows any award of common law damages except that which arises out of past and future losses from impairment to income-earning capacity. In order to qualify for any right to claim, the plaintiff must have been assessed with a degree of permanent impairment of at least 15%: s 151H.

Any amount by which the plaintiff's net weekly earnings exceed or are likely to exceed the amount of gross weekly compensation payments payable under s 34 of the Act is to be disregarded: s 151I. Damages are payable only to pension age as defined by the *Social Security Act 1991*: s 151IA.

No damages for pure mental harm, or nervous shock, may be claimed where the injury was not a work injury: s 151AD. This provision disallows any claim for nervous shock by, for instance, a relative of an injured worker.

Damages are not to be reduced on account of contributory negligence to the extent that the amount awarded is less than the court's estimate of the value of the plaintiff's entitlements by way of commutation of weekly payments of compensation: s 151N.

The defence of voluntary assumption of risk is not available to a claim under the Act but damages are to be adjusted to take account of the plaintiff's negligence: s 151O.

The *Civil Liability Act* limits an award of damages for past or future income loss by providing that the court must disregard any amount by which the plaintiff's gross weekly earnings exceed average weekly total earnings of all employees in NSW in the most recent quarter prior to the date of the award as published by the Australian Statistician: s 12.

In respect of future income loss, s 13 requires a plaintiff to establish assumptions about earning capacity that accord with his or her most likely future circumstances but for the injury. The calculation based on those assumptions must be discounted against the possibility that those circumstances might not eventuate. The court is required to state the assumptions on which the award is based and the percentage by which it has been adjusted. The same provision appears in s 126 *Motor Accidents Compensation Act*.

In *Coles Supermarkets Australia Pty Ltd v Fardous* [2015] NSWCA 82 Macfarlan JA said that the requirements of s 13 of the *Civil Liability Act* were in accordance with the principles established in *Purkess v Crittenden* (1965) 114 CLR 164 and *Morvatjou v Moradkhani* [2013] NSWCA 157, namely that a plaintiff at all times bears the onus of proof of the extent of injury and of consequential loss of income-earning capacity. They accorded also with the two-stage process of assessment described in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 that required a plaintiff to establish his or her theoretical earning capacity but for injury and the extent to which that earning capacity would, but for injury, have been productive of income.

Notwithstanding these requirements, common law principles relating to the assessment of income loss, vicissitudes or contingencies continue to apply: *Taupau v HVAC Constructions (Qld) Pty Ltd*, above, where Beazley JA said ss 12 and 13 made no change to the common law principles, established in *Graham v Baker* and *Medlin v SGIO*, that damages for economic loss, past and future, are awarded for impairment to economic capacity resulting from the injury, provided the impairment is productive of income loss.

The *Motor Accidents Compensation Act* provides in s 125 for a limit on the weekly amount that may be awarded for income losses. The amount of the cap is indexed annually with effect from 1 October in each year. Section 130 requires the court to deduct from payments on account of income loss expenses paid to the plaintiff under the *Victims Compensation Act 1996* (repealed, now *Victims Rights and Support Act 2013*) or by the insurer or Nominal Defendant.

As to the *Motor Accident Injuries Act 2017*, see [7-0085] under the subheading **Economic loss**.

The problems presented to a court in meeting the requirements of s 13 *Civil Liability Act* have been the subject of judicial comment in many decisions. In *MacArthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145, Hodgson J noted that s 13 appeared to make no provision for the contingency that a plaintiff's income might increase significantly. He said it was doubtful that the court could make allowance as in *Norris v Blake (No 2)*, above, for the prospect of superstardom.

Hodgson J also expressed doubt about the power to award a lump sum or buffer when assessing income loss under s 13. This concern was put to rest in *Dunbar v Brown* [2004] NSWCA 103 where the court held that a buffer could be allowed to account for absences from work from time to time to allow for periods of respite or treatment. This principle has been applied in a number of subsequent decisions, including *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302 where McColl JA said at [30]:

> there is a point (which may be differently assessed by different courts) beyond which the selection of a figure for economic loss is so fraught with uncertainty that the preferred course is to award a lump sum as a "buffer", without engaging in an artificial exercise of commencing with a precise figure, and reducing it by a precise percentage.

See also *Penrith City Council v Parks* [2004] NSWCA 201 at [5], [10], [58] (where the Court held that s 13 did not preclude the granting of a buffer for future economic loss when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine) and *Chen v Kmart Australia Ltd* [2023] NSWCA 96 (where a modest buffer was awarded to an eight-year-old plaintiff).

Each statute provides for the net present value of any lump sums paid on account of future income loss to be discounted at a prescribed rate, currently 5%: *Workers Compensation Act*, s 151J; *Civil Liability Act*, s 14; *Motor Accidents Compensation Act*, s 127.

Superannuation

The maximum recoverable for the loss of employer contributed superannuation is that required by law to be paid by the employer: *Civil Liability Act*, s 15C.

In general terms, where a claimant is injured during their working life, what is awarded in relation to superannuation benefits is the net present value of the court's best estimate of the fund that the claimant would have had at the date of retirement but for the injury; namely, a fund which would have generated the "lost" superannuation benefits. The capital asset that is being valued (because it is lost) is the present value of the future rights: *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at [97] applying *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354 at [54], [59], [66]–[67]. The loss suffered is the diminution in value of the asset: *Amaca Pty Ltd v Latz* at [97].

In *Amaca Pty Ltd v Latz*, the respondent, who had retired, was in receipt of a superannuation pension and the Commonwealth age pension when diagnosed with terminal malignant mesothelioma. The Full Court of the Supreme Court of South Australia held the value of both pensions were compensable losses, but reduced the award to take into account a reversionary pension payable to his partner after death under the *Superannuation Act 1988* (SA), s 38(1)(a). The High Court by majority held that the Full Court was correct to include in the damages award an allowance for the superannuation pension that he would have received for the remainder of his pre-illness life expectancy, less the reversionary pension. The majority held that that his superannuation benefits are a "capital asset", which has a present value, and which can be quantified: at [101]. As a result of the respondent's injury caused by the appellant, he would suffer an economic loss in respect of his

superannuation pension, which is a capital asset and intrinsically connected to earning capacity. That loss was both certain and measurable by reference to the terms of the *Superannuation Act* — the net present value of the superannuation pension for the remainder of his pre-illness life expectancy, a further 16 years, and he should be entitled to recover that loss: at [109]. The age pension however is neither a part of remuneration, nor a capital asset. It is not a result of, or intrinsically connected to, a person's capacity to earn and no sum should be allowed on account of the age pension in the calculation of damages for the respondent's personal injuries: at [115].

In *Najdovski v Cinojlovic* (2008) 72 NSWLR 728 the court, by majority, confirmed the adopted practice of awarding 9% if the calculation is based on a gross earning figure or 11% if calculated on earning, net of tax.

The Fox v Wood component

This element of income loss arises in situations where a plaintiff has received weekly payments for loss of income under the workers compensation legislation upon which tax has been paid. The plaintiff when recovering common law damages is required to repay to the workers compensation insurer the gross amount of weekly payments received. The tax paid on those weekly payment was held to be recoverable in *Fox v Wood* (1981) 148 CLR 438 at 441.

[7-0060] Out-of-pocket expenses

Medical care and aids

Out-of-pocket expenses incurred by a plaintiff are recoverable to the extent that they are:

- reasonably incurred, and
- expended in the treatment of injuries arising out of the accident that is the basis for the claim.

In many cases where liability is not in issue, the insurer will pay for or reimburse out-of-pocket expenses that meet these requirements. Section 83 *Motor Accidents Compensation Act* obliges an insurer, when liability is admitted in whole or in part, to meet the plaintiff's reasonable expenses of medical care, rehabilitation and certain respite and attendant care services. Payment of these expenses is commonly raised as a defence to a claim.

In general, claims for out-of-pocket expenses centre on needs for treatment, past and future, rehabilitation and aids to assist a plaintiff in overcoming disability arising from injury. As with income loss, in determining the amount to be awarded, it is often necessary to take account of future requirements for treatment, particularly in the case of orthopaedic injuries that may involve ongoing degeneration and the need for surgery for fusion or replacement of joints.

The assessment for future needs involves consideration of the following:

- has the requirement been established as a probability?
- when is the expense likely to be incurred?
- the extent to which treatment will affect income-earning capacity, so that loss of income may have to be taken into account
- in a plaintiff of relative youth, the extent to which surgery may need to be repeated.

Aids to assist in overcoming disability include items such as artificial limbs, crutches, wheelchairs and special footwear as well as the costs of providing or modifying accommodation to meet the plaintiff's needs. In addition, allowance may be made for the cost of providing special beds, tools or equipment designed to assist an impaired plaintiff in the functions of everyday living.

Section 3 *Motor Accidents Compensation Act* includes in the definition of "injury" damage to artificial members, eyes or teeth, crutches and other aids or spectacle glasses. Thus, the cost of repair or replacement of these items is compensable. Other items held to be compensable include clothing damaged in the course of the accident or treatment.

As to the *Motor Accident Injuries Act 2017*, see [7-0085].

The fact that the treatment fails or is ineffective does not preclude recovery (*Lamb v Winston (No 1)* [1962] QWN 18) but the cost of experimental treatment that offers no cure will not be recoverable. *Neal v CSR Ltd* (1990) ATR ¶81-052 held that the cost of a treatment that remained at trial stage was disallowed.

The issue of whether an expense could be regarded as reasonable was discussed in *Egan v Mangarelli* [2013] NSWCA 413. The plaintiff claimed the considerable cost of a C-leg prosthesis, a specialised computerised device. He explained that he did not, prior to trial, use his conventional prosthesis regularly or for extended periods because it caused him pain. The cost of the C-leg prosthesis was held to be reasonable because, properly fitted, it would reduce the plaintiff's pain, lead to greater use and improve his mobility.

McKenzie v Wood [2015] NSWCA 142 dealt with the issue of whether the plaintiff should recover the cost of a hip replacement. The evidence established that prior to his accident, the plaintiff suffered from symptoms of osteoarthritis and it was inevitable that he would at some stage require hip replacement that could have been undertaken in a public hospital at no expense to him. The Court of Appeal accepted that the replacement that would have been required as a result of the pre-accident progressive condition was unlikely to involve the urgent intervention necessitated by the injury suffered in the accident. Accordingly the plaintiff was entitled to recover the cost.

The capital costs of modifications to accommodation to meet the needs of a disabled plaintiff are recognised as recoverable out-of-pocket expenses and no allowance is to be made for the increase in the capital value of a property modified for that purpose: *Marsland v Andjelic* (1993) 31 NSWLR 162. In most cases, the cost of the basic accommodation itself is not recoverable. In *Weideck v Williams* [1991] NSWCA 346, the court said this was not a strict rule and that, in accordance with the principles of *Todorvic v Waller* (1981) 150 CLR 402, each case was to be decided on its facts. In *Weideck*, the injured plaintiff could no longer live in the caravan he occupied prior to his injury. He was allowed the full capital costs of modifications required to deal with his disability. In addition, he was allowed the costs of land and a basic house, heavily discounted to set off the rent he otherwise would have continued to pay and the income that ordinarily would have been diverted to the provision of a capital asset, such as a house.

The majority in the High Court in *Cattanach v Melchior* (2003) 215 CLR 1 awarded damages for the cost of raising and maintaining a child born as the result of medical negligence. In response to *Cattanach v Melchior*, s 71 *Civil Liability Act*, was enacted to prevent claims for economic loss for the cost of rearing or maintaining a child or the loss of earnings forgone while rearing the child, except where the child suffers from a disability, where the additional costs of rearing and maintaining a child who suffers from a disability are recoverable. Section 71 does not prevent the recovery of damages for pregnancy and birth of a child, where the pregnancy is the result of negligence, such as a failed sterilisation procedure: *Dhupar v Lee* [2022] NSWCA 15 at [172]. Further, s 71 does not prevent the recovery of damages for physical or psychiatric injury sustained during or as a consequence of the birth: *Dhupar* at [175]–[176].

Attendant care

There are two varieties of attendant care: those that are provided by friends or family on a gratuitous basis and those that are commercially provided and paid for. As with all heads of damage, a plaintiff may recover compensation for the loss of capacity for self and domestic care only if the need for the care arises out of injuries suffered as a result of the defendant's negligence and provided that the amount claimed is reasonable.

The issue that has been most productive of judicial and legislative scrutiny is that arising out of claims for services provided on a gratuitous basis.

The High Court in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 dealt with the issue of whether a plaintiff could be said to have suffered a compensable loss when her attendant care needs of a

domestic and nursing nature were met by an unpaid third party and to whom she owed no obligation of payment. The argument was that the loss was in truth suffered by the person who provided the services. Gibbs CJ at [12], discarding prior authority, said that damages for gratuitously provided services were payable if three conditions were met.

1. It was reasonably necessary to provide the services.
2. It would be reasonably necessary to do so at a cost.
3. The character of the benefit that the plaintiff received by the gratuitous provision of services was such that it ought to be brought to the account of the wrongdoer.

Mason J at [30] set out the principle upon which compensation was payable to the plaintiff rather than the volunteer as follows:

> The respondent's relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services and this loss is to be quantified by reference to the value or cost of providing those services. The fact that a relative or stranger to the proceedings is or may be prepared to provide the services gratuitously is not a circumstance which accrues to the advantage of the appellant. If a relative or stranger moved by charity or goodwill towards the respondent does him a favour as a disabled person then it is only right that the respondent should reap the benefit rather than the wrongdoer whose negligence has occasioned the need for the nursing service to be provided.

The issue in *Van Gervan v Fenton* (1992) 175 CLR 327 was the basis upon which this element of compensation was to be valued. In a majority decision, the High Court rejected the argument that the plaintiff's loss of capacity was to be valued by reference to the income lost by the person providing gratuitous services. Mason CJ, Toohey and McHugh JJ said at [16] that the true basis of a claim was the need of the plaintiff for gratuitous services and the plaintiff did not have to establish that the need was or might be productive of income loss. The value of the plaintiff's loss, they said, was the ordinary market cost of providing the services.

Kars v Kars (1996) 187 CLR 354, where the defendant was the plaintiff's husband and provided attendant care services, involved the argument that the defendant thereby met his obligations as a tortfeasor and no further compensation could be recovered. In rejecting the argument, the High Court confirmed that *Griffiths v Kerkemeyer* principles are directed at the loss of capacity suffered by a plaintiff and that, although the resulting need for care is quantified by reference to what the care provider does, the focus remains on the plaintiff's needs.

Justices Toohey, McHugh, Gummow and Kirby said:

> The plaintiff might, or might not, reimburse the provider. According to the repeated authority of this Court, contractual or other legal liability apart, whether the plaintiff actually reimburses the provider is entirely a matter between the injured plaintiff and the provider.
>
> …
>
> The starting point to explain our conclusion is a clear recollection of the principle that the Court is not concerned, as such, to quantify a plaintiff's loss or even to explore the moral or legal obligations to a care provider. It is, as has been repeatedly stated, to provide the injured plaintiff with damages as compensation for his or her need, as established by the evidence. The fact that a defendant fulfils the function of providing services does not, as such, decrease in the slightest the plaintiff's need.

In *CSR v Eddy* (2005) 226 CLR 1, the High Court noted at [26] that the *Griffiths v Kerkemeyer* principles were anomalous and controversial. The anomaly arose from the departure from the general rule that damages, other than damages for loss not measurable in money, were not recoverable unless the injury involved resulted in actual financial loss. The controversy arose because the result could be disproportionately large awards when compared to sums payable under traditional heads of damage.

These principles were confirmed in *Hornsby Shire Council v Viscardi* [2015] NSWCA 417 and *Smith v Alone* [2017] NSWCA 287. In *Smith* Macfarlan JA at [75]–[77] referred to authority that supported the proposition that consideration must be given to a plaintiff's family circumstances in

deciding whether the provider of gratuitous care will continue to do so in the future. He also accepted that in appropriate circumstances a deduction for vicissitudes might be appropriate when assessing a claim for attendant care costs.

Legislative provisions

The legislation that attempts to address the concerns expressed by the High Court appears in ss 15, 15A and 15B *Civil Liability Act* at and in ss 141B, 141C and 142 *Motor Accidents Compensation Act*. There are some substantial differences between these provisions. The *Civil Liability Act* sets out in s 15(1) definitions of attendant care services and gratuitous attendant care services and, in s 15(2) specifies the conditions to be satisfied to qualify for compensation, namely: a reasonable need for the services, a need created solely because of the injury to which the damages relate, and services that would not be provided but for the injury.

Both statutes impose a threshold on the recovery of damages that requires that not less than six hours per week be provided for a period of at least six consecutive months: s 15(3) *Civil Liability Act*; s 141B(3) *Motor Accidents Compensation Act*. In each case the maximum amount recoverable is set, where services are provided for more than 40 hours per week at the weekly sum that is the Australian Statistician's estimate of the average weekly total earnings of all employees in NSW, and where the weekly requirement is less than 40 hours, at the hourly rate that is one-fortieth of this figure: s 15(4) *Civil Liability Act*, s 141B(4) *Motor Accidents Compensation Act*.

As to the *Motor Accident Injuries Act 2017*, see [7-0085].

In *Hill v Forrester* (2010) 79 NSWLR 470, the Court of Appeal confirmed that both requirements of s 15(3), as amended following the decision in *Harrison v Melham* (2008) 72 NSWLR 380, must be met in order to qualify for compensation. The issue in *Hill v Forrester* was whether the right to compensation applied to services provided before the threshold of six hours per week of care over a period of six consecutive months was met. Sackville AJA held that only one six-month qualifying period was involved and it was not a continuing requirement. The result was that compensation was payable for services provided both before and after the threshold requirements were met.

The *Civil Liability Act* contains no equivalent provision to s 141C *Motor Accidents Compensation Act* where specific provision is made for the cost of reasonable and necessary respite care for a seriously injured plaintiff who is in need of constant care. It is probable however that these services would be covered within the definitions of attendant care services in s 15(1).

As to services that would have been provided in any event, the High Court in *Van Gervan v Fenton*, above, recognised that in the ordinary course of a marriage there is an element of give and take in the provision of mutually beneficial services. Deane and Dawson JJ at [4] said:

> The qualification is that such services will be taken out of the area of the ordinary give-and-take of marriage to the extent that the injuries to the wife or husband preclude her or him from providing any countervailing services. To that extent, the continuing gratuitous services provided by the spouse assume a different character and should be treated as additional services which have been or will be provided by that spouse to look after the accident-caused needs of the injured plaintiff.

Ipp JA in *Teuma v CP & PK Judd Pty Ltd* [2007] NSWCA 166 at [64] noted that this part of the minority judgment supported the majority in *Van Gervan* to the effect that no reduction should be made to attendant care damages to take account of the mutual obligations of family life.

White v Benjamin [2015] NSWCA 75 involved issues of the extent to which the time required to meet the need for attendant services could be determined separately from the needs of a household as a whole. The principle accepted by both Beazley ACJ and Basten JA was that where the elements of the claim were severable as between a plaintiff and those who also benefit from those services, no aspects of those services may be commingled for the purpose of determining whether the thresholds of six hours per week for a continuous period of six months have been met. Where those elements are not severable, the element of mutuality referred to in *Van Gervan v Fenton*, *CSR v Eddy*, above,

Hodges v Frost (1984) 53 ALR 373 and *Coles Supermarkets Australia Pty Ltd v Haleluka* [2012] NSWCA 343, applied so that the commingled needs of a plaintiff remained the plaintiff's needs even if they were of mutual benefit.

Basten JA pointed out that s 15 of the *Civil Liability Act* did not apply to claims made under the *Motor Accidents Compensation Act* where they were dealt with in s 141B which did not mirror exactly the provisions of s 15. However, s 15B of the *Civil Liability Act* applied to motor accident claims so that it was necessary to distinguish between damages awarded for the plaintiff's personal loss and those awarded for the loss of capacity to provide services to dependents and to apply the six hour/six month thresholds separately to each claim.

Nor is it permissible to aggregate the needs created by successive breaches of duty, for example, where those needs are generated by successive accidents, in order to meet the threshold requirements of the legislation: *Muller v Sanders* (1995) 21 MVR 309; *Falco v Aiyaz* [2015] NSWCA 202.

The question of whether the need for services was generated solely by the relevant injury was dealt with in *Woolworths Ltd v Lawlor* [2004] NSWCA 209 where it was argued that the plaintiff had a pre-existing asymptomatic degenerative condition that might at some later stage produce symptoms and generate the need for services. Thus, it was argued, the need for services did not arise solely out of the aggravation of the condition for which the defendant was responsible. Beazley JA, although she said the section was not without difficulty, preferred a construction that was based on the definition of injury. This included impairment of a person's physical or mental condition so that gratuitous services provided solely as a result of such an injury, although an aggravation, were compensable. The same approach to this requirement was taken in *Basha v Vocational Capacity Centre Pty Ltd* [2009] NSWCA 409; *Angel v Hawkesbury City Council* [2008] NSWCA 130 and *Westfield Shoppingtown Liverpool v Jevtich* [2008] NSWCA 139.

Daly v Thiering (2013) 249 CLR 381 dealt with the issue of whether the plaintiff, a participant in the scheme established by the *Motor Accidents (Lifetime Care and Support) Act 2006*, was entitled to compensation for the gratuitous services provided by his mother. The plaintiff's mother agreed with the Lifetime Care and Support Authority to provide domestic services for the plaintiff without pay. Although recovery of damages for gratuitously provided services is regarded as compensation for the plaintiff's loss of capacity, the High Court held that the claim was for economic loss and was precluded by s 130A *Motor Accidents Compensation Act* (now repealed) for so long as the services were provided for under the scheme. It was irrelevant that the services provided by the plaintiff's mother without expense might result in a windfall to the Authority.

Commercially provided services

Where care is not provided on a gratuitous basis, the reasonable cost of reasonably required commercially provided services is recoverable both for the past and future: *Matcham v Lyons* [2004] NSWCA 384. The issue of what was reasonable was dealt with in *Dang v Chea* [2013] NSWCA 80, where Garling J dealt with competing arguments concerning the services to be provided to the plaintiff who required 24-hour care. There was a considerable difference between the cost of 24-hour care in a rented apartment, as claimed by the plaintiff, and the cost of nursing-home care that the defendant argued would meet her reasonable requirements. Garling J rejected the plaintiff's contention after consideration of authority, including:

1. The test established by Barwick CJ in *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 that the aim of an award of damages was not to meet the ideal requirements for an injured plaintiff but rather his or her reasonable requirements.
2. The following extract from the reasons of Windeyer J in *Chulcough v Holley* (1968) 41 ALJR 336 at 338:

> A plaintiff is only entitled to be recouped for such reasonable expenses as will reasonably be incurred as a result of the accident. What these are must depend upon all the circumstances of the case — including the particular plaintiff's way of life, prospects in life, family circumstances and

> so forth. It does not follow that every expenditure which might be advantageous for a plaintiff as an alleviation of his or her situation or which could give him or her happiness or satisfaction must be provided for by the tortfeasor.

3. The following extract from the reasons of Gibbs and Stephen JJ at 573 in *Sharman v Evans* (1977) 138 CLR 563:

> The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative health benefits to the plaintiff, becomes manifest.

Accepting that the need for care was demonstrated because, although the plaintiff continued to perform domestic tasks, he did so with difficulty, the court in *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370 also accepted that his needs should be assessed on the basis that commercial services would be required after the plaintiff's family would no longer be available to care for him gratuitously. Tobias AJA rejected the argument, as without legal basis, that the court must be satisfied that the amount awarded would actually be spent. It was contrary to the authority of *Todorovic v Waller* (1981) CLR 402 at 412 that the court has no concern as to the manner in which a plaintiff uses the amount awarded.

In *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 the Court of Appeal accepted that the plaintiff was entitled to recover damages for the cost of commercially provided services at the established market rate rather than at the lower rate she paid for domestic assistance at the time of trial. The court continued its practice of preferring the commercial rate on the basis that it was not known how much longer the current service provider would continue to work at the lower rate.

In *Manly Fast Ferry Pty Ltd v Wehbe* [2021] NSWCA 67 at [110] the Court of Appeal accepted that the award of future damages at the commercial rate was appropriate where the plaintiff gave evidence that by using a commercial provider he would take pressure off his brothers and where it could be inferred that if there were funds available that his brothers would cease to provide their services gratuitously.

Loss of capacity to care for others

In *Sullivan v Gordon* (1999) 47 NSWLR 319, the Court of Appeal held that the injured plaintiff was entitled to compensation for the lost capacity to care for a child on the same basis as that established in *Griffiths v Kerkemeyer*. This approach was set aside by the High Court in *CSR v Eddy* (2005) 226 CLR 1. The court reinstated the principles of *Burnicle v Cutelli* (1982) 2 NSWLR 26 that damages for loss of capacity to care for family members was compensable but as a component of general damages and not on *Griffiths v Kerkemeyer* principles.

Damages for the loss of capacity to provide domestic services are now dealt with in s 15B *Civil Liability Act*, a provision that applies also to claims brought under the *Motor Accidents Compensation Act*, unless the care needs have been met through the *Motor Accidents (Lifetime Care and Support) Act* or payments made by the insurer under s 83 *Motor Accidents Compensation Act*: s 15B(8), (9).

The section provides definitions of assisted care and dependants and in s 15B(2) lists four preconditions to the award of damages:

> (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of "dependants" in subsection (1) — the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and
>
> (b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and

(c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:

(i) for at least 6 hours per week, and

(ii) for a period of at least 6 consecutive months, and

(d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

These requirements received scrutiny in *State of NSW v Perez* (2013) 84 NSWLR 570. Recognising the ambiguities of s 15B(2)(b), Basten JA said that the activities of a plaintiff prior to the date at which the liability arose set the upper limit of what can be claimed, provided the other requirements of the section are met. On the question of what was reasonable in all the circumstances (s 15B(2)(d)), he said the qualification did not apply to the word "need" in isolation. It qualified and required that a need for six hours of care per week for six consecutive months be reasonable. It was therefore necessary to consider the particular needs of the dependants involved.

Macfarlan JA at [39] said it was irrelevant that other family members took over the role of providing care because that care would always have to be provided by some alternative means. The right to damages addressed the needs of the dependants that would, but for injury, have been satisfied by the claimant and the question of whether those needs were reasonable in the circumstances.

The thresholds of six hours per week for six consecutive months apply and damages are quantified by reference to the limits imposed by s 15(5). The balance of s 15B is directed at avoiding duplication in the award of compensation so that:

1. If damages are awarded under the section, the assessment of non-economic loss must not include an element to compensate for loss of capacity to provide services to others: s 15B(5).
2. Damages are not recoverable:
   - by the plaintiff, if the dependant has previously received compensation for the loss of capacity for self-care: s 15B(6), or
   - by a dependant for loss of capacity for self-care, if a plaintiff has previously recovered compensation for loss of capacity to provide those services: s 15B(7)
   - to the extent that gratuitous attendant care services, for which the plaintiff is compensated under s 15, also extend to the care of dependants: s 15B(10).
3. A plaintiff who participates in the Motor Accidents (Lifetime Care and Support) Scheme cannot recover under s 15B if services provided under the scheme include those provided to dependants: s 15B(8).
4. In respect of a claim under the *Motor Accidents Compensation Act*, the plaintiff may not recover if payments in respect of services to dependants are made under s 83 of that Act: s 15B(9).
5. Other matters to be taken into account in the assessment of compensation are: the extent of the plaintiff's pre-injury capacity to provide services to dependants; the extent to which services provided pre-injury also benefited non-dependants; and vicissitudes: s 15B(11).

In *Amaca Pty Ltd v Novek* [2009] NSWCA 50, the plaintiff lived with her daughter and partner and cared for their two children while they worked. The defendant challenged the claim that the children were the plaintiff's dependants, arguing that the parents had partially delegated to her some of the moral and legal obligations for their care. Campbell JA, after reference to extensive authority dealing with the many aspects of dependency, said that the nature and extent of the care provided by the claimant to the children were such that a finding of dependence was open. On the same basis, he rejected the claim that the services were in fact provided to the parents and not to the children. Rejecting the claim that it was not reasonable nor within the intention of the legislation to compensate parents for the expense of providing childcare, Campbell JA said it was not clear that Parliament did not have this intention.

Liverpool City Council v Laskar (2010) 77 NSWLR 666 dealt with the situation where, prior to his injury, the plaintiff and his wife provided services in the nature of therapy for his profoundly disabled daughter. The defendant argued that these services were not services of a domestic nature so that they were not compensable. The defendant contrasted the definitions "attendant care services" contained in s 15 *Civil Liability Act* with the term "domestic services" appearing in the heading to s 15B. Whealy J rejected this argument. He said ss 15 and 15B addressed different objectives. Section 15B was directed, not at the care needs of an injured party, but the loss of capacity of a plaintiff to attend to the needs of dependants. Those needs, he said, should not be subjected to a restricted or narrow interpretation, they extended beyond cooking and cleaning to incorporate the very considerable personal care needs of young children and, as in this case, the needs of the plaintiff's daughter.

In contrast to ss 15, 15B does not cap the number of hours for which compensation may be provided. It caps only the hourly rate by which compensation is to be assessed. The plaintiff in *Amaca Pty Ltd v Phillips* [2014] NSWCA 249 provided 18 hours per day of care for his wife, who was suffering from dementia. Following his diagnosis with mesothelioma, he lost the capacity to provide this care, and his wife was admitted to a nursing home. The Court of Appeal upheld the award of compensation for 18 hours per day at the statutory hourly rate, rejecting the defendant's claim that the lesser cost of nursing home care should be adopted as the measure of damage and pointing out that compensation was awarded for the plaintiff's loss of capacity to provide services, not the value of those services to the recipient. Ward JA, delivering the judgment of the court, said the partial reinstatement of *Sullivan v Gordon* damages created a new statutory entitlement that did not require the plaintiff's loss of capacity to be measured by reference to the cost of providing alternative services, nor did it require account to be taken of how the plaintiff would spend the damages recovered in accordance with that entitlement.

The six hour/six month threshold must be separately assessed in respect of both the claim for the plaintiff's personal loss of capacity and to the claim of lost capacity to care for others: *White v Benjamin* [2015] NSWCA 75.

Section 15B(2) imposes two conditions on recovery of damages. First, that the claimant was in fact providing services to a dependent who had a need for the services at the time that the liability of the tortfeasor arose. And second, absent the injury, the claimant would have continued to provide such services in respect of the continuing need of the dependent: *Piatti v ACN 000 246 542 Pty Ltd* [2020] NSWCA 168 at [12] (Basten JA). The assessment of damages must take into account variables relevant to the dependent's need, for example the needs of a child will usually diminish over time where the needs of an elderly or infirm person may increase over time: *Piatti* at [15].

Damages awarded under s 15B survive the plaintiff's death where the plaintiff is entitled to prosecute a claim after death, for example pursuant to s 12B *Dust Diseases Tribunal Act 1989* and are otherwise recoverable by dependents under the *Compensation to Relatives Act 1987*: *Piatti* at [28].

[7-0070] Compensation to relatives

The *Compensation to Relatives Act* provides for actions to be brought on behalf of dependants of deceased victims of compensable injury to recover for loss of financial support and funeral expenses. Only one such action may be brought so that all potential beneficiaries should be nominated as plaintiffs. Insurance, superannuation, payments from provident funds or statutory benefits are not to be taken into account in assessing an award of compensation: s 3(3). The definition of dependants appears in s 4.

De Sales v Ingrilli (2002) 212 CLR 338 involved the very similar provisions of the *Fatal Accidents Act 1959* (WA) and concerned the extent to which a widow's prospects of remarriage were to be taken into account in the assessment of compensation. Although unanimously recognising changing social circumstances that cast doubt on prior authority, the High Court was divided on the issue. The majority, Gaudron, Gummow, Hayne JJ and Kirby J decided that the prospect of remarriage

should not be considered separately from the general, and similarly unpredictable, vicissitudes of life unless at the time of the trial there was evidence of an established new relationship. Kirby J referred to the uncertainty, distaste, cause of humiliation and judicial inconsistency likely to arise in determining the claimant's prospects of remarriage.

Gleeson CJ, McHugh and Callinan JJ said that the prospects of remarriage should be taken into account. Gleeson CJ accepted that this contingency should be dealt with when determining an appropriate adjustment for vicissitudes. He questioned the continued use of the term dependency to describe the right to compensation when, in modern society, it was common for both parties to a relationship to earn income and to have the capacity for financial self-support. He accepted, however, that each party to the relationship might have expectations of direct financial support. He also said that all elements involved in the calculation of compensation involved some speculation, including the benefits the deceased would be expected to bring to the family, the share that might be enjoyed by each dependent during the deceased's lifetime and the period of support reasonably expected by each claimant. Allowances for contingencies, he said, might take into account the deceased's health or evidence of a failing marriage.

McHugh J thought that failing to take into account the prospects of remarriage presented a danger of providing a windfall to the surviving spouse. He pointed to the anomaly involved in taking into account an established new relationship at the time of trial while making no allowance for repartnering when there was none.

In *Taylor v Owners – SP No 11564* (2014) 253 CLR 531, the High Court rejected the claim that the loss of financial support occasioned by the death of the principal income earner should be limited by the cap provided for in s 12(2) *Civil Liability Act*. They pointed out that s 125(2) *Motor Accidents Compensation Act* and the *Workers Compensation Act* referred to the deceased person's earnings and the deceased worker's earnings, terms that were not used in the *Civil Liability Act* and therefore could not be read into that Act.

The Court of Appeal, in *Norris v Routley* [2016] NSWCA 367, considered the question of an adjustment of the personal consumption figures set out in Table 9.1 "Percentage of dependency of surviving parent and children" in H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, at [9.3.3] on the basis that the appellant's deceased husband lived frugally. Having reviewed the principles involved the court concluded that there was no legal rule that prescribed the way in which the proportion of the deceased's consumption of the household income was to be proved. This was a factor to be proved in the usual way and there was no special legal or evidentiary status attaching to the Luntz tables.

[7-0080] Servitium

The cause of action actio per quod servitium amisit was abolished in claims arising out of motor accidents by s 142 *Motor Accidents Compensation Act*. The *Civil Liability Act* makes no reference to actions of this nature. The question of whether, nevertheless, the Act applied to claims of this nature was considered by Howie J in *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533. He held that the limits on recovery of lost income provided for in s 12 did not apply.

The High Court was asked, in *Barclay v Penberthy* (2012) 246 CLR 258, to consider whether the per quod claims had been absorbed into the law of negligence and no longer existed as separate causes of action. They answered in the negative, the plurality pointing out:

1. The action was available when:
   - the injury to an employee was wrongful, that is when injury was inflicted intentionally or through a breach of the duty of care to the employee, not to the employer, and
   - the result was that the employer was deprived of the services of the employee.
2. It was not an exception or variation to the law of negligence but remained a distinct cause of action.

See also *Chaina v Presbyterian Church (NSW) Property Trust (No 25)* [2014] NSWSC 518 Davies J at [623]–[632].

On the issue of the measure of damages available in per quod actions, the court in *Barclay v Penberthy*, above, at [57] adopted the following from H McGregor, *McGregor on Damages*, 13th edn, Sweet & Maxwell Ltd, UK, 1972 at [1167]:

> the market value of the services, which will generally be calculated by the price of the substitute less the wages the master is no longer required to pay the servant.

The court indicated that caution should be exercised in expanding the scope of recoverable damages in such actions and confirmed that they did not extend to loss of profits or recovery of sick pay, pension or medical expenses payable to the employee.

[7-0085] Motor Accident Injuries Act 2017

The *Motor Accident Injuries Act 2017* applies to motor accidents that occur after 1 December 2017 and provides for compensation by way of *statutory benefits* and *damages* defined in s 1.4(1) as:

> "statutory benefits" means statutory benefits payable under Pt 3.
>
> "damages" means damages (within the meaning of the *Civil Liability Act 2002*) in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle, but does not include statutory benefits.

Statutory benefits provide for compensation in the form of income loss; medical and other treatment expenses and attendant care services. The regime for the payment of statutory benefits for medical expenses and attendant care services applies to all claims. The statutory benefits payable for income loss extend to those claims that do not proceed to claims assessment or court.

Part 4 of the *Motor Accident Injuries Act* deals with awards of damages by a court and the assessment of damages by a claims assessor in respect of motor accidents. It provides for modified common law damages.

Court proceedings may only be commenced in the circumstances provided for in s 6.31; namely when the Principal Claims Assessor certifies that the claim is exempt from assessment. A certificate may be issued when:

1. it is exempted from assessment by regulation: s 7.34(1)(a)
2. a claims assessor with the approval of the Principal Claims Assessor determines that the claim is not suitable for assessment: s 7.34(1)(b)
3. in the case of a finding on liability by a claims assessor, any party does not accept the assessment: s 7.38(1) or,
4. where liability is not in issue, a claimant fails to accept the assessment of quantum within 21 days of the issue of the claims assessor's certificate: s 7.38(2).

The only *damages* that may be awarded are those that compensate for economic loss as permitted by Div 4.2 and for non-economic loss as permitted by Div 4.3.

Courts and claims assessors are no longer concerned with assessment of damages for minor injuries defined in s 1.6 as:

> (1) For the purposes of this Act, a "minor injury" is any one or more of the following:
>
> (a) a soft tissue injury,
>
> (b) a minor psychological or psychiatric injury.
>
> (2) A "soft tissue injury" is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.

(3) A "minor psychological or psychiatric injury" is (subject to this section) a psychological or psychiatric injury that is not a recognised psychiatric illness.

…

This definition is amplified in cl 4 of the *Motor Accident Injuries Regulation 2017* as follows:

Meaning of "minor injury" (section 1.6(4) of the Act)

(1) An injury to a spinal nerve root that manifests in neurological signs (other than radiculopathy) is included as a soft tissue injury for the purposes of the Act.

(2) Each of the following injuries is included as a minor psychological or psychiatric injury for the purposes of the Act:

(a) acute stress disorder,

(b) adjustment disorder.

…

(3) In this clause "acute stress disorder" and "adjustment disorder" have the same meanings as in the document entitled *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, published by the American Psychiatric Association in May 2013.

Nor are they concerned with expenses incurred for "treatment and care" or "attendant care services". In s 1.4(1) of the *Motor Accident Injuries Act*, "treatment and care" is defined as:

(a) medical treatment (including pharmaceuticals),

(b) dental treatment,

(c) rehabilitation,

(d) ambulance transportation,

(e) respite care,

(f) attendant care services,

(g) aids and appliances,

(h) prostheses,

(i) education and vocational training,

(j) home and transport modification,

(k) workplace and educational facility modifications,

(l) such other kinds of treatment, care, support or services as may be prescribed by the regulations for the purposes of this definition,

but does not include any treatment, care, support or services of a kind declared by the regulations to be excluded from this definition.

"Attendant care services" are defined in s 1.4(1) as:

… services that aim to provide assistance to people with everyday tasks, and includes (for example) personal assistance, nursing, home maintenance and domestic services.

These expenses are dealt with through the statutory benefits regime. The Act expressly provides that no compensation is payable for gratuitous attendant care, leaving open the question of whether the loss of capacity to provide these services remains for assessment under the umbrella of non-economic loss: see discussion in *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 187 CLR 354.

Economic loss

There is little change to the parameters for the assessment of loss of capacity to earn income: see [7-0050]. section 4.5 limits awards for economic loss as follows:

(1) The only damages that may be awarded for economic loss are (subject to this Division [Div 4.2]):

(a) damages for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, and

(b) damages for costs relating to accommodation or travel (not being the cost of treatment and care) of a kind prescribed by the regulations, and

(c) damages for the cost of the financial management of damages that are awarded, and

(d) damages by way of reimbursement for income tax paid or payable on statutory benefits or workers compensation benefits arising from the injury that are required to be repaid on an award of damages to which this Part [Pt 4] applies.

These limits do not apply to awards of damages in claims brought under the *Compensation to Relatives Act* 1897. Those claims are effectively unchanged by the *Motor Accident Injuries Act*.

Income loss is permitted only up to the maximum weekly statutory benefits amount, notwithstanding that this is a gross earnings amount: s 4.6(2). This amount is adjusted annually on 1 October: see Motor Accident Injuries (Indexation) Order 2017. Credit must be given for any weekly payments made under the statutory benefits provisions: see s 3.40 for the effect of recovery of damages on statutory benefits.

Superannuation contributions are recoverable at the minimum percentages required by law to be paid as employer superannuation contributions s 4.6(3).

Section 4.7 mirrors s 126 of the *Motor Accidents Compensation Act 1999* in requiring that the claimant satisfy the court or claims assessor of assumptions on which future losses may be calculated (s 4.7(1)); that the court state the assumptions that form the basis for the award (s 4.7(2)); and, the relevant percentage by which economic loss damages have been adjusted (s 4.7(3)).

The discount rate continues to be 5%, unless adjusted by the regulations: see s 4.9(2)(b).

For an assessment of economic loss damages under the *Motor Accident Injuries Act* by the Court of Appeal, see *Hoblos v Alexakis (No 2)* [2022] NSWCA 11.

Non-economic loss

Assessment of non-economic loss remains essentially unchanged: see [7-0020].

The threshold of 10% as the degree of permanent impairment continues to apply: see s 1.7(1). The assessment is made by a medical assessor and remains binding on the court or claims assessor, except in the limited circumstances provided for s 7.23. They are the same as those set out in s 61 of the *Motor Accidents Compensation Act*.

A maximum amount continues to apply, adjusted annually on 1 October: s 4.13 of the *Motor Accident Injuries Act*.

The provisions relating to mitigation in s 4.15 are the same as those in s 136 of the *Motor Accidents Compensation Act*. Those relating to the payment of interest in s 4.16 of the *Motor Accident Injuries Act* are essentially the same as s 137 of the *Motor Accidents Compensation Act*.

Contributory negligence

Section 4.17 of the *Motor Accident Injuries Act* repeats the provisions of s 138 of the *Motor Accidents Compensation Act* when dealing with the circumstances in which a finding of contributory negligence must be made with the addition of a provision to include other conduct as prescribed by regulation: see [7-0030]. section 4.17(3) leaves the assessment of the percentage reduction for contributory negligence to the discretion of the court of claims assessor, except where the regulations fix a percentage in respect of specified conduct. At this stage this aspect remains unregulated.

Miscellaneous

Provisions concerning voluntary assumption of risk (s 4.18) (see [7-0030]) and exemplary and punitive damages (s 4.20) (see [7-0110]) are unchanged.

Blameless accidents are now referred to as *no-fault motor accidents*. They are dealt with in the same way under Pt 5 of the *Motor Accident Injuries Act*: see [7-0030].

[7-0090] Funds management

In *Gray v Richards* (2014) 253 CLR 660 the High Court, dealing with a claim under the *Motor Accidents Compensation Act*, confirmed that, in ordinary circumstances, a plaintiff is not entitled to recover the cost of managing the fund comprised by a lump sum award of damages. This was because those costs are not the consequence of the plaintiff's injury. The court also confirmed the principles of *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 and *Willett v Futcher* (2005) 221 CLR 627, namely, that damages of this nature may be recovered where the plaintiff's intellectual capacity was impaired by injury to the point of putting the plaintiff in need of assistance in managing the fund.

The issues in *Gray v Richards*, above, were whether the right of recovery extended to the cost of managing the sum awarded for management of the fund (the fund management damages issue) and whether it extended to the cost of managing the predicted future income of the managed fund (the fund management on fund income issue).

In dealing with the fund management damages issue, the court referred to s 127(1)(d) of the Act entitling a plaintiff, without imposing a limit, to compensation for loss that was referable to a liability to incur expense in the future. The court held that s 127(1)(d) invited assessment of the present value of all future outgoings based on evidence that established likely future expenditure. Expenses of fund management by whatever trust company was appointed were to be included in this assessment.

The court rejected the claim for the costs of fund management on fund income. They said s 127 did not alter the principles expressed in *Todorovic v Waller* (1981) CLR 402.

1. Having applied the discount rate to damages awarded to cover future loss no further allowance should be made. It was inconsistent with this comprehensive dismissal of any further allowance to suggest that the cost of managing the income generated by the fund to ensure that it maintains a net income at a given rate was a compensable loss.
2. The capital and income of the lump sum award for future economic loss would be exhausted at the end of the period over which that loss was expected to be incurred.
3. The cost of managing the income generated by the fund was not an integral part of the plaintiff's loss arising out of injury. It would be contrary to the principles of *Todorovic v Waller*, above, to assume that the fund would generate income that would be reinvested and swell the corpus under management, an assumption that could not be made when drawings from the fund might exceed its income.

[7-0100] Workers Compensation Act 1987, s 151Z

Last reviewed: December 2023

The provisions of s 151Z are somewhat complex. They relate to situations in which a party other than an injured worker's employer is wholly or partly responsible for the injury suffered by the worker.

It deals with the mechanism by which an employer (effectively the workers compensation insurer) is able to recover from a third party workers compensation paid to a worker, either out of damages awarded to the worker in common law proceedings brought against the third party, or by a separate action in the employer's own right. The employer's action arises under the indemnity provided for in s 151Z(1)(d).

It also deals in s 151Z(2) with situations where a worker brings a claim at common law against a third party in circumstances where the third party and the employer are joint tortfeasors. In such actions, the worker may or may not join the employer. The provision applies where the worker takes or is entitled to take proceedings against both the third person and the employer: ss 151Z(2)(a) and (b).

Campbell JA described the circumstances in which it became necessary to provide for adjustment as provided for in s 151Z(2) in *J Blackwood & Son v Skilled Engineering* [2008] NSWCA 142. The need arose because, upon the introduction of the scheme for modification of the common law rights of a worker against an employer, it was no longer possible to determine the respective liabilities of an employer and a third party by reference simply to the proportions in which they were held to be responsible for the damage suffered by the employee.

The provisions of the section have generated discussion concerning the circumstances in which a worker becomes entitled to bring proceedings; the process for determination of the employer's contribution; and the manner in which the third party's proportion of damages is to be calculated.

See *Synergy Scaffolding Services Pty Ltd v Alelaimat* [2023] NSWCA 213 for a detailed explanation of the provisions of s 151Z, especially at [91], [134]–[140], [170].

Entitlement

The right of a worker to recover common law damages against an employer has been increasingly limited to the point where, commonly, no rights exist. Under the current scheme a worker must be assessed as having suffered a degree of impairment of at least 15%: s 151H. If that threshold is met, the worker's right to recover damages is limited to loss of income-earning capacity. If the threshold is not met, there is no right of recovery of any common law damages against the employer. This outcome has prompted the argument that there is no entitlement to take proceedings against the employer.

The Court of Appeal has consistently rejected this argument. The construction adopted in *Grljak v Trivan Pty Ltd (In liq)* (1994) 35 NSWLR 82 at 88 held that the term entitlement in s 151Z(2)(b) referred to the right to take proceedings and not to a right to recover damages. Once established that an employer owed a duty of care that was breached, causing loss to the plaintiff, the entitlement was established. The right to recover damages was irrelevant: *Izzard v Dunbier Marine Products (NSW) Pty Ltd* [2012] NSWCA 132.

Calculation of the employer's contribution

To determine the amount of an employer's contribution, it is necessary to calculate what the worker would recover against the employer under the modified common law provisions of the *Workers Compensation Act*. In *J Blackwood & Son v Skilled Engineering*, above, at [40] Campbell JA pointed out that ss 151Z(1)(d) and 151Z(2)(d) required that a contribution be calculated in accordance with the modified common law provisions of the Act and not that damages be assessed in accordance with those provisions.

A worker who takes action against the employer must undergo medical assessment to determine if the threshold of impairment of at least 15% is met and the process of calculation is relatively simple. A worker who does not join the employer cannot be compelled to undergo assessment. In those circumstances the calculation of the employer's contribution involves a hypothetical exercise analogous to that involved in dealing with professional negligence cases as outlined in *Johnson v Perez* (1988) 166 CLR 351: *Izzard v Dunbier Marine Products (NSW) Pty Ltd*, above, Macfarlan J at [117].

The court is required to undertake that exercise in accordance with the principles established by Pt 7 *Workplace Injury Management and Workers Compensation Act*. In so doing, it may rely on an assessment provided by a medical expert who has not been appointed under those provisions as an approved medical specialist, provided the assessment is made in accordance with WorkCover Guidelines as required by s 322(1) of the Act: *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370.

The third party's contribution

The provisions of s 151Z(2) are designed to avoid the recovery by a worker, whose rights to recover damages from an employer are restricted, of the shortfall from a non-employer third party.

Having determined that the third party and the employer are jointly liable to the worker in damages (for example, in the sum of $100,000) and the appropriate percentage of responsibility to each of them is allocated (for example, 70% third party, 30% employer), the section therefore requires that the following steps be taken.

1. Calculate the contribution the third party would recover from the employer but for the modified common law provisions of the Act (the common law sum), in the example — $30,000.
2. Calculate the amount the worker would recover from the employer under the modified common law provisions of the Act, say — $15,000.
3. Apply to this amount the percentage representing the employer's share of responsibility (the modified common law sum), — $5,000.
4. Reduce the amount that the worker can recover from the third party by deducting from the modified common law sum the common law sum, $30,000–$5,000 = reduction of $25,000.

[7-0110] Punitive damages

No compensation in the nature of aggravated or exemplary damages is recoverable through claims made under the statutory schemes: *Workers Compensation Act,* s 151R; *Motor Accidents Compensation Act*, s 144; *Motor Accident Injuries Act 2017* s 4.20; *Civil Liability Act*, ss 21, 26X. Damages under these heads remain available in the limited categories of personal injury claims that are not dealt with under these schemes.

It is very important to distinguish between aggravated and exemplary damages. In the past, courts have tended to award a single sum to account for both types of damage but it is now accepted that the better practice is to distinguish between amounts awarded under these heads and to provide reasons in each case.

In *Lamb v Cotogno* (1987) 164 CLR 1 the High Court drew the distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages.

A further explanation of the distinction is found in the judgment of Spigelman CJ in *State of NSW v Ibbett* (2005) 65 NSWLR 168 where he said at [83]:

> In this regard it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the Plaintiff and in the case of exemplary damages the focus is on the conduct of the Defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.

The award of damages under these heads is discretionary and caution is required to ensure that the circumstances in which they awarded are appropriate. In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, Leeming JA noted that this discretionary quality conferred considerable leeway in the assessment of both aggravated and exemplary damages, although the assessment must bear some proportion to the circumstances to which it relates.

The extent to which the plaintiff provoked the assault by one of the defendants was the subject of consideration in *Tilden v Gregg* [2015] NSWCA 164 in the context of whether it was appropriate to award aggravated or exemplary damages. Meagher JA quoted from Salmon LJ in *Lane v Holloway* [1968] 1 QB 379 at 391 as follows:

> There is no doubt that if a plaintiff is saying: "This man has behaved absolutely disgracefully and I want exemplary damages because of his disgraceful conduct," when the court is considering how

> disgraceful the conduct was or whether it was disgraceful at all, it is material to see what provoked it. This is relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much.

Meagher JA also noted that the defendant's assault on the plaintiff resulted in a criminal charge to which he entered a guilty plea. He referred to *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [46] in noting the principle that a civil court, when considering whether it was appropriate to award aggravated or exemplary damages, would ordinarily proceed on the basis that the criminal conviction and sentence of the assailant had adequately dealt with the elements of punishment and deterrence.

This principle was applied in *Cheng v Farjudi* (2016) 93 NSWLR 95; [2016] NSWCA 316 where Beazley P, with whom Ward JA and Harrison J agreed, having reviewed *Gray v Motor Accidents Commission*, above, and the many authorities in which these principles have been applied said at [87]:

> Accordingly, the position in Australia is that exemplary damages may not be awarded where substantial criminal punishment has been imposed. However, the High Court in *Gray* did not preclude an award of exemplary damages where something other than substantial punishment was imposed, and in accordance with the authorities in this Court exemplary damages may be awarded in some circumstances notwithstanding that a criminal sanction has been imposed.

Her Honour concluded that conviction for assault and the imposition of a bond was a substantial punishment such that exemplary damages were not warranted on this basis. Her Honour did, however, accept at [105] the other basis for the award of exemplary damages, namely, that the manner in which the appellant defended the claim for damages was unusual in the sense used in *Gray v Motor Accidents Commission*.

Aggravated damages

Damages under this heading may be awarded to a plaintiff who suffers increased distress as a result of the manner in which a defendant behaves when committing the wrong or thereafter. The qualification for their award is that the conduct of the defendant is of the type that increased the plaintiff's suffering. In *Lamb v Cotogno*, above, at 8, aggravated damages were described as compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like.

The leading case in this area is *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 where Windeyer J at 152 described the necessary conduct as insulting or reprehensible or capable of causing the plaintiff to suffer indignity or outrage to his or her feelings.

A plaintiff's own conduct may be relevant to determining whether damages of this nature should be awarded or the amount to be awarded, for instance, where a plaintiff retaliates in the case of an assault or is of bad repute.

In *Kralj v McGrath* [1986] 1 All ER 54 Woolf J rejected a claim for aggravated damages in a case based on medical negligence but said that compensatory damages could be increased to take account of consequences that made it difficult to overcome the distress caused by the negligent medical treatment.

The availability of aggravated damages in negligence clams was debated in *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268 where Mason P listed the torts for which damages under this head might be claimed including defamation, intimidation, trespass to the person and malicious prosecution. He expressed serious doubt about when they might be claimed in negligence actions or about the need for such damages when elements such as injured feelings and distress could be dealt with in an award for general damages.

These concerns were dealt with in *State of NSW v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208, and in *MacDougal v Mitchell* [2015] NSWCA 389. In *MacDougal*, an appeal challenging the trial judge's decision against the award of both aggravated and exemplary damages, Tobias AJA, with whom Meagher JA, Bergin CJ in Eq agreed, cited at length passages from the

reasons of Hodgson JA in *State of NSW v Riley*, above, where he addressed the issue of how, in a personal injury case, having assessed the appropriate level of damages, the compensatory nature of aggravated damages leaves room for the award of further compensation without incurring the risk of double counting.

Justice Hodgson's answer was reasoned at [131] as follows:

> In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt damages neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

He added further at [133] that there must be a justification for this approach, which he acknowledged was one of degree so that "the worse the defendant's conduct, the further from the centre of the range and towards the upper limit of the range the court may be justified in going".

Exemplary damages

Exemplary damages are awarded as a form of punishment: to deter repetition of reprehensible conduct by the defendant or by others, or to act as a mark of the court's disapproval of that conduct. They may be awarded for a tort committed in circumstances involving a deliberate, intentional or reckless disregard for the plaintiff and his or her interests. The objects of the award may include condemnation, admonition, making an example of the defendant, appeasement of the plaintiff in order to temper an urge to exact revenge, or the expression of strong disapproval.

The term repeatedly relied upon as the basis for the award of exemplary damages, first expressed by Knox CJ in *Whitford v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77, is conscious wrongdoing in contumelious disregard of another's rights. The defendant's conduct must be such that punishment is warranted. It may include elements of malice, violence, cruelty, high-handedness or abuse of power. In *Uren v John Fairfax & Sons Pty Ltd*, above, Windeyer J said at [11] that an award of exemplary damages should be based on something more substantial than mere disapproval of the defendant's conduct.

In *Lamb v Cotogno* (1987) 164 CLR 1 the defendant left the plaintiff in agony at the side of a road after attacking him by driving his car at him. This was considered to be conduct that was cruel or demonstrating reckless disregard or indifference towards the plaintiff's welfare.

In *Adams v Kennedy* [2000] NSWCA 152 the court awarded one aggregate figure for exemplary damages where different causes of action arose out of a series of closely connected events. Priestley JA stated at [36]:

> That figure should indicate my view that the conduct of the defendants was reprehensible, mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.

The High Court in *State of NSW v Ibbett* (2006) 229 CLR 638 at [38]–[40] similarly noted in particular the function served by exemplary damages as a tool to discourage and condemn the arbitrary and outrageous use of executive power: *Rookes v Barnard* [1964] AC 1129, Lord Devlin at 1226.

As a general principle, the power to award exemplary damages should be exercised with restraint and only when compensatory damages are insufficient to punish, deter or mark the court's disapproval of the defendant's conduct. There is a question mark over whether the defendant's means should be taken into account in deciding whether to award exemplary damages.

The award of exemplary damages is rare in actions for negligent conduct. There must be conscious wrongdoing in contumelious disregard of another's rights: *Gray v Motor Accidents Commission* (1998) 196 CLR 1.

This decision was referred to in *Dean v Phung* (2012) NSWCA 223 but ultimately the outcome of the plaintiff's claim was not based on negligence. The dentist's misrepresentations as to the need for and nature of treatment were held to negate the plaintiff's consent so that claim of trespass to the person was made out and the *Civil Liability Act* exclusion of the right to exemplary damages did not apply. In deciding that a substantial award of exemplary damages was warranted, the court noted that the dentist's conduct was carefully planned and executed over a period of more than 12 months with the purpose of self-enrichment. Damages were assessed by reference to the sum paid for the dental services and interest.

Although required to be proportionate to the circumstances, in an appropriate case, exemplary damages may exceed compensatory damages: *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 Leeming JA at [43].

State of NSW v Smith [2017] NSWCA 194 involved a claim of false imprisonment. The court regarded the police officer's conduct, in being unaware of provisions of the relevant statute, as the product of ordinary human fallibility and not a conscious wrongdoing in contumelious disregard of the respondent's rights, with the result that an award of exemplary damages was not warranted.

[7-0120] Offender damages

The *Civil Liability Act* makes special provision in Pt 2A to deal with claims by offenders in custody, including the application of the Act to claims that involve intentional torts. The legislation introduces a regime for assessment of claims that is similar to that provided for in relation to common law claims for workplace accidents.

In *State of NSW v Corby* (2009) 76 NSWLR 439, the Court of Appeal noted that Pt 2A of the Act, dealing with offender damages, had been extended by amendment to intentional torts and that nothing in the amending legislation indicated that claims for exemplary damages were to be excluded. The court was not prepared to accept that this was an oversight stating at [56]:

> The Parliament may well not have been prepared to exclude liability for exemplary damages, even in cases of relatively minor physical or mental impairment, where the conduct of its officers, for which it accepts vicarious liability, demonstrates egregious disregard of the civil rights of its citizens.

The court concluded, however, that aggravated damages were not available to an offender in custody. This was because s 26C defined damages as including any form of monetary compensation. Aggravated damages were designed to deal with matters such as humiliation and injury to feelings and provided compensation for mental suffering that fell short of a recognised psychiatric illness. In that sense, in contrast to exemplary damages they were compensatory.

[7-0125] Illegality as a limiting principle

Last reviewed: May 2023

For the purposes of damages for personal injury, unreasonable or illegal conduct is not usually reasonably foreseeable. Thus, a defendant should not ordinarily be held responsible for the losses a plaintiff sustains that result from a rational and voluntary decision to engage in criminal activity: *State Rail Authority of NSW v Wiegold* (1991) 25 NSWLR 500 at 517. In *Wiegold*, the plaintiff was seriously injured in the course of his work as a rail maintenance worker due to the negligence of his employer. The plaintiff's injuries prevented him from working at full capacity and, as a result, he struggled financially. He was convicted of cultivating indian hemp and given a custodial sentence; as a result of his imprisonment and consequent inability to attend work, his employment was terminated. The plaintiff claimed damages for personal injuries suffered in the course of employment.

The trial judge held that the plaintiff's conviction should be ignored when assessing his economic loss after his release from prison as the plaintiff was induced into the criminal enterprise by his impecuniosity, which resulted from the workplace accident. The Court of Appeal, by majority, disagreed, stating that, in this case, applying a simple but for test to determine causation would be inappropriate and, following *March v Stramare Pty Ltd* (1991) 171 CLR 506, it is erroneous to divorce considerations of public policy from the determination of issues of causation: at 511. It held that if a plaintiff has been convicted and sentenced for a crime, he or she "should bear the consequences of the punishment, both direct and indirect". If not, it risks generating "the sort of clash between civil and criminal law that is apt to bring the law into disrepute": at 514.

Other cases where illegality issues were raised have precluded an award of damages based on causation and policy considerations. For example, *Anderson v Hotel Capital Trading Pty Ltd* [2005] NSWCA 78 (appellant denied damages for work-related injury after which he suffered PTSD and became a heroin user leading to brain damage). *Wiegold* has been followed in *Holt v Manufacturers' Mutual Insurance Ltd* [2001] QSC 230 (award of general damages for motor vehicle accident discounted for plaintiff's drug taking); *Bailey v Nominal Defendant* [2004] QCA 344 (appellant not liable for economic loss flowing from respondent's misconduct resulting in his discharge from the Army, despite the misconduct being directly related to the psychiatric condition respondent suffered after work-related motor vehicle accident); *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 (appellants not liable for harm caused to respondent following incarceration in psychiatric hospital despite appellants releasing respondent the day before he committed murder during a psychotic episode); and *Tomasevic v State of Victoria* [2020] VSC 415 (plaintiff denied damages for pecuniary loss in period during which the loss was a consequence of his commission of multiple indictable offences which led to cancellation of his registration as a teacher).

The majority in *Wiegold* distinguished *Grey v Simpson* (Court of Appeal, 3 April 1978, unrep) (addiction to heroin following pain consequential on injuries) on the basis the plaintiff had not been convicted of a crime (thus issues of public policy were not involved): at 514–515. See also *Trajkovski v Ken's Painting & Decorating Services Pty Ltd* [2002] NSWSC 568 at [36] which distinguished the principle in *Wiegold*.

[7-0130] Intentional torts

Last reviewed: June 2024

An intentional tort is described as the intentional infliction of harm without just cause or excuse. The presence of an intention to cause harm is central to the imposition of liability. The tort frequently involves conduct that results in criminal as well as civil liability, although it extends to conduct that causes harm to reputation, trade or business activity.

The American Law Institute, *Restatement of the Law — Torts 2d*, § 870, American Law Institute Publishers, St Paul, Minn,1979 describes intentional torts in the following terms:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

The concept of an intention to cause harm, in the context of the law of negligence, has been the subject of a degree of judicial consideration and much academic consternation concerning the extent to which intentional conduct can be described or pleaded as negligent.

The exclusion of intentional torts from the strictures of the *Civil Liability Act 2002* has also generated judicial scrutiny of this class of tort. Section 3B(1)(a) provides:

1. The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:

(a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except:

(i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and

(ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and

(iii) Part 2A (Special provisions for offenders in custody).

The attraction of this provision is that, if the wrong of which a plaintiff complains can be brought within its scope, the constraints on damages contained within the Act can be avoided, with the exception of those relating to the recovery for gratuitously provided care services. Damages in claims of intentional torts are at large, with the exception of those claimed for voluntarily provided care. They may therefore range from a nominal amount, where a plaintiff is unable to establish actual damage, to substantial damages on all heads for personal injury. Aggravated and exemplary damages are also available in appropriate cases. Application of the provisions of the section has not been straightforward, issues to date encompassing the following.

Pleadings

It is in this area that incongruity arises in the context of the law of negligence. In *New South Wales v Lepore* (2003) 212 CLR 511, a claim of vicarious liability against an employer, views diverged on the question of whether a claim of intentional infliction of harm could be pleaded in negligence. McHugh J at [162] took the view that the plaintiff was entitled to elect to plead negligence or trespass to the person. He said an action for the negligent infliction of harm was not barred because of the intentional act of the person causing the harm. Gummow and Hayne JJ took a different view. They said at [270], that while negligently inflicted injury to the person could sometimes be pleaded in trespass to the person, the intentional infliction of harm cannot be pleaded as negligence.

Consent

Barrett JA in *White v Johnston* (2015) 87 NSWLR 779 made it clear that the absence of consent was an essential element of the tort of assault and battery. He said it was meaningless at least in the civil sphere to speak of an assault that was consensual.

The difficulty created by the failure to plead separately the allegations of negligence and assault is most clearly demonstrated in claims of medical negligence where the question of consent to treatment arises.

In *White v Johnston*, above, Leeming JA pointed to the distinction between consent to medical treatment that is procured through negligence in explaining the risks of treatment and that which is fraudulently obtained. He referred to the reasons of Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in *Rogers v Whittaker* (1992) 175 CLR 479 where they said at [15]:

> Anglo-Australian law has rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass; the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed.

Leeming JA noted the following principles on the issue of consent to medical treatment:

1. Consent may be vitiated by fraud, misrepresentation, treatment that materially differs from that to which the consent was given or the improper purpose for the provision of the treatment.

2. The motive for the provision of medical treatment is relevant to the issue of whether consent was obtained through fraud or misrepresentation or for an improper purpose. In *Dean v Phung*

[2012] NSWCA 223, the practitioner's purpose, being solely non-therapeutic, was sufficient to vitiate consent. The majority view in that case was that it was therefore unnecessary to consider further whether the practitioner acted fraudulently.

3. There may be circumstances where more than motive exists for misconduct. A person who enters land within the scope of his or her authority does not necessarily become a trespasser because he or she has some other purpose in mind.

4. Thus improper purpose, even if it falls short of fraud is relevant to the issue of whether medical treatment was outside the terms of any consent.

5. The withholding of information in bad faith is sufficient to vitiate consent.

It is not necessary that the plea of trespass to the person or assault contain a specific allegation of absence of consent. The plea itself is sufficient under the rules of common law pleading to amount to an allegation of non-consensual conduct: *White v Johnston*, Barrett JA.

Intent

The prerequisites to the operation of s 3B(1)(a) are:

- an intentional act; and
- an intentional act committed with intent to cause injury.

It is the second of these requirements that presents the greatest challenge to litigants. In *White v Johnston* Leeming JA at [132] noted that these requirements took matters further than the tort of assault and battery where it was unnecessary to establish that a defendant intended to cause harm. Even if a plaintiff was able to prove an intentional tort, he said, the action would be excluded from the *Civil Liability Act* only if it was also established that the defendant's conduct was carried out with intent to cause injury.

It is not necessary that the intended injury be physical. In *State of NSW v Ibbett* (2005) 65 NSWLR 168, a police officer pointed a gun at the plaintiff at the same time as threatening her. Spigelman CJ thought this was sufficient to establish that the officer acted with the intent to cause injury namely an apprehension of physical violence. Ipp JA agreed that it was intended to cause in the plaintiff's mind an apprehension of immediate personal violence.

It is not necessary that the intentional act be criminal in character. RS Hulme J in *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107 rejected the proposition that the s 3B exception was directed at criminal conduct and sexual misconduct. The spear tackle that resulted in the plaintiff's injury, although not a crime, was undertaken intentionally and with intent to cause injury.

In *Drinkwater v Howarth* [2006] NSWCA 222 Basten JA asked, hypothetically, whether an intentional act directed at someone other than a plaintiff might allow for the application of s 3B.

In *Hayer v Kam* [2014] NSWSC 126 Hoeben CJ at CL said it was unclear whether a defendant who is reckless as to the consequences of an intentional act has the requisite intention to cause injury. He noted, however, that in *Dean v Phung*, above, whilst the primary intention was that of monetary gain, the dentist was found to have the intention to cause harm sufficient to meet the requirements of the section because at the time of giving the relevant advice he knew that the treatment proposed was unnecessary.

Causation

Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388 involved a claim of injurious falsehood in the course of which the High Court considered whether the principles of reasonable foreseeability applied to intentional torts. Gleeson CJ, agreeing with Gummow J, said at [13] there

was no reason for foreseeability to operate as an independent factor in limiting liability for damage if the relevant harm was intended or was the natural and probable consequence of the wrongdoer's conduct.

Gummow J, dealing with the role of intention in the context of intentional torts, said at [81]:

> That role is that, where the other elements of the tort are made out, a finding that the defendant intended the consequences which came to pass will be sufficient to support an award of damages against the defendant in respect of that consequence.

After reference to authority to the effect that the intention to injure a plaintiff disposes of any question of remoteness of damage, he said at [81]:

> It will not necessarily be sufficient that the wrongdoer intended damage different in kind from that which occurred … That is to say, it will depend upon the relation of that which the wrongdoer intended to the consequences which actually resulted. This relation will generally be assessed by asking whether the damage was the "direct and natural" result of the publication of falsehood.

These principles were referred to in *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, where it was stated that damages may be awarded for personal injury, in a claim alleging trespass to land, if the injury was a natural and probable consequence of the trespass.

Injury

The issue of whether the intended injury must be physical so that it did not extend to psychological injury has been disposed of by the principle that the wrongdoer intends the harm that is the natural and probable consequence of the conduct.

In *TCN Channel Nine Pty Ltd v Anning*, above, however, the Court of Appeal rejected the claim in the absence of evidence that the mental trauma claimed by the plaintiff amounted to a recognised psychiatric disorder. Humiliation, injured feelings and affront to dignity resulting from trespass, the court said, were compensable through the means of aggravated damages.

A different approach was taken in *Houda v State of New South Wales* [2005] NSWSC 1053, where the plaintiff recovered damages in claims for malicious prosecution, wrongful imprisonment, wrongful arrest and assault, all conduct that found to have been intentional with intent to cause injury. The defendant argued that the claimed injuries of deprivation of liberty, humiliation, damage to reputation, emotional upset and trauma were not injuries within the scope of s 3B(1)(a) because they were not physical injuries. Cooper AJ held that the section extended to all forms of injury, including those of the class that resulted from the actions of the defendant's police officers.

This approach was supported by Spigelman CJ (Basten JA agreeing) in *NSW v Ibbett* (2005) 65 NSWLR 168 at 170 and followed in *NSW v Madden* (2024) 113 NSWLR 509, in which a police officer's unjustified deprivation of the respondent's liberty was found to amount to an injury within the meaning of s 3B(1)(a), considering such deprivation infringes a person's common law right to enjoy freedom of movement in his or her community: [146]. In detaining and then arresting the respondent, the police officer's subjective intention was to deprive the respondent of her liberty. Since the police officer's actions were found to be unlawful, there was no available defence or justification that would exclude application of s 3B(1)(a), including application of s 43A *Civil Liability Act 2002*: [151]–[152]. The decision of the High Court in *NSW v Williamson* (2012) 248 CLR 417 was distinguished.

Onus

The issue of where the onus lies to establish the elements of s 3B(1)(a) was dealt with comprehensively by Leeming JA in *White v Johnston*. He approached the issue from two perspectives.

He said the onus was at all times on the plaintiff to prove that consent was vitiated by fraud because:

- in general principle, a party who asserts must prove
- there would be inherent injustice in requiring a defendant to disprove a fraud, and
- if the plaintiff produced evidence that provided a basis for a finding a fraud, the evidentiary onus shifted to the defendant.

After examining competing views he rejected the argument that the onus of proof was on a defendant who pleaded consent to a claim of assault and battery or trespass to the person. His major reason for doing so was to provide coherence between the criminal and civil law. He noted that a prosecutor bears the onus of negating consent in sexual assault cases and said at [128]:

> It does not strike me as jarringly wrong for a civil plaintiff to be obliged to discharge the same burden (albeit, only to the civil standard) in order to establish a tortious assault and battery.

Vicarious liability

The decision in *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354 established the extent to which an employer might be held liable for the intentional torts of an employee. The Court of Appeal held that an employer was vicariously liable in damages, including exemplary damages, where the intentional tort was committed:

- in the intended or ostensible pursuit of the employer's interest
- in the intended performance of a contract of employment, or
- in the apparent execution of ostensible authority.

Basten JA pointed out that liability of an employer was derivative in form from that of the employee and was not substantially different from the liability of the employee. He said the employer could not escape liability under the general law by demonstrating that it did not have the intention of its employee.

Legislation

- *Civil Liability Act 2002*, Pts 2A, 6, ss 3B, 5B, 5R, 5T, 7B (rep), 7F (rep), 12, 12(2), 13(1), 14, 15, 15(1), (2), (3), (5), 15A, 15B(2)(b), (2)(d), (5), (6), (7), (8), (9), (10), (11), 15C, 16, (1), (3), 17, 21, 26X, 26C, 34, 43A, 48, 49, 50, 71(1)
- *Civil Procedure Act 2005*, s 82
- *Compensation to Relatives Act 1897*, s 3(3)
- *Fatal Accidents Act 1959* (WA)
- *Law Reform (Miscellaneous Provisions) Act 1965*
- *Motor Accidents Act 1974*
- *Motor Accidents Act 1988*, ss 49, 74, 76, 79(3)
- *Motor Accidents Compensation Act 1999*, ss 3, 7A, 7B(1), 7F, 83, 125(2), 126, 127(1)(d), 130, 130A (rep), 134, 131–134, 135 (rep), 136, 138, 140, 141B, 141C, 142, 143, 144, 146
- *Motor Accidents (Lifetime Care and Support) Act 2006*
- *Workers Compensation Act 1987*, ss 151H, 151I, 151IA, 151AD, 151J, 151L, 151N, 151O 151Q, 151R, 151Z, (1)(d), (2), (2)(a), (b), (d)
- *Workplace Injury Management and Workers Compensation Act 1998*, Pt 7, s 322(1)

- *Social Security Act 1991*
- *Victims Compensation Act 1996* (rep, now *Victims Rights and Support Act 2013*)

Further references

- The American Law Institute, *Restatement of the Law — Torts 2d*, § 870, American Law Institute Publishers, St Paul, Minn,1979
- H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021
- D Villa, *Annotated Civil Liability Act 2002*, 3rd edn, Thomson Reuters, Sydney, 2018
- J A McSpedden and R Pincus, *Personal Injury Litigation in NSW*, LexisNexis, Sydney, 1995
- J Dietrich, "Intentional conduct and the operation of the Civil Liability Acts: unanswered questions", (2020) 39(2) *University of Queensland Law Journal* 197
- H McGregor, *McGregor on Damages*, 16th edn, Sweet & Maxwell Ltd, UK, 1997

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Interest

[7-1000] Introduction

While interest up to judgment is often the subject of agreement, particularly after some judicial encouragement, a range of issues may and do arise. In more complicated situations, particularly where statutory limitations might apply, it is often the better course to receive submissions on interest after the resolution of the principal issues.

Whilst statutory limitations must be complied with it remains the position that "the award of interest should always be approached in a broad and practical way [and] should not be allowed to assume disproportionate importance…": *Cullen v Trappell* (1980) 146 CLR 1 at 22. However, for a case requiring detailed consideration of issues relating to interest up to judgment, see *Gadens Lawyers Sydney Pty Ltd v Symond* (2015) 89 NSWLR 60 at [167]–[186].

Interest after judgment, other than interest on costs, is not, usually at least, an issue for first instances judges and is not, itself, an amount for which judgment is given: *Najdovski v Crnojlovic (No 2)* [2008] NSWCA 281.

[7-1010] Interest up to judgment

Section 100 of the CPA provides that in proceedings for the recovery of money, including any debt or damages or the value of any goods, the court may include interest in the amount for which judgment is given at such rate as the court sees fit: s 100(1). The interest may be awarded on the whole or any part of the money and for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect. As to the expression "proceedings for the recovery of money" see *Lahoud v Lahoud* [2011] NSWCA 405 at [37]–[45].

Section 100(2) makes similar provision for the situation where, in proceedings for the recovery of a debt or damages, payment of the whole or part of the debt or damages has been made after the proceedings commenced but before or without judgment.

Section 100(3) provides that s 100 does not authorise the giving of interest on interest (s 100(3)(a)), the giving of interest on a debt when interest is payable as a right (s 100(3)(b)) or the giving of interest on proceedings for amounts less than a prescribed amount (s 100(3)(c)). Section 100 does not affect the damages recoverable for the dishonour of a Bill of Exchange (s 100(3)(d)).

Section 100(4) provides that in any proceedings for damages, the court may not order the payment of interest under the section in respect of the period for which an appropriate settlement sum was offered (or first offered) by the defendant unless the special circumstances of the case warrant the making of such an order.

Appropriate settlement sum means a sum offered in settlement of proceedings in which the amount for which judgment is given, including interest up to and including the date of the offer, does not exceed the sum offered by more than 10 per cent: s 100(5).

See also Practice Note No SC Gen 16 "Pre-judgment interest rates" and Practice Note DC (Civil) 15 "Pre-judgment interest rates".

[7-1020] Discretionary power

The power to award interest is a discretionary one. For applicable principles see *Ritchie's* [s 100.10]–[100.95], *Thomson Reuters* [CPA.100.30]–[CPA.100.100]. For an example of the application of these principles to both before and after interest, see *Maestrale v Aspite (No 2)* [2014] NSWCA 302.

[7-1030] Statutory limitations

There are a number of legislative provisions, including the CPA itself, which impose limitations or restrictions on the interest which may be awarded.

Section 100(3)(c) of the CPA

The text of the provision appears sufficiently above. A Local Court may not order the payment of interest up to judgment in any proceedings in which the amount claimed is less than $1,000: UCPR r 36.7(2).

Section 100(4) of the CPA

The text of the provision appears sufficiently above.

In other contexts, the issue of whether an offer of settlement is an appropriate one can raise difficult questions. However, for the purpose of s 100(4) an appropriate settlement sum is defined as set out above.

There remains, however, the question whether the special circumstances of the case warrant the making of an order for interest.

As to the meaning of special circumstances and applicable principles see *Ritchie's* [s 100.25].

[7-1040] Motor Accidents Compensation Act 1999

A plaintiff has only such right to interest on damages payable in relation to a motor vehicle accident as is conferred by s 137.

That section excludes any entitlement to interest on those components of an award calculated under s 141B (dealing with attendant care services) and any amount for non-economic loss: s 137(2), (3).

Other damages payable in relation to a motor accident are subject to the following provision: s 137(4):

(a) Interest is not payable unless:

  (i) information that would enable a proper assessment of the plaintiff's claim has been given to the defendant and the defendant has had reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the plaintiff's full entitlement to all damages of any kind but has not made such an offer, or

  (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the plaintiff that would enable a proper assessment of the plaintiff's full entitlement to all damages of any kind but has not made such an offer, or

  (iii) if the defendant is insured under a third party policy or is the Nominal Defendant, the insurer has failed to comply with its duty under s 83, or

  (iv) if the defendant has made an offer of settlement, the amount of all damages of any kind awarded by the court (without the addition of any interest) is more than 20 per cent higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) The highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the plaintiff's full entitlement to all damages of any kind.

(c) For the purposes of the subsection an offer of settlement must be in writing.

The amount of interest is to be calculated for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages: s 137(5)(a). It is

to be calculated in accordance with the principles ordinarily applied by the court for that purpose subject to the section: s 137(5)(b). The rate of interest is to be three quarters of the rate prescribed for the purposes of s 101 of the CPA: s 137(6).

Nothing in s 137 affects the payment of interest on a judgment or order of the court: s 137(1).

Despite earlier views, the award of interest, once the provisions of s 137(4) are satisfied, remains discretionary in accordance with principles applicable with respect to s 100 of the CPA: *Najdovski v Crnojlovic (No 2)* [2008] NSWCA 281 at [11].

For a discussion on a number of potential issues arising from the language of s 137(4) see *Najdovski* at [12]–[25].

On the issue of reasonableness, Basten JA at [26] said that it should be accepted that:

> too great a willingness to treat an offer as "reasonable", and therefore not unreasonable, will allow defendants to escape too readily the obligation to pay for the cost of keeping the plaintiff out of his or her damages. Ultimately reasonableness depends upon an objective assessment of the circumstances and, where the material before the court does not materially differ from that available to the defendant at the relevant time, the judgment of the Court must be treated as, subject to recognition that no precise figure is necessarily correct, a baseline for determining the reasonableness of the offer.

See [7-1060] as to the applicability of s 18(1)(c) of the *Civil Liability Act 2002*.

[7-1045] Motor Accident Injuries Act 2017

A claimant has only such right to interest on damages payable in relation to a motor vehicle accident as is conferred by s 4.16.

No interest is payable on damages awarded for non-economic loss: s 4.16(2).

Other damages payable in relation to a motor accident are subject to s 4.16(3):

(a) Interest is not payable (and the court or claims assessor cannot order the payment of interest) on such damages unless:

  (i) information that would enable a proper assessment of the claim has been given to the defendant and the defendant has had a reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the full entitlement to all damages of any kind but has not made such an offer, or

  (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the claimant that would enable a proper assessment of the full entitlement to all damages of any kind but has not made such an offer, or

  (iii) if the defendant has made an offer of settlement, the amount of all damages of any kind that is awarded (without the addition of any interest) is more than 20% higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) The highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the full entitlement to all damages of any kind.

(c) For the purposes of this subsection, an offer of settlement must be in writing.

The amount of interest is to be calculated for the period from when the loss to which the damages relate was first incurred until the date on which the damages are awarded: s 4.16(4)(a). It is to be calculated in accordance with the principles ordinarily applied by a court for that purpose, subject to the section: s 4.16(4)(b). The rate of interest to be three-quarters of the rate prescribed for the purposes of CPA s 101: s 4.16(5).

Nothing in s 4.16 affects the payment of interest on a judgment or order of a court: s 4.16(6).

The discussion in [7-1040] as to discretion and issues arising under s 137(4) of the *Motor Accidents Compensation Act 1999* apply to the similar, although not identical, terms of s 4.16.

See [7-1060] as to the applicability of s 18(1)(c) of the *Civil Liability Act 2002*.

[7-1050] Workers Compensation Act 1987

A plaintiff has only such right to interest on damages as is conferred by s 151M: s 151M(1).

Section 151M(4)–(7) adopts the same language and scheme as s 137(4)–(7) of the *Motor Accidents Compensation Act 1999*, except that s 137(4)(a)(iii), referring to a third party policy and the Nominal Defendant, is omitted.

While s 151M does not exclude interest on damages payable in respect of attendant care service or for non-economic loss, the schemes should otherwise be dealt with in the same way.

For an example of the application of s 151M, see *State of NSW v Skinner* [2022] NSWCA 9 at [132]–[154] where it was held the respondent was not entitled to pre-judgment interest as, inter alia, the appellant was entitled to have regard to the fact that there was an unresolved issue as to whether the case could proceed at all, having been commenced out of time, and the likelihood of any liability being established.

[7-1060] Civil Liability Act 2002

With respect to cases to which this Act applies, a court cannot order the payment of interest on damages awarded for non-economic loss (s 18(1)(a)), gratuitous attendant care services with some exceptions (s 18(1)(b)), or the loss of capacity to provide gratuitous services to dependants (s 18(1)(c)).

The provision that interest cannot be paid on damages awarded for the loss of capacity to provide gratuitous services to dependants applies to motor accidents: s 3B(2).

If interest is to be awarded, the amount of interest is to be calculated for the period from when the loss first occurred until the date when the court determines the damages: s 18(2)(a). It is to be calculated in accordance with the principles ordinarily applied by the court for that purpose (s 18(2)(b)). The interest rate is to be as provided by s 18(3), (4).

[7-1070] Interest after judgment

Section 101 provides for interest after judgment including interest on costs. Interest on costs is payable unless the court otherwise orders: s 101(4).

For a discussion of relevant issues see, *Ritchie's* [s 101.5]–[s 101.30], *Thomson Reuters* [CPA101.20]–[CPA 101.50], *Zepinic v Chateau Constructions (Australia) Ltd (No 2)* [2013] NSWCA 227 at [82]–[88], (just as a costs order must be sought at the time of judgment, or within any time limited by UCPR 36.16, so, too, must an interest on costs order); *Grills v Leighton Contractors Pty Ltd (No 2)* [2015] NSWCA 348; *Grima v RFI (Aust) Pty Ltd* [2015] NSWSC 332 (time from when interest should be paid) and *Tjiong v Tjiong (No 2)* [2018] NSWSC 1981 at [164] (an application for an award of interest on costs must be made, if the order proceeds to assessment, before the assessment is undertaken).

[7-1080] Rate of interest

Rates of interest are prescribed for interest after judgement: UCPR r 36.7. However, there is no such rate for interest up to judgment. The rates in r 36.7 will usually be accepted as appropriate without

evidence: *Hexiva Pty Ltd v Lederer (No 2)* [2007] NSWSC 49 at [9]. However, a party contending that the rate should be different is entitled to do so but will need, generally at least, to produce evidence in support of such a rate. "The plaintiff's loss and its quantum are to be found as a fact and assessed on the evidence…": *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358. In undertaking this task it will generally be appropriate for the court to have regard to prevailing market rates.

An accepted method of calculating the interest on damages accruing progressively over a period of time is to halve the rate of interest, the period or the principal amount: *Cullen v Trappell*, as above, *Riddle v McPherson* (1995) 37 NSWLR 338 at 342 (Motor Accidents Act 1988, s 73(5)(a)).

Legislation

- CPA ss 100, 101
- *Civil Liability Act 2002* ss 3B(2), 18
- *Motor Accidents Act 1988*, s 73(5)(a)
- *Motor Accidents Compensation Act 1999* s 137
- *Motor Accident Injuries Act 2017* s 4.16
- *Workers Compensation Act 1987* s 151M

Rules

- UCPR r 36.7

Practice Notes

- Practice Note No SC Gen 16 — Pre-judgment interest rates
- Practice Note DC (Civil) 15 — Pre-judgment interest rates

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Costs

para

Costs

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Costs

Acknowledgement: the following material was prepared by the Honourable Justice Paul Brereton, AM RFD then of the NSW Court of Appeal. It is periodically reviewed by the Honourable Justice Chen of the NSW Supreme Court and updated by Judicial Commission staff.

[8-0000] Scope

This chapter is concerned with the exercise of the jurisdiction to make costs orders between parties to litigation (and also, in some circumstances, against third parties). It is not concerned with costs as between legal practitioners and their clients, or (except incidentally) with applications for security for costs (as to which see [2-5900]ff).

The purpose of a costs order is to compensate the person in whose favour it is made, not to punish the person against whom the order is made: *Northern Territory v Sangare* (2019) 265 CLR 164 at [25]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]. It is not inconsistent with this principle that costs orders also play an essential role in case management; though not "punitive", defaults in compliance with procedural directions will often merit a costs order, because of the additional cost which the default occasions to the innocent party.

The applicable law is provided by:

- the *Civil Procedure Act 2005* ("CPA"), which authorises the making of orders with respect to costs: s 98, including gross sum costs orders: s 98(4)(c), capped costs orders: s 98(4)(d), and costs orders against legal practitioners: CPA s 99
- the *Uniform Civil Procedure Rules* 2005 ("UCPR"), which establish the general rule that costs "follow the event": UCPR r 42.1
- the *Legal Profession Uniform Law Application Act 2014* ("LPULAA") and *Legal Profession Uniform Law,* or (for proceedings which commenced before 1 July 2015), the (now repealed) *Legal Profession Act 2004* ("LPA")
- the common law, which continues to regulate some aspects of the law of costs; and
- specific statutory provisions for certain types of proceedings.

[8-0010] Power of the court to order costs

The CPA is the principal statutory source of the court's power to award costs, and confers on the court "full power" to determine by whom, to whom and to what extent costs are to be paid, on what basis, and at any stage of proceedings, unless there are statutory provisions to the contrary: CPA s 98; see also *Dal Pont* at 6.14–6.17. The court may exercise that power whenever the circumstances warrant, having regard to the scope and purpose of CPA s 98: *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Hamod v State of NSW* [2011] NSWCA 375 at [813].

However, costs being in the discretion of the court, the discretion must be exercised on a principled and judicial basis: *Northern Territory v Sangare* (2019) 265 CLR 164 at [24]; *Williams v Lewer* [1974] 2 NSWLR 91 at 95. As explained in *Sharpe v Wakefield* [1891] AC 173 at 179, to exercise discretion judicially requires adherence to "reason and justice, not according to private opinion ... according to law, and not humour", and is not to be "arbitrary, vague, and fanciful, but legal and regular". Consistency is "an essential aspect of the exercise of judicial power": *Northern Territory v Sangare* at [24].

CPA s 98 is expressly subject to, relevantly, "any other Act": s 98(1); *Smith v Sydney West Area Health Service (No 2)* [2009] NSWCA 62 at [11]. Instances of this include s 346 of the *Workplace Injury Management and Workers Compensation Act 1998*, which makes specific provision for the award of costs in claims for work injury damages including costs in court proceedings for such claims: see [8-0170]; and *Defamation Act 2005*, s 40: see [8-0050].

[8-0020] The general rule: costs follow the event

The general rule is that if the court makes any order as to costs, it is to order that the costs follow the event, unless it appears that some other order should be made: UCPR r 42.1. This general rule, in the context of the purpose of a costs order, founds a "reasonable expectation" on the part of a successful party of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], [134]; *Northern Territory v Sangare* (2019) 265 CLR 164 at [25].

The general rule reflects the notion that justice to a successful party is not achieved if it comes at the price of being out-of-pocket, so that a party who is responsible for litigation should bear its costs. Underlying both the general rule that costs follow the event, and the qualifications to it, is the idea that costs should be paid in a way that is fair, having regard to the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant's responsibility because the plaintiff was caused to incur costs by the defendant's failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79.

It has been said that the "event" is not confined to the determination of the proceedings as a whole, or of particular causes of action, nor limited to issues in the technical pleading sense, but can extend to any disputed question of fact or law: *Reid Hewett & Co v Joseph* [1918] AC 717; *Williams v Stanley Jones & Co Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478; *Forster v Farquhar* [1893] 1 QB 564 at 569; *Hughes v Western Australian Cricket Association Inc* [1986] FCA 511; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. However, the prevailing approach is that the words "follow the event" generally refer to the event of the claim or counter claim, so that a successful party should have the whole costs of the proceeding, including the costs of an issue on which it has failed, unless in respect of that issue the successful party has "unfairly, improperly, or unnecessarily increased the costs": *Windsurfing International Inc v Petit* (1987) AIPC 90-441 at 37,861–37,862, although in an appropriate case, a costs order may be moulded to reflect the degree of success on distinct issues: *Lavender View v North Sydney Council (No 2)* [1999] NSWSC 775; *Uniline Australia Ltd (ACN 010 752 057) v Sbriggs Pty Ltd (ACN 007 415 518) (No 2)* [2009] FCA 920; *Leallee v the Commissioner of the NSW Department of Corrective Services* [2009] NSWSC 518; *Sahab Holdings Pty Ltd v Registrar-General [No 3]* [2010] NSWSC 403 at [36]; *Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed)* [2011] NSWSC 1425 at [54]–[60]; *Calvo v Ellimark Pty Ltd (No 2)* [2016] NSWCA 197 at [8]–[10]; *Kumaran v Employsure Pty Ltd (No 2)* [2022] NSWCA 247 at [12]–[14]. Thus, in most ordinary cases, the "real practical outcome" of a particular claim will provide sufficient guidance: *Windsurfing International Inc v Petit* at 37,861–37,862; *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [15].

However, the prima facie principle that costs follow the event is subject to the ability of the court to make further or other orders as required to achieve a just result: *Lombard Insurance Co (Australia) Ltd v Pastro* (1994) 175 LSJS 448; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 688; *Furber v Stacey* [2005] NSWCA 242. Discretionary reasons for departing from the rule may arise where the successful party has failed to better an offer of compromise made by the unsuccessful party: see [8-0030]; where excessive or disproportionate costs (such as the briefing of Senior Counsel for simple applications) have been incurred: see [8-0160]; or where the ultimately successful party has failed on issues of substance, especially where those issues have occupied a substantial part of the proceedings: see [8-0040]. There are some classes of proceedings in which the general rule is not applied, invariably or at all: see [8-0050]. The general rule may also be displaced by contractual agreement: see [8-0060]. Other rules are necessary where there is no "event" because there is no final judgment on the merits, in particular where the parties settle the substantive dispute but are unable to resolve the question of costs: see [8-0070].

[8-0030] Departing from the general rule: depriving a successful party of costs

Last reviewed: June 2025

The discretion to depart from the general rule must be exercised judicially and "according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy": *Williams v Lewer* [1974] 2 NSWLR 91 at 95; *Oshlack v Richmond River Council* at [22]. If considering a departure from the ordinary rule, the court should have regard to the purpose, rationale and principles of fairness which inform the general rule, referred to above, in particular that the award of costs should reflect the relative responsibilities of the parties for the incurring of costs: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121]; *Turkmani v Visalingam (No 2)* [2009] NSWCA 279 at [13]. The onus lies on the unsuccessful party to demonstrate a basis for departing from the usual rule: *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [10].

Some of the more usual reasons for depriving a successful party of costs, in whole or in part, are discussed below. While these are useful illustrations of circumstances in which departure from the general rule may be justified, it remains a matter for the discretion of the court whether, in the circumstances of any particular case within the scope of those examples, it is appropriate to depart from the general rule: *Oshlack v Richmond River Council* at [69]; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [97]–[98].

Only in an exceptional case would a successful party not only be deprived of its costs but also ordered to pay the opponent's costs: *Knight v Clifton* [1971] Ch 700; *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 42 FLR 213 at 220; *Arian v Nguyen* [2001] NSWCA 5.

Disentitling conduct

Circumstances that may influence a court to depart from the general rule that costs follow the event include disentitling conduct on the part of the successful party: *Oshlack v Richmond River Council* at [40], [69]. Disentitling conduct in this context may be constituted by any conduct "calculated to occasion unnecessary expense" and need not necessarily amount to "misconduct": *Keddie v Foxall* [1955] VLR 320 at 323–324; *Lollis v Loulatzis (No 2)* [2008] VSC 35 at [29], nor even amount to "a most exceptional case, or a strong or exceptional case": *G R Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 at [20]. Instances include:

- where the successful party effectively invited the litigation: *Ritter v Godfrey* [1920] 2 KB 47
- where the successful party unnecessarily protracted the proceedings: *Lollis v Loulatzis (No 2)* at [29], and
- where the successful party pursued the matter solely for the purpose of increasing the costs recoverable.

The mere fact that a defendant strenuously defends a claim (and fails in some of those defences) does not entitle the plaintiff to all or some of the costs of proceedings in which the plaintiff does not succeed, or does not succeed to any material extent: *AMC Caterers Pty Ltd v Stavropoulos* [2005] NSWCA 79 at [4]–[6].

Late amendment

A successful party may be deprived of costs if its success is attributable to a ground raised only by a late amendment: *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137 (no costs awarded); *Faraday v Rappaport* [2007] NSWSC 253 at [25]–[30]; cf *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No 2)* [2018] NSWCA 266 at [40]–[49], [87]. Although it has been said that, as a general rule, where a plaintiff makes a late amendment which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the cost of the action down to the date of amendment: *Beoco Ltd v Alfa Laval Co Ltd* at 154, citing *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 and *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA)); see also *Murrihy v Radio 2UE Sydney Pty Ltd* [2000] NSWSC 318. This "general rule"

has emerged in the context that though the late amendment has resulted in some slight measure of success for the plaintiff, ultimately the true victor, having regard to the case as a whole, was the defendant; where that is not so, the plaintiff may still recover some, or even all, its costs: *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)* [2005] NSWSC 1111 at [17], [26], [27]; cf *Almond Investors Ltd v Kualitree Nursery Pty Ltd (No 2)* [2011] NSWCA 318 at [8].

Where the successful party is only nominally successful

Generally, the "event" will be regarded as going against a party who recovers only nominal damages: *Oshlack v Richmond River Council*, above, at [70]; *Ng v Chong* [2005] NSWSC 385, unless some other right is vindicated by the judgment notwithstanding that no substantial damages are recovered. Attention must be given, however, to the specific circumstances of each case: *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 874; *EKO Investments Pty Limited v Austruc Constructions Ltd* [2009] NSWSC 371 at [18]–[23]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [14], citing *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 at [100].

Quantum and proportionality

Even if success is more than merely nominal, the amount of the damages recovered may affect the question of costs: *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685, particularly if it falls below the threshold referred to in UCPR rr 42.34 or 42.35, in which case the successful plaintiff is entitled to its costs only if the court is satisfied that the proceedings should have been commenced and continued in that court: *Redwood Anti-Aging Pty Ltd v Knowles (No 2)* [2013] NSWSC 742 at [17]–[22]. UCPR r 42.35 provides that in proceedings in the District Court, where a plaintiff obtains a judgment in an amount of less than $40,000, an order for costs may, but will ordinarily not, be made, unless the court is satisfied the commencement and continuation of the proceedings in the District Court, rather than the Local Court, was warranted. UCPR r 42.34 makes similar provision in respect of proceedings in the Supreme Court where less than $500,000 is recovered.

Relevant considerations as to whether the commencement and continuation of the proceedings in the higher court were warranted include the complexity of the factual and/or legal issues: *Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd (No 2)* [2017] NSWCA 340 at [18]–[19]; the amount claimed, and the reasons for this; the amount actually recovered, and the reasons for this; the difficulty or otherwise of assessing the likely damages awarded; the nature of the proceedings in question, and how this impacts, if at all, upon the need to proceed in the higher court; the conduct and attitude of the parties to litigation; and the importance of the legal principle involved in the case as a matter of precedent: *Dal Pont* at 12.15; and *Singapore Airlines v Principle International* at [7]. In *McLennan v Antonios (No 2)* [2014] NSWDC 38, where the plaintiff had recovered only $12,000 in a claim under *Motor Accidents Compensation Act 1999*, a contention that no costs order should be made failed on the basis that the District Court was a specialist personal injuries and motor accidents court while the Local Court was not.

A significant disproportion between the amount for which judgment is recovered and the costs of the proceedings may warrant depriving an otherwise successful plaintiff of a usual costs order, including of a prima facie entitlement to indemnity costs arising from bettering an offer of compromise: *Jones v Sutton (No 2)* [2005] NSWCA 203.

It has been held that a party may apply under CPA and UCPR rr 12.7 and 13.4 to stay or to strike out the proceedings in their entirety, on the basis that the costs are out of all proportion to the object of resolving the issues between the parties, though such cases will be very rare: *Jameel v Dow Jones & Co Inc* [2005] QB 946 at [67]-[76]; *Bleyer v Google Inc* (2014) 88 NSWLR 670; *Vizovitis v Ryan* [2012] ACTSC 155 at [37], referring to *Jones v Sutton (No 2)*. This view is not without controversy and has not been resolved at appellate level in Australia: see the later comments by McCallum JA in *Massarani v Kriz* [2020] NSWCA 252, referring to *Smith v Lucht* [2014] QDC 302; *Feldman v The Daily Beast Company LLC* [2017] NSWSC 831 at [15]–[18]; *Ghosh v NineMSN Pty Ltd* (2015) 90

NSWLR 595 at [44]; [55]; [56]; *Lazarus v Azize* [2015] ACTSC 344 at [23]; *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639 at [130]–[143]; *Watney v Kencian* [2017] QCA 116 at [61]; *GG Australia Pty Ltd v Sphere Projects Pty Ltd (No 2)* [2017] FCA 664 at [52]; *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612 at [5], [40]; *Armstrong v McIntosh (No 2)* [2019] WASC 379 at [115]; *Fox v Channel Seven Adelaide Pty Ltd (No 2)* [2020] SASC 180 at [11]-[21]; and *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126 at [40].

Public interest

That the proceedings involve some public interest aspect does not, of itself, warrant departure from the general rule that costs follow the event: *Oshlack v Richmond River Council* at [90]; *Re Kerry (No 2) — Costs* [2012] NSWCA 194 at [13], [15]; cf *CSR Ltd v Eddy* (2005) 226 CLR 1 at [78]–[81]. While it may be a relevant consideration that there is a divergence of authority on a particular issue, in private litigation the importance of the subject matter does not necessarily provide a basis in for refusing to award costs to the successful party: *Rinehart v Welker (No 3)* [2012] NSWCA 228 at [15]. Nor do the general vicissitudes of litigation warrant a departure from the principle, even where a judge's error necessitates an application to vary an order: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [59]–[62].

Indulgences

Where a party seeks and obtains some favour or dispensation from the court (such as leave to amend or an extension of time), and although the starting point remains the general rule under UCPR r 42.1, so that the inquiry is whether in the exercise of the court's discretion, that rule should be departed from or some other order preferred: *(Nowlan v Marson Transport Ltd* (2001) 53 NSWLR 116 at [37]), ordinarily (though not invariably) the party seeking the indulgence is required to pay the costs of the application irrespective of the outcome, unless the other party has unreasonably opposed it: *Holt v Wynter* (2000) 49 NSWLR 128 at [121]*; Nardell Coal Corporation v Hunter Valley Coal Processing* (2003) 178 FLR 400 at 435–6; *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 619 at [24], citing *The Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd (No 2)* [2007] NSWSC 797 at [6]. However, whether this was a general rule was doubted in *Fordham v Fordyce* [2007] NSWCA 129 at [50]; see also *The Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347 at [109]–[111] and [144]–[153]; and *Mamfredas Investment Group Pty Limited (formerly known as MAM Marketing Pty Ltd) v PropertyIT and Consulting Pty Ltd* [2013] NSWSC 929 at [85], where the existence of such an overarching principle was said to be "not clear". This rule is of particular application where the party seeking the indulgence requires relief from some relevant delinquency, in which case costs are ordinarily awarded in favour of the unsuccessful opposing party *(Pascoe v Edsome Pty Ltd (No 2)* [2007] NSWSC 544) whereas unsuccessful opposition to a reasonable application for leave to amend is in a different category and might result in no order, or even an order that the respondent pay the applicant's costs. An application to vary an order where the judge rather than a party has made an error is not an application for an indulgence: *Jaycar Pty Ltd v Lombardo* at [67].

Offers of compromise and Calderbank letters

The general rule is displaced where the result is no more favourable to a successful plaintiff than an offer of compromise made by the defendant in accordance with the rules of court. In such a case, unless the court otherwise orders, the plaintiff is entitled to an order against the defendant for the plaintiff's costs on the ordinary basis up to the date of the offer, but the defendant is entitled to an order against the plaintiff for its costs on the indemnity basis thereafter: UCPR r 42.15.

The general rule may be displaced as a matter of discretion where the result is no more favourable to the successful party than an offer made by the unsuccessful party in a Calderbank letter: *Calderbank v Calderbank* [1975] 3 All ER 333; *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103 at 108. However, unlike a formal offer of compromise, a Calderbank letter is merely a relevant consideration in the exercise of the discretion, and does not have an

equivalent presumptive effect to an offer of compromise under the rules: *Commonwealth of Australia v Gretton* at [43]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [19], [46]–[47]; *Nobrega v Trustees for the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133 at [20]–[22]; *Skalkos v Assaf (No 2)* [2002] NSWCA 236 at [117]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [107]–[119]. One reason for this is that a party seeking to take advantage of an offer for the purposes of costs should be expected to comply with the procedures and safeguards provided by the rules of court. Nonetheless, as a matter of discretion, a *Calderbank* offer may justify a special order for costs, including an order for costs on an indemnity basis, if the final judgment is no more favourable than the offer, and its rejection was unreasonable: *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [8]; *Jones v Bradley (No 2)* [2003] NSWCA 258 at [13]; *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37], and the offer sufficiently foreshadowed its use to support a special costs order: *Brymount Pty Ltd v Cummins (No 2)* [2005] NSWCA 69 at [10]–[21]; *Penrith Rugby League Club Ltd trading as Cardiff Panthers v Elliot (No 2)* [2009] NSWCA 356; *Nu Line Construction Group Pty Ltd v Fowler (aka Grippaudo)* [2012] NSWSC 816 at [9]–[14], [38]–[40]. When determining whether the final judgment is no more favourable than the offer, so as to enliven the special costs discretion, where an appeal judgment has revised the amount of the damages award at first instance, post-judgment interest can be taken into account up to the making of a settlement offer. The effect of UCPR r 42.16 is that interest after the date the offer of compromise is made is not included in the comparison: *Channel Seven Sydney Pty Ltd v Mahommed (No 2)* (2011) 80 NSWLR 210 at [55]; however interest from the date of the primary judgment up to the date of the offer should be included in light of the decision in *Mahommed (No 2)*: *El Assaad v Al Haje (No 2)* [2025] NSWCA 17 at [39]–[40], [52].

Regarding the Court's decision to make a special costs order, the relevant question is whether the offeree's failure to accept the Calderbank offer, in all the circumstances, warrants departure from the ordinary rule as to costs. That the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure from the ordinary rule as to costs: see *Novelly v Tamqia Pty Ltd (No 2)* [2024] NSWCA 209 at [16]. The factors relevant to the question whether a rejection of an offer is unreasonable include:

- the stage of the proceeding at which the offer was received
- whether the offeree had an adequate opportunity in terms of time and information to enable it to consider and deal with the offer: *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322 at [99] citing *Donnelly v Edelsten* (1994) 49 FCR 384 at 396; *Novelly v Tamqia Pty Ltd (No 2)* at [23]
- the extent of the compromise offered
- the offeree's prospects of success assessed as at the date of the offer
- the clarity with which the terms of the offer were expressed, and
- whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it (see *Commissioner of State Revenue v Challenger Listed Investments Ltd (atf Challenger Diversified Property Trust 1) (No 2)* [2011] VSCA 398 at [8]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (Vic) (No 2)* [2005] VSCA 298 at [25]; *Miwa Pty Ltd v Siantan Properties Pty Ltd (No 2)* at [12].

The assessment as to unreasonableness is to be made as at the date the offer was made; it is not to be determined with hindsight: see *Regency Media Pty Ltd v AAV Australia Pty Ltd* [2009] NSWCA 368 at [33]; *El Assaad v Al Haje (No 2)* at [45].

The onus is on the offeror to show the offeree's rejection of the Calderbank offer is unreasonable: *Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61 at [20]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [46]–[47]; *El Assaad v Al Haje (No 2)* at [32].

See also "Offers of compromise and Calderbank letters" under [8-0130].

Offers of contribution

Where a party has made an offer to contribute under UCPR r 20.32, the court must take into account both the fact and the amount of the offer in exercising its discretion as to costs: UCPR r 42.18; *Simmons v Rockdale City Council (No 2)* [2014] NSWSC 1275; *Thornton v Wollondilly Mobile Engineering (No 2)* [2012] NSWSC 742 at [13]–[18]; *James Hardie & Co Pty Ltd v Wyong Shire Council* (2000) 48 NSWLR 679 at [23]. While such an offer is only "taken into account", which means that it does not have the presumptive effect of an offer of compromise, it is a useful tool for one defendant against another in litigation. The necessary consequence of acceptance of an offer of contribution is the application of r 20.27(3), being the ability to apply for judgment to be entered accordingly: *Charlotte Dawson v ACP Publishing Pty Ltd* [2007] NSWSC 542 at [23]. A defendant making an offer to contribute may seek costs, including indemnity costs.

[8-0040] Departing from the general rule: apportionment

Last reviewed: March 2025

Mixed success on multiple issues

Where the litigation involves multiple issues, the ultimately successful party may have failed on one or a number of the issues in the trial. Where the ultimately unsuccessful party has succeeded (and, as a corollary, the successful party has failed) on one or more substantial issues, the question often arises whether there should be a departure from the general rule given that "the event" is not necessarily limited to the final overall outcome, but can include individual issues in the proceedings: *Williams v Stanley Jones & Co Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478; see [8-0020]. In this context, courts do not usually apportion costs between issues, but act on the outcome of the proceedings as a whole, without attempting to differentiate between particular issues on which the successful party may not have succeeded: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. As the High Court cautioned in *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* [2015] HCA 53 at [6], there are "good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like". The severability of one issue on which the successful party failed is not, without more, sufficient to warrant departure from the general rule: *Hawkesbury District Health Service Ltd v Chaker (No 2)* [2011] NSWCA 30 at [14]. A successful party's entitlement to the whole of the costs of the proceedings should not be discounted to allow for another party's success on a separate issue that played a very minor part in the proceedings as a whole: *Waters v PC Henderson (Australia) Pty Ltd* [1994] NSWCA 338; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [107]; *Macourt v Clark (No 2)* [2012] NSWCA 411 at [7].

However, the court must strike a balance between permitting litigants to canvas all issues, while not rewarding them for unreasonable conduct or encouraging the agitation of unnecessary issues: *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16. Apportionment to reflect the relative success of the parties is becoming more commonplace. Unreasonable or improper conduct is not a necessary condition for moderating a costs order to reflect a party's failure on a particular issue: *Short v Crawley (No 40)* [2008] NSWSC 1302 at [32]. The court may depart from the general rule if the unsuccessful party succeeds on significant issues: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [31]–[36]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]; *Sydney Ferries v Morton (No 2)* [2010] NSWCA 238 at [10]–[12]; *Roads and Traffic Authority (NSW) v McGregor (No 2)* [2005] NSWCA 453 at [20]; *Cross v Queensland Newspapers Pty Ltd (No 2)* [2008] NSWCA 120 at [13]; *Tarabay v Leite* [2008] NSWCA 259 at [76]; *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)* [2022] NSWCA 258 at [11]–[12]; or if the Court considers the fairer course is to make an issues based costs order, taking a relatively broad brush approach to this exercise: *Zurich Australian Insurance Ltd v CIMIC Group Ltd* [2024] NSWCA 229 at [630]–[638]; *Zurich Australian Insurance Ltd v CIMIC Group Ltd (No 2)* [2024] NSWCA 276

at [9]–[12]. This approach was taken as it was regarded as too simplistic merely to frame costs by reference to the overall success of the insurers on appeal, as that did not reflect the extent to which grounds were advanced and submissions made, and costs therefore spent, on discrete issues raised and determined by the Court: at [9]. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [241]–[245], Kiefel and Keane JJ concluded that each side should bear its own costs on the basis that the plaintiff's limited success was largely "a Pyrrhic victory, given the rejection of substantial aspects of her case".

A court will generally only deprive the successful party of the costs relating to an issue on which it was unsuccessful when that issue was clearly dominant or separable: *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]; *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63]–[66]; *Waters v PC Henderson (Australia) Pty Ltd*. However, in *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd (No 2)* [2024] NSWCA 274 at [20], the Court emphasised that the phrase "dominant or separable" should not be applied as if it were a statutory test — it involves two concepts, each of which should be treated flexibly; *Zurich Australian Insurance Ltd v CIMIC Group Ltd (No 2)* at [8]. An issue or group of issues is "clearly dominant" when it is clearly dominant in the proceedings as a whole: *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [107]; cf *Correa v Whittingham (No 2)* [2013] NSWCA 471 at [26]–[30]; *Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue (NSW)* [2013] NSWCA 470 at [229]–[232] (cross-appeal not clearly dominant or separable); *Xu v Jinhong Design & Constructions Pty Ltd (No 2)* [2011] NSWCA 333 at [4] (contractual issues not clearly dominant or separable); *Turkmani v Visvalingan (No 2)* [2009] NSWCA 279 at [11] (contributory negligence not clearly separable from liability). Greater latitude is allowed in this respect to a defendant than to a plaintiff, so that the general rule may be departed from more readily against a successful plaintiff who has pressed additional issues which have failed, than against a successful defendant who has unsuccessfully raised additional issues: *Ritter v Godfrey* [1920] 2 KB 47; *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 81 ALR 166 at 169; *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 637; *Hendriks v McGeoch* [2008] NSWCA 53 at [104]; *Griffith v ABC (No 2)* [2011] NSWCA 145 at [16], [19]–[20], [38]–[39]; *Dal Pont* 8.8–8.9. Thus where a plaintiff's case fails, it may sometimes be appropriate to order the plaintiff to pay the costs of issues unsuccessfully raised by the defendant, even if those issues are severable, so long as the defendant acted reasonably in raising those issues; but it is less often the case that a defendant would be ordered to pay the costs of severable issues unsuccessfully raised by an otherwise successful plaintiff. However, the requirements of CPA s 56, that parties assist the court to facilitate the just, quick and cheap resolution of the real issues on the proceedings and take reasonable steps to resolve or narrow the issues in dispute, apply to defendants as well as plaintiffs. This is relevant to the exercise of the costs discretion: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [9]–[10].

The principles governing the making of a costs order to reflect the costs incurred in dealing with a particular issue on which the successful party in the proceedings did not succeed have been summarised, in the context of appellate proceedings, by the Court of Appeal in *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38] as follows:

- Where there are multiple issues in a case the court generally does not attempt to differentiate between the issues on which a party was successful and those on which it failed. Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed: *Waters v PC Henderson (Aust) Pty Ltd* [1994] NSWCA 338.
- In relation to trials, it may be appropriate to deprive a successful party of costs or a portion of the costs if the matters upon which that party was unsuccessful took up a significant part of the trial, either by way of evidence or argument: *Sabah Yazgi v Permanent Custodians Limited (No 2)* [2007] NSWCA 306 at [24], so a similar approach is adopted on appeal.

- If the appellant loses on a separate issue argued on the appeal which has increased the time taken in hearing the appeal, then a special order for costs may be appropriate which deprives the appellant of the costs of that issue: *Sydney City Council v Geftlick (No 2)* [2006] NSWCA 374 at [27].
- Whether an order contrary to the general rule that costs follow the event should be made depends on the circumstances of the case viewed against the wide discretionary powers of the court, which powers should be liberally construed: *State of NSW v Stanley* [2007] NSWCA 330 at [18] per Hislop J (with whom Beazley and Tobias JJA agreed).
- A separable issue can relate to "*any disputed question of fact or law*" before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [34].
- Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion and mathematical precision is illusory. The exercise of the discretion depends upon matters of impression and evaluation: *James v Surf Road Nominees Pty Ltd (No 2)*, citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272.

See also *Elite Protective Personnel Pty Ltd & Anor v Salmon (No 2)* [2007] NSWCA 373; *City of Canada Bay Council v Bonaccorso Pty Ltd (No 3)* [2008] NSWCA 57 at [22]; *Turkmani v Visvalingham (No 2)* [2009] NSWCA 279; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [22]; *Avopiling Pty Ltd v Bosevski* (2018) 98 NSWLR 171 at [173]; *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [232]–[233].

Giving effect to apportionment

Orders to the effect that party A pay party B's costs of specified issues (and that party B pay party A's costs of other issues) create complexities for assessors. It is therefore undesirable to have multiple costs orders defined by reference to issues arising out of the one set of proceedings. It is preferable to make a single order that covers all of the issues, on what has often been referred to as a "broad axe" basis: *In the matter of Commercial Indemnity Pty Ltd* [2016] NSWSC 1125, that Party B pay a percentage of Party A's costs of the proceedings: see Precedent 8.6 at [8-0200]. This avoids visiting on assessors a requirement to allocate work and costs between issues. The nature and extent of the apportionment is a discretionary one, and the court may take an impressionistic approach to apportionment, "on a relatively broad brush basis", rather than seeking to identify and quantify issues with precision: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [19]; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272; *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [11]; *Bostik Australia Pty Ltd v Liddiard (No 2)* at [38]. The court should seek to make an order that is fair in all the circumstances, taking account of the extent to which issues are separable, and without aspiring to the false hope of mathematical precision: *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)*, above, at [9]. It has been said that the approach of analysing the percentage of costs between the issues by counting the proportion of paragraphs and pages devoted to each factual topic is "a highly artificial way of proceeding", giving "a false air of mathematical precision": *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [84]; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (No 2)* [2019] NSWCA 173 at [32]. Nonetheless, such an analysis can sometimes provide useful assistance in apportionment, so long as its limitations are recognised.

If, for example, it is considered that issues on which (unsuccessful) Party B succeeded accounted for about 20% of the costs of the proceedings, and that Party A should not recover costs of those issues but should not have to pay Party B's costs of them, then the order would be that Party B pay 80% of Party A's costs of the proceedings. If it were considered that Party A should pay Party B's costs of the issues on which Party A failed, then Party B should pay 60% of Party A's costs of the proceedings.

Other cases for apportionment

Independently of issues of separability, the general rule may be departed from:

- where each party has had substantial success — in which case the court may make no order as to costs: *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 at [40]
- where the plaintiff has incurred unnecessary costs — including the unnecessary retainer of senior counsel, or through significant credit issues: *Jones v Sutton (No 2)* [2005] NSWCA 203 at [64]; alternatively, the successful party's costs may be capped: UCPR r 42.4; *Nudd v Mannix* [2009] NSWCA 32 at [26]–[27]; *Re Sherbourne Estate (No 2)* (2005) 65 NSWLR 268; see [8-0160], and
- where the shortcomings and delinquencies of the unsuccessful party are equalled or exceeded by those of the successful party: *Rural & General Insurance Broking Pty Ltd v APRA* [2009] ACTSC 67, in which the conduct of the practitioners on both sides, and their clients, was said to be "a sorry affair" and contributed to there being only limited costs orders upon the discontinuance of hopeless proceedings: at [173] and contributed to there being only limited costs orders upon the discontinuance of hopeless proceedings.

[8-0050] Displacement of the general rule: particular types of proceedings

In some types of proceedings, common law principles, convention, and/or statutory provisions have the consequence that the application of the general rule is qualified, modified or displaced [see *Dal Pont* at 8.71–8.92].

Probate

In probate proceedings, subject to two well-recognised exceptions, the general rule that costs follow the event usually applies, the exceptions being:

1. where the testator had been the cause of the litigation, and
2. where the "circumstances led reasonably to an investigation concerning the testator's will": *Brown v M'Encroe* (1890) 11 LR (NSW) Eq 134 at 145-6; *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709; *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [13]–[14]; *Grynberg v Muller; Estate of Bilfeld* [2002] NSWSC 350 at [32]ff; *Re Estate Late Hazel Ruby Grounds* [2005] NSWSC 1311 at [30]; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 at [125]; *Walker v Harwood* [2017] NSWSC 228 at [52]–[57].

However, this general rule may be displaced by discretionary considerations: *Simpson v Hodges* [2008] NSWSC 303 at [55], and in a proper case the costs of both parties may be borne by the estate: *Williamson v Spelleken* [1977] Qd R 152; or a certain percentage of costs may be borne by the estate: *McCusker v Rutter* [2010] NSWCA 318.

Even where it is appropriate that the estate bears the costs, the estate does not automatically bankroll the legal costs of every party who wishes to be heard. This needs to be borne in mind by parties who desire to participate in the proceedings but whose interests are already adequately protected — parties and their legal representatives must take reasonable steps to avoid duplicated or unnecessary legal representation: *Milillo v Konnecke* [2009] NSWCA 109 at [125]–[128]; *Re Dowling; sub nom NSW Trustee and Guardian v Crossley* [2013] NSWSC 1040. Additionally, orders may be made fixing (or "capping") the maximum costs, founded on the principle of proportionality: see [8-0160].

Executors acting honestly and with propriety are entitled to costs not recoverable from another party from the estate, on an indemnity basis: *Milillo v Konnecke* at [130]; *Diver v Neal* [2009] NSWCA 54 at [80]; *Warton v Yeo* [2015] NSWCA 115: see also [8-0100].

Family provision

Section 99, *Succession Act 2006* provides that the court may order that the costs of proceedings for a family provision order, including costs in connection with mediation, be paid out of the estate or notional estate, or both, in such manner as the court thinks fit. The section also authorises regulations making provision for or with respect to the costs in connection with family provision proceedings, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person, and provides that the section and any regulations made under it prevail to the extent of any inconsistency with the legal costs legislation.

It has been said that such proceedings stand apart from cases in which costs follow the event; that costs in family provision cases generally depend on the overall justice of the case; that even in the case of an unsuccessful application, it may be that no order is made as to costs, particularly if it would have a detrimental effect on the applicant's financial position; and that there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate: *Singer v Berghouse* [1993] HCA 35 (Gaudron J, refusing an application for security for costs). However, usually success is evaluated in such cases in the ordinary way, and where an application for a family provision order succeeds, the usual order is to the effect that plaintiff's costs on the ordinary basis and the defendant/executor's costs on the indemnity basis be paid out of the estate: see Precedent 8.8 at [8-0200]. Where an application fails, usually the plaintiff is ordered to pay the defendant/executor's costs on the ordinary basis, unless there is some reason, such as failure to better an offer of compromise, for making an indemnity order.

In a successful appeal, the usual order is for costs of both parties to be paid out of the estate: *Coates v NTE&A* (1956) 95 CLR 494; *Re Hall* (1959) 59 SR NSW 219; *Bowcock v Bowcock* (1969) 90 WN (Pt 1) NSW 721; *Hutchinson v Elders Trustee Co* (1982) 8 Fam LR 267; *Hunter v Hunter* (1987) 8 NSWLR 573; *Churton v Christian* (1988) 12 Fam LR 386, sometimes on an indemnity basis: *Dehnert v Perpetual Executors* (1954) 91 CLR 177; *Goodman v Windeyer* (1980) 144 CLR 490, although on rare occasions the respondent may be ordered to pay the appellant's costs: *Hughes v NTE&A* (1979) 143 CLR 134; typically where it is perceived that the respondent has not acted properly — for example, by giving untruthful evidence: *Cooper v Dungan* (unrep, 25/3/76, HCA) or by failing to adduce evidence which it was bound to adduce: *Dijkhuijs v Barclay* (1988) 13 NSWLR 639. In *Barnaby v Berry* [2001] NSWCA 454, where the appellant failed at first instance but received an enlarged legacy on appeal, the court ordered that all costs be paid out of the estate. In *Barns v Barns* (2003) 214 CLR 169, where the appellant failed at first instance and on intermediate appeal, upon her ultimate success, all costs were ordered to be paid out of the estate. However, in *Blackmore v Allen* [2000] NSWCA 162 and *Marshall v Carruthers* [2002] NSWCA 86, costs followed the event. Each party may be left to bear its own costs where the estate is small: *Re Salathiel* [1971] QWN 18. See generally de Groot and Nickel, *Family Provision in Australia and New Zealand*, 5th edn, 2016; and *Jvancich v Kennedy (No 2)* [2004] NSWCA 397.

De-facto property division

In proceedings in the Family Court, the starting point is that each party "shall bear his or her own costs", although costs orders may be made in an appropriate case: *Family Law Act 1975*, s 117. While the NSWCA previously considered that, in claims under the *Property (Relationships) Act 1984*, "the starting point should be that each party should bear its own costs" (*Kardos v Sarbutt (No 2)* [2006] NSWCA 206) this approach has now been rejected in favour of the general rule that costs should follow the event: *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 at [35]–[40]; *Baker v Towle* [2008] NSWCA 73 at [12], [82]. When an application for property adjustment is refused, the event will be clear and, upon a straightforward application of r 42.1, the defendant will have the costs of the application unless the court makes some other order; but where an order for adjustment is made, the costs order made will rarely, if ever, depend simply upon which party commenced proceedings, and the "event" will depend on the facts and circumstances, pleadings and issues, in each case: *Baker v Towle* at [20]–[25].

Care proceedings

The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify doing so: *Children and Young Persons (Care and Protection) Act 1998*, s 88. Where there are such circumstances, the power extends to awarding indemnity costs: *Director-General of the Department of Human Services v Ellis-Simmons* [2011] NSWChC 5. No such requirement for "exceptional circumstance" applies before costs orders can be made in review or appellate proceedings in the Supreme Court: *Re Kerry (No 2)* [2012] NSWCA 194, citing *Wilson v Department of Human Services; re Anna (No 2)* [2011] NSWSC 545 at [106].

Land and Environment Court

For costs in the NSW Land and Environment Court, see *Dal Pont* 8.81–8.88 and Ritchie's at [42.1.105].

Defamation

Section 40 *Defamation Act 2005* provides that in awarding costs in defamation proceedings, the court may have regard to the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and any other matters that the court considers relevant. Unless the interests of justice require otherwise, a court must, if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff, order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff. If defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant, it must order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

[8-0060] Where the general rule does not apply: costs are agreed by the parties independently of the "event"

Leases, mortgages, guarantees, insurance policies and other commercial contracts often contain provisions for costs to be payable by a party in the event of non-performance, often on an indemnity basis: *Re Shanahan* (1941) 58 WN (NSW) 132; *Re Adelphi Hotel (Brighton) Ltd* [1953] 2 All ER 498; *AGC (Advances) Ltd v West* (1984) 5 NSWLR 301; *Heaps v Longman Australia Pty Ltd* [2000] NSWSC 542; *State of NSW v Tempo Services Pty Ltd* [2004] NSWCA 4 at [21]; *Rail Corp NSW v Leduva Pty Ltd* [2007] NSWSC 800 at [18]; *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356 at [112]–[115]. Courts will normally exercise their costs discretion in accordance with the contractual provision: *Gomba Holdings (UK) Ltd v Minories Finance Ltd* [1993] Ch 171. Indemnity costs will be ordered as a matter of discretion on the basis of a contractual obligation of this kind if the contractual obligation is sufficiently plain and unambiguous: *Kyabram Property Investments Pty Ltd v Murray* [2005] NSWCA 87 at [12]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [32]–[38].

[8-0070] Where there is no final judgment: discontinuance and compromise

Last reviewed: December 2024

Dismissal and discontinuance

Where a plaintiff discontinues without the consent of the defendant, or where the plaintiff's claim is dismissed in whole or in part, the plaintiff must pay the defendant's costs of the proceedings to the extent to which they have been discontinued or dismissed, unless the court otherwise orders: UCPR rr 42.19 and 42.20; and see *Foukkare v Angreb Pty Ltd* [2006] NSWCA 335 at [68]*; Australiawide*

Airlines Ltd v Aspirion Pty Ltd [2006] NSWCA 365; *Scope Data Systems Pty Ltd v Agostini Jarrett Pty Ltd* [2007] NSWSC 971; *Oberlechner v Watson Wyatt Superannuation Pty Ltd* [2007] NSWSC 1435 at [10]; *Norris v Hamberger* [2008] NSWSC 785. If the court strikes out a defence, in whole or in part, the defendant must pay the plaintiff's costs of the proceedings in relation to those matters in respect of which the defence has been struck out, unless the court otherwise orders: UCPR r 42.20(2).

While these rules do not create a presumption, and are merely default provisions, they reflect the general rule that an unsuccessful party should pay the costs of a successful party, and the discontinuing party must make an application to be relieved of the obligation to pay costs, and show some sound positive ground or good reason for departing from the default position: *Fordyce v Fordham* (2006) 67 NSWLR 497 at [84]; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32 at [53]–[54] and [69]–[74] (in which the court also discussed circumstances in which a court might or might not depart from the consequence provided by the rule: at [56]–[63] and [75]–[81]); *Wallace v McMillan Investment Holdings Pty Ltd* [2024] NSWCA 106 at [24]–[25] (in which the Court of Appeal found no error in the primary judge's reliance on a "supervening event" of a partial settlement between the parties to depart from the ordinary order as to costs when parts of the plaintiff's claims against the unrepresented party were dismissed); *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2014] NSWCA 107 at [21]–[29]. The discretion to "otherwise order" may be exercised where the discontinuing party has obtained practical extra-curial success; but will generally not be exercised where the plaintiff effectively abandons its claim: *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624; *Cummins v Australian Jockey Club Ltd* [2009] NSWSC 254 at [22]. Unsatisfactory conduct of the discontinued proceedings, such as failure to comply with case management requirements (*Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352) or commencing the abandoned proceedings in circumstances amounting to an abuse of process (*Packer v Meagher* [1984] 3 NSWLR 486 at 500) may found an order that the costs of the defendant be paid on the indemnity basis: see [8-0130].

Stay

Where proceedings are commenced in a court contrary to a contractual provision for arbitration or alternative dispute resolution, the proceedings may be stayed or dismissed and the plaintiff ordered to pay the costs: *Haniotis v The Owners Corporation Strata Plan 64915 (No 2)* [2014] NSWDC 39, and the cases summarised there. As to whether this extends to indemnity costs, see [8-0130].

Compromise

Where proceedings are resolved by compromise without a hearing on the merits, but the parties cannot agree on the question of costs, courts avoid embarking on a trial to determine only the question of costs, and ordinarily will make no order as to costs, with the intent that each party bears its own costs, unless it appears that one party has effectively capitulated, or that one party has acted unreasonably in bringing or defending the proceedings: *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624; *Harkness v Harkness (No 2)* [2012] NSWSC 35 at [16]. In rare cases it may be appropriate to make an order for costs without a contested hearing on the merits, if the court can be almost certain which party would have succeeded: *Ferguson v Hyndman* [2006] NSWSC 538; see also *Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission of NSW* [2006] NSWCA 129; *Indyk v Wiernik* [2006] NSWSC 868; *Oberlechner v Watson Wyatt Superannuation Pty Ltd* [2007] NSWSC 1435 at [9]–[10]; *Foley v Australian Associated Motor Insurers Ltd* [2008] NSWSC 778; *Muhibbah Engineering (M) BHD v Trust Company Ltd* [2009] NSWCA 205.

[8-0080] Where there are multiple parties

Prima facie, all the unsuccessful parties should bear the successful party's costs. Unless the costs order specifies otherwise, an order for costs against two or more parties renders each of them jointly and severally liable to pay the relevant costs: *Rushcutters Bay Smash Repairs Pty Ltd v H McKenna*

Netmakers Pty Ltd [2003] NSWSC 670, citing *Ryan v South Sydney Junior Rugby League Club Ltd* [1955] 2 NSWLR 660 at 663. However the court may, as a matter of discretion, apportion liability between multiple parties: *Mulcahy v Hydro-Electric Commission* (unrep, 2 July 1998, FCA). This is more likely to be appropriate when one of the multiple parties conducts a separate or distinct case.

Where there are multiple successful defendants, whose interest is identical and there is no possible conflict of interest between them, and who are separately represented, the court will not normally allow more than one set of costs; but this is subject to at least three provisos:

1. If a conflict of interest appears possible but unlikely, the defendants should make any necessary enquiries from the plaintiff as to the way in which their case is to be put if this would resolve the possibility of conflict between defendants: *Re Lyell* [1941] VLR 207.
2. There may be circumstances in which, although the defendants are united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation.
3. Even if defendants are acting reasonably in maintaining separate representation for some time or for some purposes, they may still be deprived of part of their costs if they act unreasonably by duplicating costs on any particular matter or at any particular time: *Statham v Shephard (No 2)* (1974) 23 FLR 244 at 246–247; *Milillo v Konnecke* [2009] NSWCA 109 at [109]–[110].

Where the plaintiff succeeds against one defendant but not the other, and both are jointly represented by the same solicitors and counsel, there is a "rule of thumb" that the successful defendant should recover a proportionate share of the "common" costs referable to the claim pressed against each defendant, as well as any associated only with the claim against the successful defendant. However, while this rule of thumb is convenient for the "ordinary case", it is not to be automatically applied in every case: *King Network Group Pty Ltd v Club of the Clubs Pty Ltd (No 2)* [2009] NSWCA 204 at [25]–[35], citing *Korner v H Korner & Co Ltd* [1951] Ch 10 at 17.

Multiple plaintiffs must be represented by the same solicitor: *Herbert v Badgery* (1893) 14 LR (NSW) Eq 321; *Lewis v Daily Telegraph Ltd* (No 2) [1964] 2 QB 601, unless (as not uncommonly occurs in family provision proceedings) the court, balancing questions of costs and the problems that might arise with a lawyer acting for conflicting interests, considers that justice requires separate representation. Thus, absent leave, an insured and insurer cannot have separate representation, even if there are "insured" and "uninsured" elements to the claim: *Carter v Marine Helicopters Ltd* (1995) 9 ANZ Ins Cas 61-299 at 76-347 (New Zealand High Court), applied by Einstein J in *Sydney Airport Corporation Pty Ltd v Baulderstone Hornibrook Engineering Pty Ltd* [2006] NSWSC 1106 at [19]. See generally *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356 at [5]–[11]. Where leave is granted, it may be conditioned on only one set of costs being recoverable.

Bullock orders and Sanderson orders

Where the plaintiff succeeds against one or more defendants but fails against others, application of the general rule that costs follow the event would require the plaintiff to pay the costs of the successful defendant(s), despite having won the case. While this may sometimes be appropriate, there are circumstances in which the court may make special orders so that the costs of the successful defendant(s) are ultimately borne, indirectly or directly, by the unsuccessful defendant/s: *Gould v Vaggelas* (1985) 157 CLR 215. A "Bullock order" requires the unsuccessful defendant(s) to reimburse the plaintiff for any costs the plaintiff has to pay to the successful defendant(s): *Bullock v London General Omnibus Company* [1907] 1 KB 264; (see Precedent 8.3 at [8-0200]). A "Sanderson order" requires the unsuccessful defendant/s to pay the costs of the successful defendant/s, leaving the plaintiff out of the process entirely, and has obvious advantages for a plaintiff in cases of an insolvent unsuccessful defendant, as well as eliminating administrative and procedural steps: *Sanderson v Blyth Theatre Co* [1903] 2 KB 533; *Coombes v Roads and Traffic Authority (No 2)* [2007] NSWCA 70 at [42]; see Precedent 8.4 at [8-0200].

Bullock and Sanderson orders should only be made where it was reasonable and proper for the plaintiff to join the defendant(s) against which it failed: *Gould v Vaggelas* at 230, 247 and 260; *Stevedoring Industry Finance Committee v Gibson* [2000] NSWCA 179, citing *Lackersteen v Jones* (No 2) (1988) 38 NTLR 101; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [176]–[193], [296]–[299]; *Nominal Defendant v Swift* [2007] NSWCA 56; *Council of the City of Liverpool v Turano (No 2)* [2009] NSWCA 176 at [15]. That requirement will typically be satisfied where claims against two defendants are interdependent, or where it is necessary to join both in circumstances where only one may be liable. Conversely, it will not be satisfied where the successful defendant is joined only for the purpose of spreading the potential net of liability so as to obtain an additional defendant who might be able to afford to pay: *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 at [105]–[111]. However, there is no additional requirement that the causes of action must be substantially connected or interdependent: *Nationwide News Pty Ltd v Naidu* (No 2) [2008] NSWCA 71 at [16]–[18]; *ACQ v Cook (No 2)* (2008) 72 NSWLR 318.

A second precondition is that there must also have been something in the conduct of the unsuccessful defendant that makes it appropriate to make the order: *Gould v Vaggelas* at 230 per Gibbs CJ; *Sved v Council of the Municipality of Woollahra* (1998) NSW Conv R 55-842 at 56,605; *Stevedoring Industry Finance Committee v Gibson* [2000] NSWCA 179, citing *Lackersteen v Jones (No 2)* (1988) 38 NTLR 101; *Almeida v Universal Dye Works Pty Ltd (No 2)* [2001] NSWCA 156; *Coombes v Roads and Traffic Authority (No 2)* at [9]ff; *Council of the City of Liverpool v Turano (No 2)* [2009] NSWCA 176 at [15]; *Stephens v Giovenco (No 2)* [2011] NSWCA 144 at [18]; *Sneddon v Speaker of the Legislative Assembly* [2011] NSWSC 842 at [36], citing *Furber v Stacey* [2005] NSWCA 242 at [116]–[117]; *Simmons v Rockdale City Council (No 2)* [2014] NSWSC 1275. This requires that the unsuccessful defendant have done something, beyond a mere denial of liability, that makes it fair to impose on it liability for the costs of the successful defendant — such as creating circumstances of uncertainty as to who is the proper defendant: *Dominello v Dominello (No 2)* [2009] NSWCA 257 at [15]–[27], citing *Roads and Traffic Authority v Palmer (No 2)* [2005] NSWCA 140 at [35]. This "something more" need not amount to "misconduct" but it must be conduct sufficient to make it fair to visit the liability on it: *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [29]. Examples of such conduct can include the making of a "very reasonable" offer to the unsuccessful defendant, no offer being made by the unsuccessful defendant, and the length and costs of the proceedings had the unsuccessful defendant not defended the case: *Stephens v Giovenco; Dick v Diovenco (No 2)* [2011] NSWCA 144 at [19]. However it can include conduct that predates joinder, so long as that conduct is relevant to the fairness, or reasonableness, of making a costs order against the unsuccessful defendant: *Almeida v Universal Dye Works Pty Ltd (No 2)* at [33].

Concurrent tortfeasors

Where a defendant has identified a concurrent tortfeasor (for the purposes of *Civil Liability Act 2002*, s 35A), and the plaintiff joins that party, costs issues are determined in accordance with s 35A, whether or not the plaintiff succeeds against the alleged concurrent tortfeasor: *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195 at [9]; *Sydney Water Corporation v Asset Geotechnical Engineering Pty Ltd (No 2)* [2013] NSWSC 1604 at [27]–[29].

Cross-claims

A defendant/cross-claimant who fails against a cross-defendant, whether or not it has succeeded against the plaintiff, is generally ordered to pay the cross-defendant's costs: *Dal Pont* at [11.33].

Where the plaintiff fails against the defendant, and the defendant's cross-claim against a third party consequently fails, the plaintiff may, but will not necessarily, be ordered to pay the cross-defendant's costs, or indemnify the defendant in respect of the costs it is required to pay the cross-defendant. However, although a defendant and a cross-defendant are adversarial parties, and a plaintiff resisting an order for costs on the basis of identity of their interests has an evidentiary onus to negative any conflict of interests, where there is a substantial identity of interests, the

cross-defendant should co-operate with the defendant to avoid duplication of effort and costs, and the plaintiff may be relieved of part or all of those costs if the cross-defendant fails to do so: *Furber v Stacey* [2005] NSWCA 242 at [57]–[59] (cross-defendant awarded only one-quarter of costs against an unsuccessful plaintiff).

It is within the legitimate scope of the power under CPA s 98 to award costs in favour of a plaintiff against a cross-defendant not joined by that plaintiff, where the conduct of that cross-defendant was the real cause of the litigation: *Vameba Pty Ltd v Markson* [2008] NSWCA 266.

[8-0090] Self-represented litigants (including lawyers)

Last reviewed: March 2025

Generally

Legal costs may only be recovered by a party in relation to costs of legal practitioners. However, a litigant in person may recover reasonably incurred disbursements and witness expenses, including costs and disbursements for legal work done by others: *Malkinson v Trim* [2003] 2 All ER 356, but not travelling expenses or loss of earnings: *Cachia v Hanes* (1994) 179 CLR 403; *Dal Pont* 7.28–7.29. Ultimately, this is a question of quantification on assessment, not one of liability (for costs), and unless it is apparent that there could be no entitlement, there is no reason why an order for costs should not be made in favour of a successful self-represented litigant, leaving it to the assessor to quantify the precise entitlement.

Self-represented lawyers

Previously, legal practitioners acting on their own behalf in legal proceedings were not in the same position as a litigant in person, under the "Chorley exception": *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872, considered in *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47; see also *Wang v Farkas* (2014) 85 NSWLR 390; *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538 at [24]–[34]. However, in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, the High Court said that the exception was not only anomalous, but exalted the position of legal practitioners in the administration of justice to such an extent that it was an affront to the fundamental value of equality of all persons before the law. As such, it was held that the *Chorley* exception should not be recognised as a part of the common law of Australia.

However, in *Spencer v Coshott* (2021) 106 NSWLR 84, it was held that the abrogation of the *Chorley* exception by the High Court in *Bell Lawyers Pty Ltd v Pentelow* did not deny recovery of costs by a solicitor litigant who is represented by an incorporated legal practice of which he or she is the principal and the sole director and shareholder, because of the separate legal personality of an incorporated legal practice. In *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305, the majority held that the High Court's rejection of the *Chorley* exception did not exclude an unincorporated law firm from being entitled to recover costs for work done by the employed solicitors of that firm. As a matter of statutory construction, the court is bound to apply the meaning of the word "remuneration" as used in the definition of "costs" in *Civil Procedure Act 2005*, s 3(1). And, approaching the matter simply as a matter of common law principle, following the joint judgment and judgment of Gageler J in *Bell*, the "employed lawyer rule" or "in-house solicitor rule" involves an application of the general indemnity principle and there is no proper basis to exclude unincorporated law firms, uniquely, from the benefit of that rule and that principle: at [188], [213] and [308]–[309] (Kirk JA); Simpson AJA. The High Court (by majority) dismissed an appeal from this decision in *Birketu Pty Ltd v Atanaskovic* [2025] HCA 2, and held that an unincorporated law firm is entitled to claim professional fees under a costs order for work done by its employed solicitors: at [2]. The Court held that to deny the entitlement of a litigant solicitor or unincorporated law firm to recover costs of work done by their employed solicitors would be to depart from the application of the general common law principle, and would be to depart from the principle in a manner which would run counter to the

fundamental principle of equality which underlay the rejection of the *Chorley* exception in *Bell*: at [27]–[30], [38]. The contrary approach of the Victorian Court of Appeal in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 was overruled: at [37].

[8-0100] Representative, nominal and inactive parties

Generally speaking, any party to litigation, including those who act in a representative capacity, is amenable to a costs order, but representative parties are often entitled to indemnity from the relevant estate or fund.

Tutors

Ordinarily, a tutor for a party with disability is personally liable for any costs order against that party; indeed, one of the reasons why a tutor is required is so that there is a person answerable for costs: *Yakmore v Handoush (No 2)* (2009) 76 NSWLR 148 at [45]; *Dal Pont* at 22.68. However, although one of the reasons for the appointment of a tutor for a person with disability is to have a person on the record that is personally liable for the costs of the litigation, that is not the sole function or purpose of the appointment of the tutor, which includes the protection of the person with the disability and of the processes of the court: *Smith v NRMA Insurance Ltd* [2016] NSWCA 250 at [29]–[36], citing *NSW Ministerial Insurance Corporation v Abuafoul* (1999) 94 FCR 247 at [27]–[29], and *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 at [552]. An order protecting a tutor from personal liability for costs may be made as an incidental term of an order appointing a tutor under UCPR r 7.18(1)(b), or pursuant to the power conferred by UCPR r 2.1, or in the inherent power in the parens patriae jurisdiction. Under UCPR r 42.24, if the court appoints a solicitor to be the tutor of a person under legal incapacity in connection with any proceedings, the court may order that the costs incurred by the solicitor in performance of the duties of tutor be paid by the parties to the proceedings or any of them, or out of any fund in court in which the person under legal incapacity is interested. The court may make orders for the repayment or allowance of the costs as the case requires.

Executors, trustees and mortgagees

Under UCPR r 42.25, a person who is or has been a party to proceedings in the capacity of trustee or mortgagee is entitled to be paid his or her costs of the proceedings, in so far as they are not payable by any other person, out of the fund held by the trustee or the mortgaged property. The court may, however, otherwise order if the trustee or mortgagee has acted unreasonably, or the trustee has in substance acted for its own benefit rather than for the benefit of the fund.

If a legal personal representative acts properly, their costs and/or the costs which they are ordered to pay in an unsuccessful defence of the estate may be ordered to be paid out of the estate: *Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 709–710; see generally *Halsbury's Laws of England*, 4th ed, vol 17, pars 917–919, vol 37, par 721. However, if, in conducting a proceeding, the executor is not acting merely in that capacity but in substance prosecuting or defending his or her own interests, that principle does not apply: *Nowell v Palmer* (1993) NSWLR 574 at 581–582. These principles apply not only to personal representatives but to fiduciaries generally: *Miller v Cameron* (1936) 54 CLR 572 at 578–579; *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [47].

An executor who commences or defends an action in the capacity of executor is ordinarily entitled to be indemnified out of the estate for the costs incurred in doing so, even if the litigation is unsuccessful, the executor's conduct is found to have been mistaken, and the other party in the litigation is held to be entitled to an order for costs: *Drummond v Drummond* [1999] NSWSC 923 at [43]. As a rule, a trustee is allowed their costs out of the trust estate if their conduct has been honest, even though it may have been mistaken: *Miller v Cameron* at 578; *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 562; see also *Re Weall; Andrews v Weall* (1889) 42 Ch D 674 at 677, where Kekewich J spoke of the "tenderness which the Court is anxious to exhibit towards trustees honestly exercising discretion in discharge of their duties, often difficult and still more often thankless", and

Re Jones; Christmas v Jones [1897] 2 Ch 190 at 197, where the same judge said that "a man who fulfils the difficult duties of an administrator, executor or trustee is, in common sense and common justice, entitled to be recouped to the very last penny everything that he has expended properly — that is to say, without impropriety — in his character of administrator, executor or trustee".

However, this does not apply where the executor has acted improperly*: Drummond v Drummond* at [44]–[45]; *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 562. Cases of impropriety include an executor taking or defending proceedings in breach of trust, or conducting the proceedings in such a way that the court, on a general view of the case, regards the executor's conduct as "not honestly brought forward", or "where the claim is of monstrous character, that is, one which no reasonable man could say ought to have been put forward": *Re Jones* [1897] 2 Ch 190 at 198; or where the trustees acted without "reasonable prudence": *Re Weall* at 678–679.

The rule relates only to costs incurred in the administration and distribution of the estate, as distinct from costs incurred by an executor in furtherance of a personal interest: *Drummond v Drummond* at [47]; *Miller v Cameron* at 578–579; *Re Jones* [1897] 2 Ch at 197–198; *Plimsoll v Drake (No 2)* (unrep, 8/6/95, SCT). Executors who pursue personal interests in litigation are "not fighting for the estate any more than if they were not executors at all": *Skrimshire v Melbourne Benevolent Asylum* (1894) 20 VLR 13 at 18. Thus an executor who prosecutes or defends proceedings in the capacity of creditor or beneficiary of the estate rather than in the capacity as executor is not entitled to recoup the costs of the litigation from the estate simply because they are also an executor. A trustee who defends an action for their removal may be representing their own interests and not those of the trust estate: *Miller v Cameron* at 578–579, though this is not necessarily invariably so; likewise one who unsuccessfully demands a release before distributing the trust estate to the beneficiaries: *Plimsoll v Drake (No 2)*.

Liquidators

Analogous principles apply to liquidators in relation to proceedings in which they participate in their own name: *Re Buena Vista Motors Pty Ltd (In Liq) and the Companies Act* [1971] 1 NSWLR 72, in which Street J ordered a liquidator who brought an unsuccessful claim to pay the opponents' costs but to be indemnified out of the company's assets since, although "the claim had been unsuccessful, it could not be characterized as frivolous or vexatious. Nor could the liquidator be said to have been acting unreasonably in bringing the claim forward for litigation" (at 73). See also *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [47]; the same principles apply also in respect of proceedings which they conduct in the name of the company: *Mead v Watson as Liquidator for Hypec Electronics* [2005] NSWCA 133 at [11] ff; see also *Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652; *Joubert v Campbell Street Theatre Pty Ltd (in liq)* [2011] NSWCA 302. A liquidator whose determination is challenged and who, rather than taking no active part in the proceedings, actively defends his or her decision, becomes an adverse party and is liable for costs: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341; *Lewis v Nortex Pty Ltd (in liq)* at [34].

A liquidator who successfully contests an allegation of impropriety is entitled to costs out of the company funds, to the extent that they are not recoverable from the other party: *National Trustees Executors and Agency Co of Australasia Limited v Barnes* (1941) 64 CLR 268 at 279; *Expo International Pty Ltd v Chant (No 2)* (1980) 5 ACLR 193 at 197–198; *Lewis v Nortex Pty Ltd (in liq)* at [49].

Submitting parties

Ordinarily, a submitting party who genuinely takes no part in the proceedings will not be ordered to pay costs: *Highland v Labraga (No 3)* [2006] NSWSC 871 at [19]–[23]. However, this may be otherwise where the submitting party does in fact take some active part in the proceedings: *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147 at [66]; *Hornsby Shire Council v Valuer General of NSW* [2008] NSWSC 1281 at [3]–[8]; see also *Mahenthirarasa v State Rail Authority*

of NSW (No 2) (2008) 72 NSWLR 273, where the submitting party, while not actively opposing the orders sought, did not consent to them and thus occasioned the incurring of additional costs and was ordered to pay costs; cf *Lou v IAG Limited* [2019] NSWCA 319 where, in similar circumstances, by majority, no costs order was made. Similarly, in an application for preliminary discovery, it may be appropriate not to order costs against an unsuccessful but "innocent" respondent who does not oppose the application: *Totalise plc v Motley Fool Ltd* [2002] 1 WLR 1233; *Bio Transplant Inc v Bell Potter Securities Ltd* [2008] NSWSC 694; cf *Airways Corporation of New Zealand v Koenig* [2002] NSWSC 521, where the application was opposed.

Relators

The court may make an order for costs against a relator: *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518 at 524.

Interveners

An order may be made against an amicus curiae in an exceptional case: *Dal Pont* at 22.75-76.

Interpleaders

All participants in interpleader proceedings may claim their costs from the fund, where they do no more than present evidence and reasonable arguments as to how that fund should be distributed. Where their involvement goes further and amounts to raising issues that add to the costs of the litigation, on which they are unsuccessful, they may be deprived of costs on those issues, or may be ordered to pay costs: *Westpac Banking Corp v Morris* (unrep, 2/12/98, NSWSC).

[8-0110] Non-parties

The power to make costs orders extends to orders against non-parties: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

Non-party orders were formerly rare, but the repeal of UCPR r 42.3 (formerly Supreme Court Rules 1970, Pt 52A r 4), removed restrictions on the making of costs orders against non-parties: *Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652 at [24]–[25]. However, the power is to be exercised with restraint: *Yu v Cao* [2015] NSWCA 276 at [136]–[139]; *HM&O Investments Pty Ltd (in Liq) v Ingram* [2013] NSWSC 1778 at [9]–[15], and having regard to principles of procedural fairness: *Flinn v Flinn* [1999] 3 VR 712, which sets out the procedure for notice to the non-party.

Most cases of costs orders against a non-party involve circumstances in which the non-party has effective control of the litigation: *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 (litigation funder); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661(professional indemnity insurer); *Younan v GIO General Limited (ABN 22 002 861 583) (No 2)* [2012] NSWDC 149 (plaintiff's de facto partner the true plaintiff); *McVicar v S & J White Pty Ltd (No 2)* (2007) 249 LSJS 110 at [17]–[26]; *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 (directors of a corporate party). However, such control is usually not of itself sufficient to warrant such an order; there must be something additional in the conduct of the non-party that makes it just that it should bear the costs: *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* (fraudulent insurance claim); *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 and *Melbourne City Investments Pty Ltd v Leightons Holdings Limited* [2015] VSCA 235 (abuse of process). Orders will also been made against a non-party (such as a solicitor) who conducts litigation in the name of another without proper authority: *Hillig v Darkinjung (No 2)* [2008] NSWCA 147 at [47]; and against non-parties who by some delinquency increase the costs, such as by failing to attend court in answer to a subpoena: see UCPR r 42.27.

These categories are not closed: *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210] (per Basten JA); see also *Yates v Boland* [2000] FCA 1895; *Gore*

v Justice Corporation Pty Ltd; *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 (approved by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] All ER (D) 420 (Jul); and see Leeming JA's summary of the principles in *PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM* [2018] NSWCA 168 at [22]–[39].

Legal aid providers

While courts are reticent to order costs against government bodies such as legal aid providers, such parties may be subject to costs orders in an extreme case: *Collins and the Victorian Legal Aid Commission* (1984) FLC ¶91-508; *Marriage of Millea and Duke* (1992) 122 FLR 449.

[8-0120] Legal practitioners

Last reviewed: June 2024

Inherent power

The Supreme Court has inherent power to make costs orders against legal practitioners, derived from its supervisory jurisdiction: *Myers v Elman* [1940] AC 282; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [85]–[86]; *Re Felicity, FM v Secretary Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [18]–[20]. The object of the court's inherent power is primarily compensatory, so as to indemnify or compensate, and thus protect, the party or parties who have suffered: *Dal Pont* at 23.2; *Myers v Elman* at 289; *Hartnett t/a Hartnett Lawyers v Bell* (2023) 112 NSWLR 463 at [141]–[142] (in which the appellant was found to have engaged in exorbitant overcharging and had a history of evasion and threats of counter-suit). Such general jurisdiction is exercisable against an Australian lawyer from interstate providing legal services in NSW: *Council of the NSW Bar Association v Siggins* [2021] NSWCA 40 at [137]–[138]; *Hartnett* at [86]. While the principles that inform the exercise of this inherent power should not be conflated with those relevant to the statutory powers of the court contained in CPA s 99 and *Legal Profession Uniform Law Application Act 2014*, Sch 2, to order a legal practitioner to pay a party's costs (*Whyked Pty Ltd v Yahoo 7 Pty Ltd* [2008] NSWSC 477 at [12]–[20]), similar circumstances are likely to be relevant in both cases. As to the continued existence of the Supreme Court's inherent power, see *Re Felicity; FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [18]–[20]; *King v Muriniti* (2018) 97 NSWLR 991.

Civil Procedure Act 2005, s 99

Section 99 empowers the court to make a "wasted costs order" against a legal practitioner personally, where costs have been incurred by serious neglect, incompetence or misconduct of the practitioner, or improperly or without reasonable cause in circumstances for which the practitioner is responsible. This statutory power is available to the District Court and Local Court, which do not enjoy inherent jurisdiction, as well as to the Supreme Court : *Knaggs v J A Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 485.

As to the construction of s 99 and the "voluminous case law" with respect to the making of costs orders against legal practitioners in different statutory contexts (which was partially cautioned against), see *Re Felicity* at [21]–[24] and *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 at [7]–[11]. The court has a right and a duty to supervise the conduct of its solicitors, and to visit with consequences any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which the solicitor is engaged professionally. The jurisdiction is exercised where it is demonstrated that the solicitor has failed to fulfil their duty to the court and to realise their duty to aid in promoting in their own sphere the cause of justice. The order is for payment of costs thrown away or lost because of the conduct complained of and is frequently exercised in order to compensate the opposite party in the action. Such an order may be made on the indemnity basis: *Mitry Lawyers v Barnden* [2014] FCA 918 at [112].

Where a solicitor is employed by another, the client's retainer is with the employer, and regardless of who is on the record, the firm may be liable: *Kelly v Jowett* (2009) 76 NSWLR 405; at [69]–[71]; *Re Bannister & Legal Practitioners Ordinance* 1970-75; *Ex Parte Hartstein* (1975) 5 ACTR 100; *Re Fabricius & McLaren and Re Legal Practitioners Ordinance* 1970 (1989) 91 ACTR 1; *Knaggs v J A Westaway & Sons Pty Ltd*. Thus the jurisdiction may be exercised even where there has been no personal complicity by the solicitor charged: *Kelly v Jowett* at [61]–[62], [65]; *Re Jones* (1870) 6 Ch App 497; *Myers v Elman* [1940] AC 282; *Harley v McDonald* [2001] UKPC 18; [2001] 2 AC 678.

Section 99 is engaged only by egregious conduct; mere negligence, incompetence or misconduct is insufficient to satisfy the test in s 99: *Muriniti v Kalil* [2022] NSWCA 109 at [45], [82]. A three-stage approach applies: *first*, is the practitioner's conduct such as to satisfy the test; *secondly*, if so, did that conduct cause the applicant to incur unnecessary costs; and *thirdly*, if so, is it in all the circumstances just to order the legal practitioner to compensate the applicant for the whole or any part of the relevant costs: *Kelly v Jowett*, above, at [60]; *Muriniti v Kalil* at [45].

It should not be accepted that simply by making a claim for costs against a solicitor, a burden of proof is placed on the solicitor to deny misconduct: *Gokani v Visvalingam Pty Ltd* [2023] NSWCA 80 at [56].

Conduct which has been held to justify an order that a practitioner personally pay costs includes:

- commencing or conducting proceedings which are an abuse of process: *Young v R (No 11)* [2017] NSWLEC 34
- raising untenable defences, for the purpose of delay: *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56
- signing a certificate on a false affidavit of discovery: *Myers v Elman* [1940] AC 282 (a case involving the inherent power)
- repeatedly putting untenable submissions: *Buckingham Gate International v ANZ Bank Ltd* [2000] NSWSC 946 at [18]–[19]
- attempting to re-agitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* [2008] NSWCA 194 at [208]–[216]
- prosecuting an appeal which has no prospects of success: *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 at [17]
- commencing proceedings which had no prospects of success where the nature of the allegations were of the utmost gravity (fraudulent misrepresentation and conspiracy): *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180 at [120]–[122]
- acting in ignorance of the rules: *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SPA* (unrep, 9/6/89, HCA), and
- unpreparedness, resulting in a hearing date being vacated, or in time being wasted during the hearing: *Stafford v Taber* (unrep, 31/10/94, NSWCA).

Breach of the practitioner's duty to ensure proceedings are conducted efficiently and expeditiously may sound in a personal costs order: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [8]–[11]; *Ashmore v Corporation of Lloyds* [1992] 2 All ER 486; *Whyte v Brosch* (1998) 45 NSWLR 354 (late submissions). In considering the exercise of the discretion under s 99, the court may take into account a legal practitioner's failure to comply with the obligations imposed by CPA ss 56(3), (4) and (5), which require the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in

the proceedings: *Kendirjian v Ayoub* at [208]–[210]. The obligations of legal practitioners to conduct litigation reasonably are described in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd ACN 086 674 179 (No 5)* [2014] NSWSC 437 at [64]–[77].

Before such an order is made, the practitioner must first be given a reasonable opportunity to be heard: CPA s 99(2). The court may refer the matter to a costs assessor for inquiry and report: CPA s 99(3).

It is usually appropriate to defer the question of any personal costs order until the conclusion of the trial in order to avoid the potential for creating a conflict that may be to the disadvantage of a party in the conduct of the proceedings: *Muriniti v Kalil*, above, at [46]–[48], referring to *Lemoto v Able Technical Pty Ltd*, above; *Redowood Pty Ltd v Goldstein Technology Pty Ltd* [2004] NSWSC 515 at [35] and *Saadat v Commonwealth of Australia (No 2)* [2019] SASC 75 at [24].

Legal Profession Uniform Law Application Act 2014, Sch 2

Schedule 2, cl 5 LPULAA, which applies in all courts, permits the making of costs orders against solicitors personally where legal services are provided in a claim for damages "without reasonable prospects of success". The court is empowered to order that the practitioner repay costs to a party in the proceedings, or otherwise indemnify that party in respect of their costs. The exercise of the power remains discretionary: *Lemoto v Able Technical Pty Ltd* at [130], and the due administration of justice should not be impaired by the "too liberal exercise" of this power: *Lemoto* at [126]. Both Sch 2, cl 5 LPULAA and s 99 CPA rely on an objective test. A finding that a solicitor took a step in litigation without a belief as to reasonable prospects of success is an extremely serious finding. The relevant factor is the practitioner's belief in a fact, rather than the fact itself; it is no part of a legal practitioner's role in litigation to form concluded views as to the existence of facts or the outcome of proceedings. The precise question to be addressed is the solicitor's state of knowledge: *Gokani v Visvalingam Pty Ltd* at [43], [52], [54]. Where a practitioner believes he or she has available material providing a proper basis for alleging a fact, provided the belief was reasonable, the proceedings cannot be said to have been commenced "without reasonable prospects of success": *Fowler, Corbett & Jessop v Toro Constructions Pty Ltd* [2008] NSWCA 178 at [86]–[88]. Practitioners will be exposed to liability only when their belief that the material to support the claim "unquestionably fell outside the range of views which could reasonably be entertained" as to the objective justification for the proceedings: *Lemoto* at [131]–[132], approving the "fairly arguable" test proposed by Barrett J in *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284.

However, the requirement that the practitioner have a "reasonable belief" is a continuing one: see *Lemoto* at [127], so that if circumstances change as a result of which the belief becomes no longer reasonable, then continuing to prosecute a claim may attract liability: *Eurobodalla Shire Council v Wells* [2006] NSWCA 5 at [31] (order made under the prior equivalent of this clause: s 348 of the *Legal Profession Act 2004*, where barrister and solicitor were found "reckless" in continuing to prosecute an appeal; see also *Nadarajapillai v Naderasa (No 2)* at [17].

The practitioner must be afforded procedural fairness before such an order is made: *Lemoto* at [151]ff; see also *Mitry Lawyers v Barnden* at [43]. The appropriate procedure for the making of an application and the giving of notice to the practitioner, is described in *Lemoto* at [8]–[10] and [143]–[149] and involves a three-stage process of some complexity: *De Costi Seafoods (Franchises) Pty Ltd v Wachtenheim (No 5)* [2015] NSWDC 8 at [42]–[45].

[8-0130] Basis for assessment: ordinary or indemnity costs

In NSW, two bases for costs orders are now recognised. CPA s 98(1)(c) provides that the court may award costs on the ordinary basis or on the indemnity basis. The ordinary basis subsumes what was formerly the common fund basis, and the indemnity basis what was formerly the solicitor-client basis, so that, at least in NSW, there is no longer any distinction, as between parties, between costs on the solicitor/client basis and costs on the indemnity basis. Although in *Firth v Hale-Forbes (No 2)* [2013] FamCA 814 at [80]–[85] a distinction between the two was recognised, the terms are widely

regarded as interchangeable: *Rapuano (t/as RAPS Electrical) v Karydis-Frisan* [2013] SASCFC 93 at [92]–[93]; *Secure Funding Pty Ltd v StarkSecure Funding Pty Ltd v Conway* [2013] NSWSC 1536 at [9]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [36]. The CPA and UCPR contain no reference to the common fund basis or the solicitor-client basis.

Ordinary basis

Absent special order, a costs order implicitly contemplates costs assessed on the "ordinary" basis. On the ordinary basis, a party is entitled to recover "a fair and reasonable amount" for the legal costs and disbursements that were reasonably incurred in the conduct of the proceedings: LPULAA, ss 74–80; see also UCPR r 42.2 and CPA s 3.

Indemnity basis

The court may order that costs be assessed on an indemnity basis. "Indemnity basis" means the basis set out in r 42.5, which, in any case other than where costs are payable out of property held or controlled by a person who is party to the proceedings, provides that all costs are to be allowed other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount.

The discretion to award indemnity costs must be exercised judicially: *Mead v Watson* [2005] NSWCA 133 at [8] and with caution: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [47]; *Ng v Chong* [2005] NSWSC 385 at [13]. For those reasons the discretion should be the subject of careful reasoning: *Degmam Pty Ltd (In Liq) v Wright (No 2)* [1983] 2 NSWLR 354. Although it has been said that there is no fixed rule or rationale as to when an indemnity order might be made (*Harrison v Schipp* [2001] NSWCA 13 at [139]), except that it requires a "sufficient or unusual feature" (*Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233–234), such an order is appropriate where the party entitled has been wantonly or recklessly caused to incur costs. That will often be the case where the party liable is guilty of some "relevant delinquency": *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [44]. This does not mean moral delinquency or some ethical shortcoming, but "delinquency" bearing a relevant relation to the conduct of the case: *Ingot Capital Investment v Macquarie Equity Capital Markets Ltd (No 7)* [2008] NSWSC 199 at [24]; *Liverpool City Council v Estephan* [2009] NSWCA 161 at [95]. As to the relevant principles relating to the making of indemnity costs orders, see the summary in *In the Matter of Indoor Climate Technologies Pty Ltd* [2019] NSWSC 356 at [8]. An award of indemnity costs remains compensatory and not punitive: *Hamod v State of NSW* [2002] FCAFC 97. A formal warning of an intention to claim indemnity costs may enhance the prospects of obtaining one: *Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd* (1995) 36 NSWLR 242, citing *Insurers' Guarantee Fund NEM General Insurance Association Ltd (In Liq) v Baker* (unrep, 10/2/95, NSWCA). Such warnings should not be lightly made.

The power to make an indemnity costs order is an important case management tool, as it promotes the making of settlement offers and discourages the litigation of cases where there are no reasonable prospects of success (*Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [111]), or where a reasonable offer of settlement has been made. The following are the most common circumstances in which such orders are made, but the categories are not closed: *Colgate-Palmolive Pty Ltd v Cussons* at 257.

Hopeless cases

A party who commences, continues or defends proceedings which have no prospect of success, such as where the claim (or defence) is "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile, may be ordered to pay the other party's costs on the indemnity basis: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [4]; *Hillebrand v Penrith Council* [2000] NSWSC 1058 (limitation period obviously expired). It is not a necessary condition that the party responsible be impugned with a collateral or improper

purpose: *J-Corp P/L v Australian Builders Labourers Federation Union of Workers (No 2)* [1993] FCA 70 at [303]. However, mere weakness of an arguable case is insufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 542.

Abuse of process

Costs may be awarded on an indemnity basis where the proceedings amount to an abuse of process: *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362, such as where they are commenced other than in good faith, or for an ulterior or collateral purpose: *Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352; *Packer v Meagher* [1984] 3 NSWLR 486 at 500.

Unreasonable conduct or "relevant delinquency"

This covers a wide range of conduct, both leading to and in the course of the conduct of the proceedings. Evidence of actual misconduct is not required. Examples of the former include unfounded allegations of fraud or improper conduct: *Maule v Liporoni (No 2)* [2002] NSWLEC 140 at [39]; refusal to withdraw an improper caveat: *Martin v Carlisle* [2008] NSWSC 1276; deliberate or high-handed conduct: *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277. Instances of the latter include failure to provide proper discovery: *Masha Nominees Pty Ltd v Mobil Oil Australia Pty Ltd (No 2)* [2006] VSC 56 at [17]–[21]; making multitudinous amendments: *Qantas Airways Ltd v Dillingham Corporation Ltd* (unrep, 14/5/87, NSWSC); behaviour which causes unnecessary anxiety, trouble or expense, such as failure to adhere to proper procedure: *FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61-384; disregard of court orders: *O'Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 at [35]; perverse persistence by an unrepresented litigant with a hopeless application: *Rose v Richards* [2005] NSWSC 758; unnecessarily prolonging the proceedings: *Degmam Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354 at 358; and knowingly and deliberately giving false evidence which prolongs the proceedings through litigation of false claims: *Degmam Pty Ltd (in liq) v Wright (No 2)* at 357–358; *Liu v Lam (No 2)* [2025] NSWSC 264 at [59]–[60].

Fraud and misconduct

A party against whom serious misconduct is established may be ordered to pay costs on the indemnity basis, such as fraud: *Gate v Sun Alliance Ltd* (1995) 8 ANZ Ins Cas ¶61-251 at 75,817–75,818; perjury or contempt: *Berkeley Administration Inc v McClelland* [1990] FSR 565 at 568–569; *Ivory v Telstra Corporation Ltd* [2001] QSC 102 or other dishonest conduct: *Vance v Vance* (1981) 128 DLR (3d) 109 at 122.

Offers of compromise and Calderbank letters

A party who fails to better an offer of compromise is liable to pay indemnity costs from the date of the offer unless the court otherwise orders: UCPR r 42.13–42.15. Failure to accept a Calderbank offer which is not bettered may have similar consequences, although in such a case the consequences are discretionary and do not flow from the rules; see "Offers of compromise and Calderbank letters" at [8-0030].

Arbitration or dispute resolution clauses

There are two lines of authority as to whether there is a presumption that a party who unsuccessfully challenges an order for referral or stay where there is an arbitration or dispute resolution clause should pay indemnity costs:

- in favour of indemnity costs: *A v B (No 2)* [2007] 1 All ER (Comm); *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (S) at [18]
- against indemnity costs: *Ansett v Malaysian Airline System (No 2)* [2008] VSC 156 at [22]; *John Holland Pty Ltd v Kellog Brown & Root Pty Ltd (No 2)* [2015] NSWSC 564 at [20]–[24]; *In the matter of Ikon Group Ltd (No 3)* [2015] NSWSC 982; *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [No 2]* [2015] FCA 1046.

The controversy has not yet been resolved by an intermediate appellate court, but the weight of authority in Australia favours the latter view: see *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (S) at [23]–[25], holding that while commencement of proceedings in breach of an arbitration agreement may be a relevant factor in exercising the court's discretion to award costs, there is no justification for a general rule that costs should be awarded on an indemnity basis where proceedings are commenced in breach of an arbitration agreement.

[8-0140] Costs orders may be made at any stage of the proceedings

By CPA s 98(3), an order as to costs may be made at any stage of proceedings, or after conclusion of the proceedings.

Security for costs

In certain circumstances, generally involving a risk that a costs order against the plaintiff, if unsuccessful, may not be enforceable, a defendant (or cross-defendant) may apply for security for costs. At the conclusion of the litigation, the security is paid out to the party entitled to costs: *The "Bernisse" and The "Elve"* [1920] P 1; *Huon Shipping and Logging Co Ltd v South British Insurance Co Ltd* [1923] VLR 216; see also *Kiri Te Kanawa v Leading Edge Events Australia Pty Ltd* [2007] NSWCA 187 as explained by Hamilton J in *Lym International Pty Ltd v Chen* [2009] NSWSC 167 at [18]–[20]); *Dal Pont* at 28.65. A defendant intending to apply for security for costs should generally do so promptly after the institution of proceedings. For security for costs, see [2-5900]ff.

Preliminary costs

In some classes of litigation, of which matrimonial proceedings are the paradigm, a party unable to fund proceedings may apply for a preliminary costs order, to place them in funds to enable them to conduct the proceedings. Such an order is taken into account in the final relief: see *Breen v Breen* (unrep, 7/12/90, HCA); *Parker v Parker* (unrep, 4/8/92, NSWSC).

Interlocutory applications

The disposition of an interlocutory application is usually a discrete event in proceedings, and typically involves consideration of the costs of the application. For interlocutory costs orders, see [8-0150].

When the trial is adjourned or aborted

The adjournment or abortion of a trial may require consideration of the costs thereby occasioned. Where a trial has been aborted and a new trial is ordered, the general rule is that the costs of the first trial await the result of the retrial, as costs in the cause: *Brittain v Commonwealth of Australia (No 2)* [2004] NSWCA 427 at [30]; *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [62]. However, it is not a prerequisite for departing from such a course that the party seeking a costs order demonstrate wrongdoing was responsible for the trial's early termination: *Nudrill Pty Ltd v La Rosa* [2010] WASCA 158 at [15]; *Brittain v Commonwealth of Australia (No 2)* at [33]. Whether any special costs order is necessary if a trial is adjourned part-heard will depend on the facts of the case: *Canturi Corporation Pty Ltd v Gagner Pty Ltd* [2008] NSWDC 151.

Upon final judgment

In a straightforward case, the trial judge may deal with the question of costs in the substantive judgment. Such a course is desirable, where the prima facie costs order is fairly clear, because it may avoid the time and costs of a further hearing on the question of costs. Such an order does not preclude a party from seeking a special or different costs order (such as an indemnity order, based

on an offer of compromise of which the court will not previously be aware): costs orders may be reconsidered on application made before (under UCPR r 36.16(1)) or within 14 days after (under r 36.16(3A)) the order is entered, and reconsideration may be appropriate if the order was made without the parties having had a proper opportunity to make relevant submissions before the order was made: *Harris v Schembri* (unrep, 7/11/95, NSWSC). A costs order may also be varied in an appropriate case under the "slip rule", on application under r 36.17: *Roads and Traffic Authority v Palmer (No 2)* [2005] NSWCA 140 at [25]. However, where there is room for argument about the costs order, or a party seeks an opportunity to be heard, it is prudent expressly to reserve liberty to apply, within a specified time, to set aside or vary the costs order.

If the proper costs order is not prima facie apparent, or apportionment may be appropriate, or if the parties have foreshadowed that they wish to be heard on the question of costs, then after giving judgment in the proceedings it will be appropriate to proceed to hear, then or at a later time, submissions on the question of costs. Trial judges should not defer hearing or determining costs applications merely because an appeal is contemplated or pending. Where there is a dispute as to the appropriate costs order, the judge should rule on the issue, including any application for indemnity costs, and it should not be deferred pending the outcome of a foreshadowed appeal: *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 at [54]. Stays of costs assessments may be ordered if there is doubt as to whether costs, if paid, could be repaid if the appeal is successful and there are reasonably arguable grounds of appeal: *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4)* [2007] FCA 1594 at [8].

Where the question of costs is not addressed and determined, the court is not *functus officio* in respect of costs, and an order for costs can be made after judgment: *NSW Ministerial Insurance Corporation v Edkins* (1998) 45 NSWLR 8. Costs orders against non-parties may also be made after the entry of judgment between the parties: *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd (No 1)* (1993) 45 FCR 224; *Akedian Co Ltd v Royal Insurance Australia Ltd* [1999] 1 VR 80 at 98; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39; [2005] 1 NZLR 145; [2005] 4 All ER 195 (PC).

The typical orders in a straightforward case are, (where the plaintiff succeeds) that the defendant pay the plaintiff's costs; or (where the defendant succeeds) that the plaintiff pay the defendant's costs (or that there be judgment for the defendant, with costs; or that the proceedings be dismissed, with costs): see Precedent 8.1 and 8.2 at [8-0200]. For orders where there are multiple defendants, see [8-0080] and Precedents 8.3, 8.4 and 8.5 at [8-0200].

It is implicit in an order that Party B pay Party A's costs that the quantum, unless agreed, be determined by assessment, and quite unnecessary to specify that that the costs be "as agreed or assessed". But because, absent agreement, the costs must be quantified by a costs assessor, it is important that the costs the subject of the order, whether interlocutory or final, be described in clear and certain terms, in order to ensure that the parties and the costs assessor can easily ascertain the precise scope of the costs to be paid: *Hogan, In the Marriage of* (1986) 10 Fam LR 681 at 686.

Cost of the proceedings

Unless a special order is made, the costs of any application or other step in proceedings form part of the general costs in the proceedings. A general costs order thus includes any reserved costs, and any in respect of which no previous order has been made, except where the court has specifically made "no order as to costs" UCPR r 42.7, and see *Dal Pont* at [6.21]–[6.27]. A general costs order does not disturb or include previous special costs orders, and if it is intended to vary a previous interlocutory costs orders, that must be expressly stated.

Court-ordered mediations

A general costs order for the "costs of the proceedings" includes the costs of a court-ordered mediation under CPA s 28: see *NSW Civil Procedure Handbook* at [r Pt42.290].

[8-0150] Interlocutory costs orders

Last reviewed: December 2024

The court has power under CPA s 98(3) to make orders for costs at any stage of proceedings. Costs issues arise not only at the final hearing, but also in connection with interlocutory applications, such as applications for interlocutory injunctions, determination of preliminary questions, and applications for discovery. An interlocutory costs order may be reconsidered at any later stage of the proceedings. If an interlocutory costs order is not made, the costs of the relevant application fall to be dealt with as part of the general costs in the proceedings.

Particular interlocutory costs orders

Common interlocutory costs orders include:

That party X pay party Y's costs of the motion

This order may be appropriate where party Y is substantially successful on the interlocutory application, and is considered to be entitled to costs of the application regardless of the ultimate outcome of the proceedings. It is more often appropriate where a defendant succeeds on the motion, as such a motion will have occasioned additional costs even if the plaintiff ultimately succeeds in the proceedings, whereas a plaintiff who succeeds on an interlocutory application will not necessarily be entitled to its costs if the proceedings ultimately fail in their entirety. "Costs of the motion" include all the costs of and incidental to the particular interlocutory application before the court, including costs "reasonably connected" with the application, such as preparation and taking out the relevant orders: *Re Hudson; Ex parte Citicorp Australia Ltd* (1986) 11 FCR 141 at 144; *Dal Pont* at [1.23], and are not confined to "costs of the day" (which catch only the costs associated with the appearance on the day in question).

That party X pay party Y's costs thrown away by the [amendment/adjournment]

This formula catches the costs which have been incurred and are wasted by reason of an adjournment or amendment, typically where the same or similar work (such as drafting a responsive pleading, or preparing for argument) may have to be undertaken a second time.

That costs of the motion be costs in the proceedings

This order has the effect that the costs of the motion will be treated as costs of the substantive proceedings generally, and will form part of the costs dealt with by the general costs order: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorp (No 2)* [2007] NSWCA 142 at [18]. This is the default position if no special costs order is made (see "No costs order", below), and for that reason is strictly unnecessary, but is nonetheless commonly made for clarity and certainty. It may be appropriate where the motion does not give rise to an "event" distinct from the proceedings as a whole, or was necessarily or reasonably brought or opposed to prepare the substantive proceedings for hearing, or where the true merits of the application may not be apparent unless seen in the context of the final result: *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664.

That costs of the motion be the [plaintiff's/defendant's] costs in the proceedings

This order means that if the party in whose favour it is made ultimately obtains a general order for costs in the substantive proceedings, then that order includes the costs of the motion; but if the other party obtains a general costs order, then neither party receives the costs of the motion. It is appropriate where the successful party on the motion should have the costs of the motion only if it also succeeds on the substantive proceedings. An order that costs of the motion be the plaintiff's costs in the proceedings is the usual order in the Equity Division of the Supreme Court where a plaintiff

succeeds on a contested application for an interlocutory injunction: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorp (No 2)* at [23]–[26].

That costs of the motion be reserved to the trial judge

This order means that the costs of the motion may be determined separately by the trial judge upon completion of the proceedings, and if not so separately determined will be costs in the proceedings. It is generally undesirable that questions of costs be left to a judicial officer who has not heard and determined the application to which those costs relate. However, where the hearing is imminent, or the issue is related to trial issues, the making of the costs order may be left to the trial judge, especially if it will be the same judge.

No costs order, and "no order as to costs"

Where no specific order is made in respect of costs of interlocutory proceedings, the costs become costs in the proceedings and are caught by any general costs order ultimately made in the proceedings. A general order in respect of costs of the proceedings catches not only the costs of the final hearing, but all interlocutory proceedings except insofar as there is an order to the contrary: UCPR r 42.7; *Dal Pont* at [1.19]. The absence of any specific costs order is to be distinguished from the court specifically making "no order as to costs", which amounts to the expression of a contrary intent and means that no party is to receive costs of the motion, regardless of the ultimate outcome, so that each must bear its own costs: *Trikas v Rheem (Australia) Pty Ltd* [1964] NSWR 645 at 646. Such costs "lie where they fall": *Wentworth v Wentworth* [1999] NSWSC 638.

Time for assessment and payment of interlocutory costs orders

Unless the court otherwise orders (for example, by specifying *"such costs to be payable forthwith"*), the costs of an interlocutory application are not payable until the end of the proceedings: UCPR r 42.7(2). One reason for this is to reduce the likelihood of multiple costs assessments in respect of the one proceeding, though the rule does not preclude assessment (as distinct from enforcement) in the interim: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2)* at [49], observing that the rule does not prevent the parties from taking "steps to quantify any such order, but that is a different matter to the question of enforceability": *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674 at [5]; *Eastmark Holdings Pty Ltd v Kabraji (No 2)* [2012] NSWSC 1255 at [43]; cf *Zisti v Bartter Enterprises Pty Ltd* [2013] NSWCA 146 at [73]; *Sturesteps v Khoury* [2015] NSWSC 1041 at [209]; *Mundi v Hesse* [2018] NSWSC 1548 at [59]–[62].

The court may "otherwise order" that an interlocutory costs order be payable forthwith: *Solarus Products v Vero Insurance (No 4)* [2013] NSWSC 1012; *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664 at [171]–[173]; *Australian Securities and Investments Commission v Rich* [2003] NSWSC 297. The discretion may be exercised at any time prior to the conclusion of the proceedings: *Showtime Touring Group Pty Ltd v Mosley Touring Inc* [2013] NSWCA 53 at [29].

The discretion to order the immediate payment of interlocutory costs is wide; "[i]n the end, the demands of justice are the only determinant": *Fiduciary Ltd v Morningstar Research Pty Ltd* at [7]; *Gattelleri v Meagher* [1999] NSWSC 1279 at [9]; *Plaza West Pty Ltd v Simon's Holdings (NSW) Pty Ltd (No 2)* [2011] NSWSC 556 at [13]; *Pavlovic v Universal Music Australia Pty Ltd (No 2)* [2016] NSWCA 31. In considering whether to exercise its discretion to order otherwise, the Court must take into account the matters in CPA ss 56 and 57 and may also have regard to the matters set out in CPA s 58(2)(b), including the extent to which the parties have acted expeditiously and assisted the Court in facilitating the just, quick and cheap resolution of the real issues in dispute: *Bevillesta Pty Ltd v D Tannous No 2 Pty Ltd* [2010] NSWCA 277 at [37]–[39]; *Penrose v Fernandez* [2024] NSWSC 1207 at [31]–[35]. The practice that interlocutory costs orders were payable only upon completion of the proceedings is a relic of times when personal injury litigation formed the overwhelming business of the courts, and is more commonly departed from in commercial litigation.

Because an order that costs be paid forthwith is an exception, it will only be made in a case that is out of the ordinary, as such an order "has the capacity to stultify proceedings particularly brought by persons with limited resources, and also has the risk of operating unfairly where, over the course of the proceedings, there may be orders which are made that one or other party should pay the costs of the other from time to time": *In the matter of Elsmore Resources Ltd* [2014] NSWSC 1390 at [5]; *Hargood v OHTL Public Co Ltd (No 2)* [2015] NSWSC 511 at [8]. The court must consider whether the costs in question should be paid prior to the conclusion of the litigation, or whether one occasion of enforcement of costs orders at the end of a case, with costs orders going different ways being set off, is preferable: *Richards v Kadian (No 2)* [2005] NSWCA 373 at [7].

The discretion to "otherwise order" that interlocutory costs be payable forthwith has been exercised in a variety of circumstances, including:

Where the decision relates to the determination of a discrete or self-contained question: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1 at [11]–[13]; *Richards v Kadian* [2005] NSWCA 373 at [6]–[7]. Examples include an unsuccessful application for summary judgment: *Perpetual Trustee Co v McAndrew* [2008] NSWSC 790; an application for discovery, or a Mareva order: *McNamara Business and Property Law v Kasermidis (No 3)* [2006] SASC 262; an unsuccessful application to administer interrogatories: *Megna v Marshall* [2005] NSWSC 1326 at [26]; an application for contempt: *Ark Hire Pty Ltd v Barwick Event Hire Pty Ltd* [2007] NSWSC 488 at [46]–[49]; a security for costs application: *Young v Cooke (No 2)* [2018] NSWSC 1787; and a successful application to restrain solicitors acting for the opponent: *Chinese Australian Services Society Co-Operative Ltd v Sham-Ho* [2012] NSWSC 241. Where non-parties have appeared in relation to challenges to subpoenas, the court may make orders for costs which are assessable forthwith. However, steps reasonably taken in the management of the proceedings towards a hearing, such as a directions hearing, should be treated as costs in the proceedings generally: *Metlife Insurance Ltd v Visy Board Pty Ltd (Costs)* [2008] NSWSC 111 at [11]–[12].

Where the costs are significant and there is likely to be a delay in the conclusion of the proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [11]–[13]; particularly if the receiving party is impecunious and the application diverted funds from the substantive cause: *Reserve Rifle Club Inc v NSW Rifle Assn Inc* [2010] NSWSC 351; *Hardaker v Mana Island Resort (Fiji) Ltd (No 2)* [2019] NSWSC 1100 at [24]–[25]. This may be the case where liability has been separately determined (under UCPR r 28.2): *Herbert v Tamworth City Council (No 4)* (2004) 60 NSWLR 476 at [30] (costs of hearing on liability payable forthwith where liability established but assessment of damages could be delayed for a decade).

Where the costs were incurred by unreasonable or unnecessary conduct: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [11]–[13] (costs abnormally increased by service of very voluminous material at the last moment, the vast bulk of which was not referred to on the application); *Vitoros v Raindera Pty Limited* [2014] NSWSC 99 at [20] (multiple appearances necessitated by plaintiff's repeated defaults); *Seven Network Ltd v News Ltd* [2005] FCA 1630 at [8] (wrongful suppression of material documents unnecessarily incurring costs in defending a claim for legal professional privilege); *Stokes v McCourt* [2013] NSWSC 1014 at [164]–[165] (delays in conduct of the principal proceedings suggested that defendant was conducting a "war of attrition" through interlocutory disputes). The court will take into account the extent to which the parties have failed to facilitate the overriding purpose of the just, quick and cheap resolution of the real issues in the proceedings as required by CPA s 56, must take into account the matters set out in ss 56 and 57, and may have regard to the checklist in s 58(2)(b): *Bevillesta Pty Ltd v D Tannous 2 Pty Ltd* [2010] NSWCA 277 at [37]–[39]; *Australian Securities and Investments Commission v Rich* [2003] NSWSC 297 at [85]; *Seven Network Ltd v News Ltd* [2005] FCA 1630 at [8].

Where the costs order involves third parties, such as legal practitioners: See *Bagley v Pinebelt Pty Ltd* [2000] NSWSC 830 at [7] (wrongful lodgement of caveat by barrister); *North South Construction Services Pty Ltd v Construction Pacific Management Pty Ltd* [2002] NSWSC 286 at [35]–[36] (abuse of process by non-party).

Considerations that may tend against an "otherwise order" for costs to be payable forthwith include that the party is legally aided: *Richards v Kadian (No 2)* at [5], or that the final outcome is sufficiently uncertain that it is preferable to defer the question of costs to the trial judge, or to make costs of the interlocutory application costs in the cause: *Megna v Marshall* at [27]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1. Cases in which the court has declined to make a "forthwith" order include *Cameron v Ofria* [2007] NSWCA 37 at [12] (successful application to strike out cross claim, characterised as ordinary interlocutory application in the general course of proceedings); *Hargood v OHTL Public Co Ltd (No 2)* [2015] NSWSC 511 (failed application for stay and likely two years before conclusion of proceedings insufficient to depart from usual rule); *Hall v Swan* [2013] NSWSC 1758 at [11]–[15] (delay in service of expert reports); *Eastmark Holdings Pty Ltd v Kabraji (No 2)* [2012] NSWSC 1255 at [42]–[46] (several motions heard together, discretionary factors tending in both directions).

Failure to pay interlocutory costs orders

Where a party fails to pay a series of interlocutory costs orders that are payable forthwith, orders for a stay of proceedings under CPA s 67, security for costs and/or dismissal in the event of non-compliance with such orders may be made, but generally only in a special case, such as where the costs are substantial, or the failure to pay is unreasonable, or the party is acting vexatiously: *Morton v Palmer* (1882) 9 QBD 89; *Re Wickham* (1887) 35 Ch D 272; *Graham v Sutton, Carden & Co* [1897] 2 Ch 367; *Trkulja v Dobrijevic (No 2)* [2016] VSC 596 (13 costs orders totalling over $150,000); *Kostov v Zhang; Kostov v Fairfax Media Publications Pty Ltd* [2017] NSWDC 7 (Court of Appeal order for gross sum costs order of $15,000).

[8-0160] Quantification of costs

Last reviewed: March 2025

Where an order is made that party A pay party B's costs, the quantum of party A's liability is usually ultimately resolved by assessment, failing agreement. Costs as between party and party (now called "ordered costs": see LPULAA, s 74) are for the most part not regulated, and are assessed on the ordinary basis or the indemnity basis (as to which, see [8-0130]. For circumstances in which costs are regulated, see [8-0170].

Capping of costs

CPA s 98(1)(b), and UCPR r 42.4(1), provides that the court may "cap" costs, and this may be on the application of a party or of its own motion, and prospectively or retrospectively: *Dal Pont* 7.42–7.47; *Nudd v Mannix* [2009] NSWCA 327; *Nicholls v Michael Wilson Partners Ltd (No 2)* [2013] NSWCA 141. However, it is preferable that any such order be made prospectively and not retrospectively: *Re Sherborne Estate (No 2); Vanvalen v Neaves* (2005) 65 NSWLR 268 at [22]–[26], [31]; *Dal Pont*, 7.42–7.49; JP Hamilton, "Containment of costs: litigation and arbitration" (presentation, 1 June 2007); Practice Note SC Eq 7. This power has most often been exercised in proceedings where the parties are effectively litigating from the same purse, such as family provision or de facto property litigation.

Gross sum costs orders

Although the quantification of a costs order is usually left to the process of assessment, CPA 98(4)(c) provides that at any time before costs are referred for assessment the court may make an order for a specified gross sum, instead of assessed costs.

The guiding principle as to the making of a lump sum costs order was outlined in *Harrison v Schipp* (2002) 54 NSWLR 738 at [22], namely, that the power "should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available". Further principles were elaborated in

Hamod v State of NSW [2011] NSWCA 375 at [813]–[820]. Together, these decisions are frequently cited as the leading statements of principle: see, eg, *Colquhoun v District Court of NSW (No 2)* [2015] NSWCA 54 at [6]–[7] (a decision of particular relevance in circumstances where there is inadequate evidence as to the appropriate sum to be ordered); *South Western Sydney Local Health District v Gould (No 2)* [2018] NSWCA 160 at [11]; *Riva NSW Pty Ltd v Mark A Fraser and Christopher P Clancy trading as Fraser Clancy Lawyers (No 4)* [2018] NSWCA 327 at [73].

Although courts were initially reluctant to make such orders, they have become increasingly common: *Poulos v Eberstaller (No 2)* [2014] NSWSC 235; *Chaina v Presbyterian Church (NSW) Property Trust (No 26)* [2014] NSWSC 1009 at [43]–[57]. At first they were utilised in "megalitigation" cases, where the assessment of costs would likely be protracted and expensive: *Idoport Pty Ltd v NAB Ltd* [2005] NSWSC 1273; see also *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640, but they are now made in a wide variety of circumstances, including where there has been contumelious conduct by a party (*Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99), or where the financial circumstances of the party ordered to pay costs are poor: *Hamod v State of NSW* at [813]–[820]; *Constantinidis v Prentice (No 2)* [2023] NSWSC 160 at [20]. Such orders are now increasingly made where the subject matter of the litigation is a modest sum in comparison to the costs involved, or to avoid "satellite litigation" about costs: *O'Rourke v P & B Corporation Pty Ltd* [2008] WASC 36 at [5]; *Lambert v Jackson* [2011] FamCA 275 at [59] (lump sum costs orders made on an indemnity basis by reason of conduct of the litigation); *Vumbaca v Sultana (No 2)* [2013] NSWDC 195 at [7]; *Colquhoun v District Court of NSW* [2014] NSWCA 460 at [62] (appeal from Children's Court, in which unsuccessful party had contested every point, and the costs order to which the other parties were entitled should not be rendered nugatory by the prospect of disproportionate disputation by him); *Constantinidis v Prentice (No 2)* at [19]–[20] (any costs assessment was likely to be lengthy, expensive and out of proportion to the modest amount of costs being assessed due to plaintiff's repeated attempts to litigate the same matters over and over again); or even in litigation with no special features: *Poulos v Eberstaller (No 2)*. However in *O'Connor v O'Connor* [2022] NSWSC 940 at [8]–[10] (cited in *I C Pipes Pty Ltd v DGS Trading Pty Ltd (No 3)* [2023] NSWSC 1146) Hammerschlag CJ in Eq noted that a gross sum costs order is not warranted simply because a party has a costs order and it will convenience that party not to have their costs subject to the formal process of assessment; there must be some good reason to make such an order.

When making a gross sum order, the court must determine a reasonable amount. The assessment of any lump sum to be awarded must represent a review of the successful party's costs by reference to the pleadings and complexity of the issues raised on the pleadings; the interlocutory processes; the preparation for final hearing and the final hearing, but the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment: *Hamod v State of NSW* at [819], citing *Smoothpool v Pickering* [2001] SASC 131; *Harrison v Schipp* (2002) 54 NSWLR 738 at 743; *Hadid v Lenfest Communications Inc* [2000] FCA 628 at [35]; *Auspine Ltd v Australian Newsprint Mills Ltd* [1999] FCA 673; see also *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99 at [28], [38]. This typically involves an assessment of the different components of the costs, including the rates and hours billed per lawyer, in the context of the litigation as a whole. An example of this can be seen in *Zepinic v Chateau Constructions (Aust) Ltd (No 2)*, where junior counsel's fees were deemed reasonable because the rates were not excessive, it was appropriate for counsel to be briefed to appear, and it was sensible and efficient for counsel to draft and settle written submissions; however, another lawyer's fees were deemed to be disproportionately high, because the matter was neither large nor complex and it could and should have been resolved promptly by summary dismissal. See also *Zarfati v McMillan* [2023] NSWSC 839, in which the retention of a "very eminent senior counsel" was acknowledged to be a "luxury rather than a necessity" which was considered in the assessment of costs: at [24]–[25]. However, the way in which the plaintiff conducted the proceedings was accepted to have legitimately caused the defendants to undertake more lengthy and detailed preparation, and consequently incur greater

costs, than might ordinarily be expected, and therefore the defendants should be compensated for the additional preparation and work undertaken on their behalf as a result of, or in response to, that conduct: at [27].

A discount (typically in the order of 10–20% in the case of an indemnity order, and 30–35% in the case of a party/party order) is usually applied when calculating a gross sum costs order, for two main reasons: first, because on assessment, even on the indemnity basis, a successful party invariably recovers something less than its actual costs, typically 15% where the assessment is on an indemnity basis; and secondly, the necessarily broad-brush approach of the court to assessment on a lump sum basis — involving some risk that the sum includes costs that would not be recovered on assessment — coupled with the savings to the costs creditor in time and costs through avoiding a detailed assessment, and the loss to the costs debtor of the opportunity to scrutinise and object to a detailed bill, has resulted in a practice of applying a discount on lump sum assessments: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119; *Idoport Pty Ltd v NAB, Idoport Pty Ltd v Donald Robert Argus* [2007] NSWSC 23 at [13]; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* at [38]; *In the matter of Aquaqueen International Pty Ltd* [2015] NSWSC 500 at [18]; *Hancock v Rinehart (lump sum costs)* at [56]–[57].

However, that does not mean that the court must apply a percentage discount to the sum sought by the successful party, and the court "must be astute not to cause an injustice to the successful party" by applying "an arbitrary 'fail safe' discount on the costs estimate submitted to the court". If the court can be confident that there is little risk that the sum includes costs that might be disallowed on assessment, the case for a discount is seriously undermined, and where a gross sum is assessed on an indemnity basis, and there is no evidence of unreasonableness, it may be inappropriate to apply any discount, although one may nevertheless be appropriate if there is evidence that the successful party errs on the side of excessive use of legal services: *Beach Petroleum* at 164–165; *Norfeld v Jones (No 2)* [2014] NSWSC 199 at [7]–[10]; *Harvey v Barton (No 4)* [2015] NSWSC 809 at [48] ; *Hancock v Rinehart (Lump sum costs)* at [57]–[59]; *In the matter of Beverage Freight Services Pty Ltd* [2020] NSWSC 797 at [24], [36].

An application for costs to be specified in a gross sum is not a "variation" of an order so does not attract the operation of the 14-day time limit in UCPR r 36.16(3A): *Hartnett t/a Hartnett Lawyers v Bell (No 2)* [2023] NSWCA 311 at [38]; cf *Ahern v Aon Risk Services Australia Ltd (No 2)* [2022] NSWCA 39 at [19]–[21]; see also *Gabrielle v Abood (No 4)* [2023] NSWCA 100 at [12], in which the Court said it was not necessary for a costs order to be "varied" to specify that it be paid in a gross sum as the specification was an additional order (not a variation). See also *Livers v Legal Services Commissioner (No 2)* [2021] NSWCA 164 at [8]; *M1 v R1* [2024] NSWCA 256 at [4], [85], [122]: the words in CPA s 98(3) and (4), including that an order as to costs may be made "at any stage of the proceedings or after the conclusion of the proceedings", should not be read narrowly. UCPR r 36.16 does not provide a temporal constraint upon a court's orders as to costs, including orders that a party pay a specified sum instead of assessed costs. Note that in *M1 v R1* at [4], Leeming JA departed from his contrary ruling (in *Riva NSW Pty Ltd v Fraser and Clancy t/as Fraser Clancy Lawyers (No 4)* [2018] NSWCA 327) that an application to seek a gross sum costs order enlivened r 36.16.

CARC Guideline

The Costs Assessors Review Committee (CARC) has published a "Guideline: costs payable between parties under court orders" (updated October 2023) (whether "ordered costs" under the new legislation or "party/party costs" under the repealed legislation). This Guideline is intended to provide guidance for assessors as to what might reasonably be allowed in respect of certain types of work and hourly rates, but does not have the effect of a mandatory scale. By analogy it may assist courts in quantifying costs.

[8-0170] Regulated costs

In some situations, costs are fixed, limited or regulated by or under statutory provisions, including *Legal Profession Uniform Law Application Act 2014*, ss 59 and 61, *Workplace Injury Management and Workers Compensation Act 1998*, and *Motor Accidents Compensation Act 1999*.

Costs on default judgment and the enforcement of judgments

The costs recoverable for the undefended recovery of a liquidated debt, and for the enforcement of a judgment by a judgment creditor, are fixed under s 59(1)(d) and (e) of LPULAA and Pt 5, reg 24 of the *Legal Profession Uniform Law Application Regulation 2015*. The scales as to the costs recoverable in such matters are set out in Sch 1 for each court.

Claims for personal injury damages

LPULAA Sch 1 limits the recoverable costs for legal services in respect of certain claims for personal injury damages where the damages recovered do not exceed $100,000: LPULAA Sch 1, cl 2. These provisions do not preclude the awarding of costs on an indemnity basis if a reasonable offer of compromise is not accepted: Sch 1, cl 5. Applications may be made to the court under CPA s 98, UCPR rr 42.15 and 42.20 by a plaintiff for costs outside the cap: *Hurcum v Domino's Pizza (No 2)* (2007) 4 DCLR 194 (failed allegation of fraud which complicated and delayed personal injury proceedings). The costs cap applies to a defendant, including one who brings a cross-claim, but not to a cross-defendant in proceedings for contribution: *Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty Ltd* (2006) 65 NSWLR 717 at [50], [52].

The cap applies if the amount recovered on a claim for personal injury damages does not exceed $100,000, whether the claim is in negligence or for an intentional tort such as assault, but does not include claims for false imprisonment, which is not a "personal injury": *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; *NSW v Williamson* (2012) 248 CLR 417 at [7], [8]; [44].

Where damages are merely indirectly related to the death of or injury to a person, such as damages for professional negligence connected to proceedings about the death of or injury to a person, they do not fall within the definition of "personal injury damages" in s 11. The claim for damages must be a claim for the personal injury suffered: *New South Wales v Williamson* (2012) 248 CLR 417. In *Osei v PK Simpson* (2022) 106 NSWLR 458, where an injured plaintiff later sued his legal representatives, it was held that as the claim was for professional negligence and not damages for personal injury, the cap under Sch 1, cl 2 of the LPULAA does not apply.

Claims for work injury damages

The *Workplace Injury Management and Workers Compensation Act 1998* ("the WIM Act"), s 346, applies to costs (including disbursements) payable by a party in or in relation to a claim for work injury damages, including court proceedings for work injury damages, and authorises regulations making provision for or with respect to the awarding of costs to which it applies. The regulations may provide for the awarding of costs on a party/party basis, on a practitioner and client basis, or on any other basis. A party is not entitled to an award of costs to which the section applies, and a court may not award such costs, except as prescribed by the regulations or by the rules of the court concerned. In the event of any inconsistency between the provisions of the regulations under this section and rules of court, the provisions of the regulations prevail to the extent of the inconsistency. For the purpose of s 346, the relevant regulation is *Workers Compensation Regulation 2016* ("the Regulation"), Pt 17. "Work injury damages" are defined in s 250 as damages recoverable from a worker's employer in respect of:

(a) an injury to the worker caused by the negligence or other tort of the employer, or

(b) the death of the worker resulting from or caused by an injury caused by the negligence or other tort of the employer,

whether the damages are recoverable in an action for tort or breach of contract or in any other action, but does not include motor accident damages.

In such claims, the WIM Act and the Regulation govern the costs to be awarded, to the exclusion of the discretion conferred by CPA s 98. Thus, a court can only award costs as prescribed by the Regulation or by the UCPR, but in the event of any inconsistency, the Regulation prevails. The scheme of the Regulation allows no scope for an award of indemnity costs: *Chubs Constructions Pty Ltd v Chamma* [2009] NSWCA 98 at [11]–[31]. This is to be distinguished from proceedings for workers' compensation, as s 112 of the WIM Act allows the Personal Injury Commission to make orders on an indemnity basis.

Similarly, the UCPR rules relating to offers of compromise do not operate once a Certificate of Mediation Outcome has been issued under WIM Act, s 318B. So far as costs in court proceedings are concerned, the parties are "fossilised" in their respective positions at the conclusion of the mediation. The same position applies throughout the court proceedings, including any appeal: *Smith v Sydney West Area Health Service (No 2)* [2009] NSWCA 62 at [11]–[20]; *Pacific Steel Constructions Pty Ltd v Barahona (No 2)* [2010] NSWCA 9 at [12]–[16]; see also *Chubs Constructions Pty Ltd v Sam Chamma (No 2)* (2010) 78 NSWLR 679 at [37]–[40]; *Sneddon v The Speaker of the Legislative Assembly* [2011] NSWSC 842 at [15]–[24].

Claims under the Motor Accidents Compensation Act 1999

Costs in respect of claims covered by the *Motor Accidents Compensation Act 1999*, for accidents that occur after 5 October 1999, are regulated by Ch 6 (ss 148–153) of that Act: *Najjarine v Hakanson* [2009] NSWCA 187. Section 152(2) provides that the rules of court relating to offers of compromise apply to any such offer made in those proceedings. This extends to *Calderbank* offers: *Arnott v Choy (No 2)* [2010] NSWCA 336 at [9]–[14]. Otherwise, subject to the rules of court, the costs of such proceedings are to follow the event and are payable on a party/party basis: s 152(3). However, the provisions of Ch 6 regulate costs in court claims brought under the MAC Act in a way that does not otherwise permit for the operation of the rules of court: *San v Rumble (No 2)* [2007] NSWCA 259 at [15].

[8-0180] Interest on costs

For actions commenced before 24 November 2015, an application can be made under CPA s 101(4) for interest on costs: *Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99 at [39]–[45]; see also *Short v Crawley (No 45)* [2013] NSWSC 1541; *Alawadi v Widad Kamel Farhan trading as The Australian Arabic Panorama Newspaper (No 3)* [2016] NSWDC 204. Although it has been said that some positive basis for the application should be established (*Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd (No 2)* (2013) 84 NSWLR 436 at [38]; *McKeith v Royal Bank of Scotland Group Plc; Royal Bank of Scotland Group Plc v James (No 2)* [2016] NSWCA 260 at [55]), and interest on costs has been refused where it was not sought at trial and there has been delay (*T&T Investments Australia Pty Ltd v CGU Insurance Ltd (No 2)* [2016] NSWCA 372) or for insufficiency of evidence (*Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd (No 2)* at [59]–[60]), it is not necessary to demonstrate circumstances out of the ordinary to warrant such an order: *Drummond and Rosen Pty Ltd v Easey (No 2)* [2009] NSWCA 331 at [4]. The better view is that interest on costs should now be seen, like interest on a judgment, as no more than appropriate compensation for the time value of money, for the period while a party is out of pocket: *Drummond and Rosen Pty Ltd v Easey (No 2)* at [4]; *Grace v Grace (No 9)* [2014] NSWSC 1239 at [57]–[72]; *Richtoll Pty Ltd v WW Lawyers (in Liq) Pty Ltd (No 3)* [2016] NSWSC 1010 at [12]–[17]. Such orders, which have become increasingly commonplace, have often adopted the complex formula set out in *Lahoud v Lahoud* [2006] NSWSC 126 which required the attribution of payments between the client and the solicitor to particular parts of the party/party costs.

An interest order under CPA s 101(4) can be made after the costs order has been made, at least so long as it is made before there is a judgment for costs effected by registration of the certificate of assessment: *Timms v Commonwealth Bank of Australia (No 3)* [2004] NSWCA 25 at [11] (Beazley JA, observing, in respect of the former *Supreme Court Act 1970,* s 95(4), that a claim for interest

under the section is "part of the claim that a party has in relation to costs", and not a separate and independent course of action, and that if no application for interest were made and determined before entry of judgment for costs, the claim merged with the judgment, as had occurred in that case when final judgment for costs was obtained upon filing the costs certificate); *Seiwa Australia Pty Ltd v Seeto Financial Circumstances Pty Ltd (No 2)* [2010] NSWSC 118; *Simmons v Colly Cotton Marketing Pty Ltd* [2007] NSWSC 1092; *Lucantonio v Kleinert (Costs)* [2011] NSWSC 1642 at [26]–[29].

For actions commenced on or after 24 November 2015, CPA s 101 now provides that interest runs on a costs order at the prescribed rate from the date of the order (unless stated otherwise in the court order): s 101(4) and (5). This means that, for actions commenced on or after 24 November 2015, interest on costs from the date of the order is the default position, but the court retains a discretion to otherwise order — including to order that interest run from an earlier date. If the court does so (which may well be appropriate if the party entitled has been paying its lawyers throughout), then rather than invoking the complex *Lahoud* formula, although it is in principle impeccable, it is preferable to adopt an approach analogous to that used for interest on damages and select an approximate mid-point from which interest will run.

[8-0190] Appeals

Leave to appeal is required for appeals to the Court of Appeal on a question of costs alone: *Supreme Court Act 1970*, s 101(2)(c). For leave to be granted something more than arguable error is necessary; there must be "an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable": *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235 at [46]; see, eg, *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]–[38]; *The Age Company Ltd v Liu* (2013) 82 NSWLR 268 at [13]; and *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [28].

If a trial judge's exercise of discretion in relation to costs miscarries, the costs order may be set aside and the Court of Appeal may then exercise the discretion afresh: *McCusker v Rutter* [2010] NSWCA 318; *State of NSW v Quirk* [2012] NSWCA 216 at [165]–[181] (factors justifying appellate intervention), or remit the matter to the trial judge for redetermination.

As to costs on appeal generally, see *Dal Pont*, Ch 20.

Applications for payment from the Suitors' Fund Act 1951

The *Suitors' Fund Act* makes provision for payments to relieve litigants of the burden of costs arising out of erroneous decisions of lower courts. The legislation generally applies in the context of appeals, which include proceedings for judicial review: *Ex Parte Parsons; Re Suitors' Fund Act* (1952) 69 WN (NSW) 380; *Lou v IAG Limited t/as NRMA Insurance* [2019] NSWCA 319, from a decision of a court or tribunal, which includes a claims assessor under the *Motor Accidents Compensation Act*: *Australia Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497 at 513–4; *Lou v IAG Limited t/as NRMA Insurance*. Certificates have been granted in the District Court in the course of judgments handed down after hearing appeals from tribunals: *Perla v Danieli* [2012] NSWDC 31; *Patel v Malaysian Airlines Australia Ltd (No 2)* [2011] NSWDC 4, and a Local Court appeal: *Jolly v Houston* (2009) 10 DCLR (NSW) 110. See *Dal Pont*, Ch 21.

[8-0200] Precedent costs orders

The following are recommended forms to be adopted in making costs orders:

- **Precedent 8.1 — Final costs order** (where the plaintiff succeeds): *that the defendant pay the plaintiff's costs*.
- **Precedent 8.2 — Final costs order** (where the defendant succeeds): *that the plaintiff pay the defendant's costs* **OR** *that there be judgment for the defendant, with costs* **OR** *that the proceedings be dismissed, with costs.*

- **Precedent 8.3 — Bullock order** (where the plaintiff succeeds against the first defendant but fails against the second defendant): (1) *that the plaintiff pay the second defendant's costs;* (2) *that the first defendant pay the plaintiff's costs, including any costs which the plaintiff is liable to pay the second defendant under the preceding order.*
- **Precedent 8.4 — Sanderson order** (where plaintiff succeeds against first defendant but fails against second defendant): (1) *that the first defendant pay the plaintiff's costs;* (2) *that the first defendant pay the second defendant's costs.*
- **Precedent 8.5 — Ordinary order where plaintiff succeeds against single or multiple defendants:** *that the defendant(s) pay the plaintiff's costs.*
- **Precedent 8.6 — Apportionment:** *that the defendant pay 80% of the plaintiff's costs.*
- **Precedent 8.7 — Indemnity costs from date of offer of compromise:** *that the defendant pay the plaintiff's costs, on the ordinary basis until <date> and thereafter on the indemnity basis.*
- **Precedent 8.8 — Family Provision** (where the plaintiff succeeds): (1) *that the defendant pay the plaintiff's costs;* (2) *that the defendant be entitled to be indemnified out of the estate in respect of the defendant's costs, including the costs payable to the plaintiff under the preceding order.*
- **Precedent 8.9 — Forthwith:** *"... such costs to be payable forthwith".*
- **Precedent 8.10 — no order as to costs:** It is inappropriate to make an order that a party pay its own costs: *Liverpool City Council v Estephan* [2009] NSWCA 161 at [75]. However, parties often desire some express provision to make clear that there is no associated costs liability; this may be addressed by a notation: *"It is noted that there is no order as to costs, to the intent that each party bear its own costs".*

Legislation

- CPA ss 3, 5(1), 56–60, 98, 99, 101
- *Children and Young Persons (Care and Protection) Act 1998* s 88
- *Civil Liability Act 2002* s 35A
- *Defamation Act 2005* (NSW) s 40
- *Family Law Act 1975* (Cth) s 117(2)
- *Legal Profession Act 2004* (rep)
- Legal Profession Uniform General Rules 2015
- *Legal Profession Uniform Law Application Act 2014* Sch 2, ss 59, 61
- *Legal Profession Uniform Law Application Regulation 2015*
- *Motor Accidents Compensation Act 1999* Ch 6
- *Property (Relationships) Act 1984*
- *Succession Act 2006* s 99
- *Suitors Fund Act 1951*
- Workers Compensation Regulation 2016 Pt 17
- *Workplace Injury Management and Workers Compensation Act 1998* ss 112, 250, 318B, 346

Rules

- UCPR rr 16.9, 36.10, 36.16, 42.2, (former) 42.3, 42.4, 42.5, 42.7, 42.14, 42.15, 42.24, 42.25, 42.27, 42.34 and 42.35

Further references

- G Dal Pont, *Law of Costs*, 4th ed, LexisNexis Butterworths, 2018
- Ritchie's Uniform Civil Procedure NSW (LexisNexis Butterworths)
- JP Hamilton, G Lindsay,and C Webster, General Editors, *NSW Civil Procedure Handbook* 2023, Lawbook Co, 2023
- MJ Beazley, "Calderbank offers 2", paper delivered at the "'Without prejudice' offers and offers of compromise" NSW Young Lawyers Civil Litigation Committee Seminar, 26/9/2012
- MJ Beazley, "Calderbank offers", paper delivered at the Australian Lawyers Alliance Hunter Valley Conference, 14–15 March 2008
- JP Hamilton, "Containment of costs: litigation and arbitration", 1/6/2007
- Costs Assessment Rules Committee, "Guideline: costs payable between parties under court orders", Supreme Court of New South Wales website, 25/5/2023.

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Stay of execution

[9-0000] Introduction

As to "Stay of pending proceedings" see [2-2600]–[2-2640].

The Supreme Court has inherent power to stay execution of a judgment or order "in any situation where the requirement of justice demands it": *Tringali v Stewardson Stubbs & Collett Pty Ltd* [1966] 1 NSWR 354 at 360.

However, all CPA courts have wide powers under the CPA and UCPR to stay execution where appropriate. See, *Secretary of the Treasury v Public Service Association & Professional Officers' Association Amalgamation Union of New South Wales* [2014] NSWCA 14.

Civil Procedure Act 2005 s 67 confers a general power on the court, subject to the UCPR, to stay proceedings either permanently or until a specified day.

The court may, by order, give directions with respect to the enforcement of a judgment or order: CPA s 135(1). It may make an order prohibiting the Sheriff from taking any further action on a writ or prohibiting any other person from taking any further action, either permanently or until a specified day, to enforce a judgment or order of the court: CPA s 135(2).

[9-0010] Pending appeal

An application (summons) for leave to appeal or an appeal to the Court of Appeal does not operate as a stay of proceedings under the decision below, or invalidate any intermediate act or proceedings: UCPR r 51.44(2). Subject to the filing of appropriate process, the Court of Appeal may order that the decision below or the proceedings under the decision be stayed: UCPR r 51.44(1).

Generally, an application for a stay pending appeal is made, in the first instance at least, to the trial judge: see *Ritchie's* at 51.44.10.

An appeal from an Associate Judge to the Supreme Court, other than to the Court of Appeal, does not operate as a stay unless the Supreme Court or the associate Judge, subject to any direction of the Supreme Court, so directs: UCPR r 49.10.

Other than as provided by particular statutes, for example, *Companion Animals Act 1998* s 24, an appeal from a tribunal to the Supreme Court does not operate as a stay with similar exceptions: UCPR r 50.7.

[9-0020] Principles governing stays

The former requirement that the applicant was only able to deny the judgment creditor the "fruits of victory" when "special" or "exceptional" circumstances warranted the imposition of a stay pending appeal no longer applies in New South Wales. It is sufficient that the applicant for the stay demonstrate a reason or an appropriate case to warrant favourable exercise of the discretion: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694.

The court judgment in that case at 694–695 enumerates a number of other relevant principles:

- The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties.
- The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.

- The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties.
- Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may refuse a stay.
- Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay.
- The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.
- As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security — see discussion at 695.

In *Woolworths Ltd v Strong (No 2)* (2011) 80 NSWLR 445, Campbell JA referred, at [68], to the importance of the "usual practice" of staying judgments pending appeal where there is a risk that the plaintiff will be unable to repay the money without difficulty or delay if the appeal were to succeed. See also *TCN Channel 9 Pty Ltd v Antoniadis (No 2)* (1999) 48 NSWLR 381 at [15], [16].

[9-0030] Set offs or cross-claims

The existence of set off or cross-claim may, in appropriate circumstances, provide grounds for a stay of execution. The above mentioned principles are relevant to a consideration of those circumstances. See the cases cited in *Ritchie's* at [s 135.5]. The ability to pay is an important factor: *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* [2004] NSWSC 344.

Further, an indemnity, whether raised by way of cross-claim or not, may provide such a ground: *State Bank of Victoria v Parry* [1989] WAR 240 and see discussion in *Lewis v Lamb* [2004] NSWSC 322 at [6]–[9].

[9-0040] Particular applications

District Court Act 1973 s 128

If, after judgment in an action, the court orders that the proceedings be stayed during the period within which an appeal may be brought, and an appeal has been brought and security is given to the satisfaction of the Registrar for the judgment and costs, the stay continues until the appeal is disposed of or until the court or Supreme Court otherwise orders: s 128(1) and (2).

An appeal does not operate as a stay in any other way: s 128(3).

Summary judgment

Where the court gives summary judgment to a plaintiff under r 13.1 against a party, if that party has made a cross-claim against the plaintiff, the court may stay enforcement of the judgment until determination of the cross-claim: r 13.2.

Payment by instalments

Where a court makes an order that a judgment order allowing for payment of a judgment debt within a specified time or by instalments, the judgment is stayed while the order is in force: CPA s 107(2). Also see s 119 as to garnishee orders.

Where an application for an instalment order is made, the judgment is stayed until the application is determined or, if refused, an objection to that refusal is determined: r 37.5.

[9-0050] Sample Orders

I grant a stay of proceedings for a period of twenty eight days upon the filing of a notice of appeal and upon payment to the plaintiff of the sum of $ X within the said period of twenty eight days. I order that stay to be continued until the appeal so initiated is disposed of or until the court or the Court of Appeal otherwise orders.

Note 1: Whether any payment should be ordered and, if so the amount thereof, will depend upon the circumstances. Payment is more likely where the appeal is expected to be primarily directed to the quantum of damages awarded.

Note 2: In respect of District Court actions, s 128 provides for continuation of the stay.

Note 3: Orders are sometimes made that the appeal be pursued with diligence.

Note 4: Other terms may be added as appropriate.

Legislation

- CPA ss 67, 107(2), 119, 135(1), 135(2)
- *Companion Animals Act 1998* s 24
- *District Court Act 1973* s 128(1), (2)

Rules

- UCPR rr 13.1, 13.2, 37.5, 49.10, 50.7, 51.44

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Enforcement of local judgments

[9-0300] Introduction

The enforcement of judgments or orders is dealt with in Pt 8 (ss 102–138) of the CPA. Section 103 provides that subject to that Part, the procedure for enforcing a judgment or order of the court is to be as prescribed by the rules of court. The relevant rules are set out in Pt 39 of the UCPR. Further, Pt 37 provides for time to pay or payment by instalments and Pt 38 provides for the examination of judgment debtors.

This chapter is not exhaustive and deals only with selected topics. For the detailed provisions and general discussion, see *Ritchie's* pp 2771–2831, 8447–8612; *Thomson Reuters* pp 10001–12006, 55501–59006.

Nothing in Pt 8 limits the manner in which a judgment or order may be enforced, apart from the CPA. Nor does the Part limit the issue of consecutive writs for the levy of property against the same judgment debtor, or the making of consecutive garnishee orders or successive charging orders in respect of the same judgment debtor in respect of the same judgment debt: s 138(2)(a). Further, the Part does not limit the making of concurrent garnishee orders against different garnishees or consecutive garnishee orders against the same garnishee in respect of the same judgment debt.

Thus a Supreme Court judgment for payment of money may also be enforced by the appointment of a receiver or the sequestration of the judgment debtor's property: r 40.2.

[9-0310] Methods of enforcement of judgments

Judgments for possession of land in the Supreme or District Courts may be enforced by a writ of possession: s 104, UCPR Forms 47 and 50.

Judgments for delivery of goods may be enforced by a writ of delivery: s 105, Forms 48, 51.

Judgments for the payment of money may be enforced by:

- A writ for the levy of property: s 106(1)(a), Forms 49, 52
- A garnishee order: s 106(1)(b), Forms 53, 54, 55 or
- In the Supreme or District Courts, a charging order: s 106(1)(c), Forms 56, 57.

[9-0320] Writ for the levy of property

A writ of execution against goods binds the property in the goods from the time the writ is delivered to the sheriff: s 109(1). However, an acquirer in good faith and for valuable consideration is protected unless aware of the delivery of the writ and that it remains unexecuted: s 109(2).

A writ of execution against land binds the land, as from the time the writ is delivered to the Sheriff, in the same way as a writ of execution against goods binds the property in the goods: s 112(1). However, the writ does not affect the title of an acquirer in good faith and for valuable consideration unless aware of the delivery of the writ and that it remains unexecuted: s 112(2).

In *Garnock v Black* (2006) 66 NSWLR 347 cited by *Ritchie's* at [s 112.5]–[s 112.10] and *Thomson Reuters* at [s 112.20], it was held that s 112(2) protected a purchaser who, in good faith for valuable consideration and without notice, entered into a contract of purchase of the land and thus acquired an equitable interest in the land. However, by majority the High Court has recently upheld an appeal against that decision: *Black v Garnock* (2007) 230 CLR 438. Such an interest is not protected by s 112(2).

It should be noted that a judgment in any action does not of itself bind or affect any land: s 112(3).

The restrictions upon and procedure for the sale of land is set out in s 106(3) and rr 39.21–39.28.

[9-0330] Priority of writs

Writs for the levy of property against the same judgment debtor are to be enforced by the Sheriff in the order in which they are received by the Sheriff: r 39.4, and see *Ritchie's* [39.4.5]–[39.4.15] and *Thomson Reuters* [r 39.4.20]–[r 39.4.40].

[9-0340] Disputed property

If the Sheriff takes or intends to take possession of any disputed property, a claimant in respect of the property, or the proceeds of sale or value of the property, may give notice of the claim to the sheriff: r 43.3, Form 58.

As to what follows, see [2-3020] Sheriff's interpleader.

[9-0350] Garnishee orders

Subject to the UCPR, a garnishee order operates to attach, to the extent of the amount outstanding under the judgments, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order: s 117.

Money held in a financial institution to the credit of the judgment debtor is taken to be a debt owed by the judgment debtor by that institution: s 117(2).

As to debts capable of being the subject of a garnishee order, see *Ritchie's* [s 117.5]–[s 117.30], *Thomson Reuters* [s 117.40].

Subject to ss 121 and 122 and the UCPR a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, any wage or salary payable by the judgment debtor by the garnishee while the order is in force: s 119(1)(a). The order ceases to have effect when the judgment is satisfied: s 119(3). An instalment order limits the amount payable: s 119(1)(b).

As to limitations as to amount, see ss 121, 122. See also r 39.35.

The amounts under one or more garnishee orders must not, in total, reduce the amount of the aggregate debt due to less than $447.70: s 118A.

As to matters which should be disclosed on an ex parte application for a garnishee order, see *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53.

[9-0360] Garnishee orders against public servants

A garnishee order that attaches to wages or salary binds the Crown in respect of New South Wales but not in respect of the Commonwealth: s 119(4).

The *Attachment of Wages Limitation Act 1957* which provided an alternative means of deducting money from the wages of NSW government employees has been repealed.

Section 75 of the *Public Service Act 1999* (Cth) governs the procedure for applying for a garnishee order against the wages or salary of a Commonwealth public servant.

[9-0370] Time within which garnishee required to make payment

Where a garnishee order relates to a debt, payment must be made within 14 days after service of the order or, if the debt falls due after that date, within 14 days after the due date: s 118.

Where a garnishee order relates to wages or salary, payment must be made within 14 days of the wage or salary falling due.

[9-0380] Payments by garnishee

The garnishee must pay the money directly to the judgment creditor: s 123. The garnishee may, after the payment of each amount under the garnishee order, retain up to the amount prescribed to cover the garnishee's expense: s 123(2). If sufficient funds are not available to cover the prescribed amount (currently $13.00) the garnishee may retain that amount as soon as sufficient funds become available: s 123(2A). However the above retention is not available where the garnishee order is in relation to a judgment debt the subject of an instalment order: r 39.42 and Sch 3.

A payment to the judgment creditor must be accompanied by a statement showing:

(a) the amount attached under the garnishee order,

(b) how much of that amount has been retained by the garnishee, and

(c) how much of that amount has been paid to the judgment creditor: s 123(3).

As between the garnishee and the judgment debtor, the amount attached under the garnishee order is taken, subject to any order of the court, to have been paid by the garnishee to the judgment debtor: s 123(4).

A note to the subsection gives as an example of the making of such an order that the garnishee has failed to comply with the requirements of subsection (3).

As between the judgment creditor and the judgment debtor, the amount of the payment to the judgment creditor is taken to have been paid by the judgment debtor in satisfaction, to the extent of that amount, of the judgment: s 123(5).

Thus any amount retained by the garnishee for administrative expenses does not operate to reduce the judgment debt.

[9-0390] Failure to comply with garnishee order

If a garnishee fails to comply with a garnishee order, the judgment creditor may apply by notice of motion for judgment against the garnishee for the amount of the debt, wage or salary, or for the unpaid amount of the judgment debt (whatever is the lessor): s 124(1).

As between the garnishee and the judgment debtor payment pursuant to such a judgment counts as a payment by the garnishee to the judgment debtor: s 124(4).

The court may vary or suspend the making of payments by the judgment debtor, upon the application of the judgment debtor, at any time if satisfied that it is appropriate: s 124A.

[9-0400] Disputed liability of garnishee

A garnishee who believes that there is no debt or no wage or salary due or accruing may serve on the judgment creditor a statement to that effect verified by affidavit: r 39.40(1).

On an application by the judgment creditor under s 124 the court may hear and determine any question as to the liability of the garnishee and, if satisfied, give judgment against the garnishee: s 124(1).

The court may refuse to give such a judgment if it is of the opinion that such judgment should not be given: s 124(2).

The smallness of the amount outstanding and the smallness of the debt, wage or salary to be attached could be reasons for such an opinion: s 124(3).

As to the defences available to the garnishee, see *Ritchie's* [s 117.10]–[s 117.30], [39.40.5], *Thomson Reuters* [s 117.40].

Where the garnishee claims that some person, other than the judgment debtor, may be entitled to the moneys garnisheed or have a charge or lien on, or other interest therein, the court may hear and determine that claim and give judgment, or make orders as the nature of the case requires: see *Ritchie's* [39.41.5], *Thomson Reuters* [r 39.41.40].

[9-0410] Charging orders

In proceedings in the Supreme and District Courts, a judgment creditor may apply for a charging order by filing a notion of motion: s 106(1), r 39.44. Unless the court orders otherwise, the notice of motion may be dealt with in the absence of the parties (r 39.44(2)(a)) and need not be served: r 39.44(2)(b).

The charge can extend to property being stocks and shares in a public company, money on deposit in a financial institution being money held in the judgment debtors own right or in the name of some other person in trust for the judgment debtor, or any equitable interest in property: s 126(1).

Subject to the UCPR, a charging order operates to charge the property in favour of the judgment creditor to the extent necessary to satisfy the judgment, and to restrain the chargee from dealing with the property otherwise than in accordance with the directions of the judgment creditor: s 126(2).

A charging order takes effect when it is made: s 126(3). However the judgment creditor cannot take proceedings to take the benefit of the charge for 3 months: s 126(4).

A charging order entitles the judgment creditor, in relation to the property charged, to any relief to which the judgment creditor would have been entitled had the charge been made in the judgment creditor's favour by the judgment debtor: s 126(5).

A chargee or other person having notice of the charge, dealing with the property otherwise then in accordance with the directions of the judgment creditor is liable to the judgment creditor to satisfy the judgment but not beyond the value of the property: s 127(1).

A purported transfer or disposal by the judgment debtor of the property charged, other than in accordance with the directions of the judgment creditor, is of no effect as against the judgment creditor: s 128.

Where the judgment was entered as the result of the filing of a costs certificate, r 39.45(b) should be considered.

[9-0420] Additional provisions for enforcement — Supreme Court only

In addition to other means of enforcement, a judgment for the payment of money, including into court, may be enforced by appointment of a receiver of the income of the person bound by the judgment and/or by sequestration of the property of that person: r 40.2(1).

See *Ritchie's* [40.2.5]–[40.2.20] and *Thomson Reuters* [r 40.2.40].

A writ of sequestration may not be issued except by leave of the court: r 40.3(1). An applicant must file a notice of motion and serve the notice and any supporting affidavit personally on the person where property is sought to be sequestrated: r 40.3(2). Service may be dispensed with: r 40.3(3).

See *Ritchie's* [40.3.5]–[40.3.15] and *Thomson Reuters* [r 40.3.40]–[r 40.3.60].

[9-0430] Additional provisions for enforcement — Supreme and District Courts

Part 40 div 2 applies to judgments of the Supreme Court or District Court and relates to matters in addition to those dealt with in Pt 8 of the CPA.

A judgment or order is not enforceable against a person by attachment or committal of the person: s 130. However, nothing in the Act or UCPR permits or otherwise affects the power of the court to attach or commit a person for contempt: s 131.

Part 40, div 2 deals with such committals and also sequestration.

Rule 40.6 applies where:

(a) a judgment requires a person to do an act within a specified time and the person fails to do the act within that time or, if the time is extended or abridged, within that time as extended or abridged;

(b) a judgment requires a person to do an act forthwith, or forthwith on a specified event and the person fails to do the act as required; or

(c) a judgment requires a person to abstain from doing an act and the person disobeys the judgment,

but does not apply to a judgment for the payment of money (including into court).

Where the rule applies the judgment may be enforced by one or more of the following means:

(a) committal of the person bound by the judgment;

(b) sequestration of the property of the person bound by the judgment;

(c) if the person bound by the judgment is a corporation:

(i) committal of any officer of the corporation; and

(ii) sequestration of the property of any officer of the corporation.

See *Ritchie's* [40.6.5]–[40.6.15], *Thomson Reuters* [r 40.6.40]–[r 40.6.80].

A judgment is not enforceable by committal or sequestration unless a sealed copy is served personally and, if the judgment requires the person to do an act within a specified time, the sealed copy is served within that time or its extension or abridgment: r 40.7(1).

If the person is a corporation, the judgment is not enforceable by committal of an officer of the corporation or by sequestration of the property of an officer of the corporation, unless in addition to service under subrule 1 a sealed copy is served personally on the officer and, if the judgment requires the corporation to do an act within a specified time, the sealed copy is served before the time expires: r 40.7(2).

The sealed copy must set out the material nominated in r 40.7(3). Service is not necessary in the circumstances set out in r 40.7(4) and may by dispensed with by the court: r 40.7(5).

See *Ritchie's* [40.7.5]–[40.7.10], *Thomson Reuters* [40.7.40].

[9-0440] Substituted performance

If a judgment requires a person to do an act, and the person does not do the act, the court may direct that the act be done by a person appointed by the court and order the person to pay the costs.

Usually the person nominated by the court is the Registrar.

[9-0450] Security for future conduct

Where the court, for the purpose of security for future conduct, requires a payment into court of the ways set out in r 40.4(1), it must, by order, specify the circumstances in which money paid is to be forfeited, returned or otherwise disposed of, or specify the circumstances in which the order for the payment of money may be made.

Where the court, for the purpose of security for future conduct, requires submission by a person to an order for a payment into court in any of the ways set out in r 40.4(2), it must, by order, specify the circumstances in which the order for payment may be made and may, by order, specify the manner in which the submission is to be made.

Legislation

- *Attachment of Wages Limitation Act 1957*
- *Civil Procedure Act 2005* ss 102–138
- *Public Service Act 1999* (Cth) s 75

Rules

- UCPR Pts 37, 38, 39, rr 40.2, 40.4, 40.7

Forms

- Forms 47–58

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Enforcement of foreign judgments

[9-0700] Introduction

Foreign judgments, that is judgments pronounced by a judicial tribunal other than a New South Wales tribunal, are recognised and enforced by New South Wales courts subject to certain specific requirements.

The requirements for enforcement at common law are conveniently set out in Chs 9 and 11 of *Nygh's Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney.

It is not proposed to deal with the common law position in this section as, for practical purposes, the field is now covered by two legislative provisions. The statutory regime applies where a country has been designated as a jurisdiction of substantial reciprocity under the Regulations to the *Foreign Judgments Act 1991* (Cth). For example, decisions of Chinese courts may be enforceable in Australia under the common law procedure for the enforcement of foreign judgments: see *Bao v Qu; Tian (No 2)* (2020) 102 NSWLR 435 at [23]–[30]. Certain exceptions are referred to below at [9-0770].

Since 10 April 1993 any judgment given in Australia including in the external territories, before or after that date, must be enforced under Pt 6 of the *Service and Execution of Process Act 1992* (Cth).

Judgments given outside Australia must be enforced under the *Foreign Judgments Act 1991* (Cth) if they fall within the scope of that Act: s 10.

Certain New Zealand judgments can only be enforced in accordance with the provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) as to which see "Trans-Tasman proceedings" at [5-3580]–[5-3650].

[9-0710] The Service and Execution of Process Act 1992 (Cth)

The Act extends to territories including external territories: ss 5, 7.

Upon lodgment of a sealed copy of a judgment, or a fax in the appropriate court of another State the proper officer of that court must register the judgment: s 105(1).

Subject to what follows, the judgment has the same force and effect as if the judgment had been made by the court in which it is registered: s 105(2)(a).

It may, subject to ss 106 and 108, give rise to the same proceedings by way of enforcement as if made in that court: s 105(2)(b).

Section 106 provides that the court may, on application, order that proceedings for enforcement not be commenced until a specified time or be stayed for a specified period: s 106(1). Such an order must be subject to conditions that, within a period specified in the order, there be an appropriate application for relief and that the application be prosecuted in an expeditious manner: s 106(2)(a). Appropriate relief is an application to set aside, vary or appeal against the judgment made to a court with jurisdiction in the State where the judgment was given: s 106(3). The court may also impose other conditions including provision of security: s 106(2)(b).

This section supports the view, considered the better one, that the court has no jurisdiction to vary the original judgment: see *Bell v Bell* (1954) 73 WN (NSW) 7.

Section 108 provides that interest is payable as in the State of the judgment, and that the judgment creditor must satisfy the court in the enforcement proceedings as to the appropriate amount.

If the copy of the judgment is lodged by fax, a sealed copy is to be lodged within 7 days after the fax is lodged: s 105(3). If that is not done, a proceeding to enforce the judgment is not to be commenced or continued without the leave of the court until the sealed copy is lodged: s 105(4).

A judgment is capable of being enforced only if, and to the extent that, at the time when the proceeding for enforcement is taken, the judgment is capable of being enforced in or by the original court or another court in that State: s 105(5).

The appropriate court means, if the original court were a Supreme Court, the Supreme Court, otherwise the court by which relief as given by the judgment could have been given. If there is more than one such court, the one of more limited jurisdiction is the appropriate court. If there is no such court, the Supreme Court is the appropriate court: s 105.

Costs of enforcement are provided for in s 107.

Section 109 provides that the court must not, merely because of the operation of the rule of private international law, refuse to permit proceedings by way of enforcement to be taken or continued.

[9-0720] Procedure — Supreme Court

An application under s 105(4) is required to be commenced by Summons: SCR Pt 71A r 2. The summons need not be served unless the court otherwise orders: Pt 71A r 4.

An affidavit must be filed, sworn not more than 14 days before proceedings for the enforcement of a registered judgment are taken, stating that the judgment is capable of being enforced and the extent to which the judgment is capable of being enforced in or by the original court or another court in that State: Pt 71A r 6.

The court may notify the Sheriff of any change in the rate of interest: Pt 71A r 6(2).

Costs and expenses under s 107(1) shall be assessed by the court. This may be done without service of the relevant affidavit, in the absence of the public and without attendance by the plaintiff: Pt 71A r 7. The supporting affidavit must contain particulars of the costs and expenses claimed and state the basis upon which they are claimed: Pt 71A r 7(2).

[9-0730] Procedure — District and Local Courts

In proceedings for the enforcement of a registered judgment the court will require evidence that the judgment is capable of being enforced and of the extent to which it is capable of being enforced.

Evidence may also be required on cost and interest issues.

[9-0740] Foreign Judgments Act 1991 (Cth)

For a fuller treatment see *Conflict of Laws*, above, Ch 10.

This legislation does not apply to the enforcement of interstate judgments. However, a duly registered judgment under the Act may be registered in the Supreme Court of another State or Territory under Pt 6 of the *Service and Execution of Process Act 1992* (Cth).

The legislation applies to the superior courts of specified countries: s 5(1). If the superior courts are specified as such they are taken to be superior courts, however, failure to specify a particular court does not imply that the court is not a superior court: s 5(2). The legislation also applies to specified inferior courts of those countries: s 5(3).

For a list of the specified countries and courts, see *Foreign Judgments Regulations* 1992, as amended.

The judgment to be enforced must be an enforceable money judgment that is final and conclusive and was given in a superior court of a country in relation to which the legislation applies or an inferior court to which it applies: s 5(4).

A judgment is taken to be final and conclusive even though an appeal may be pending against it or it may still be subject to appeal: s 5(5).

The legislation provides for extension by regulation to prescribed non-money judgments of specified countries, however, no such regulation has been made.

Judgments for taxes, fines and penalties are excluded except in relation to certain New Zealand and Papua New Guinea tax matters. See *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* (2014) 85 NSWLR 404.

For the registration of a foreign judgment against a foreign State, or a separate entity of a foreign State, see the *Foreign States Immunities Act 1985* (Cth), s 11. For a detailed discussion of the application of the *Foreign States Immunities Act 1985* (Cth) to proceedings under the *Foreign Judgments Act 1991* (Cth), see *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.

[9-0750] Procedure

A plaintiff who has obtained a judgment of the relevant kind may apply to the Supreme Court for registration of the judgment: s 6(1). The application must be made within 6 years after the date of the judgment or the determination of any appeal: s 6(1).

Conflict of Laws at p 201 states that this period may be extended under s 6(5), however it is arguable that s 6(5) applies to an application under s 6(4), as to which see below, and not to s 6(1).

Subject to the Act and proof of matters prescribed by Rules of Court the Supreme Court is to order the judgment to be registered: s 6(3).

The Act provides that the judgment is not to be registered if, at the date of the application, it has been wholly satisfied, or it could not be enforced in the country of the original court: s 6(6).

UCPR r 53.3 sets out the evidence required in support of an application for registration. The application is made by summons joining the judgment creditor as plaintiff and the judgment debtor as defendant: r 53.2. Unless the court otherwise orders the summons need not be served: r 53.2(3).

When making the order for registration the court must specify the period in which an application may be made to set the registration aside: s 6(4). That period may be extended: s 6(5).

The registered judgment may be enforced and carries interest as if the judgment had originally been given and entered in the Supreme Court on the date of registration: s 6(7).

Rule 53.6(1) provides that a notice of the registration must be served on the judgment debtor. Service must be personal except where the judgment debtor has entered an appearance, is in default of appearance or the court otherwise orders. The notice of registration must inform the judgment debtor of his right to apply to set aside the registration or seek a stay of the judgment: r 53.6(3).

Once registered and subject to allowing time for an application to set aside to be made and determined, the judgment may be enforced as a judgment of the court: r 53.8. Before any step is taken for enforcement, an affidavit of service of the notice of registration must be filed or the court otherwise satisfied of service: r 53.8(2).

An application to set aside should be made by notice of motion. Section 7(2)(a)(i)–(xi) provides that the court is obliged to set the registration aside if it is satisfied:

(i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or

(iii) that the judgment was registered in contravention of this Act; or

(iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or

(vi) that the judgment was obtained by fraud; or

(vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or

(viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or

(ix) that the judgment has been discharged; or

(x) that the judgment has been wholly satisfied; or

(xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; …

Registration is only required to be set aside under s 7(2)(a)(v) of the *Foreign Judgments Act* if insufficient notice was given so as to have prevented the judgment debtor from having an opportunity to defend the matter: *Nyunt v First Property Holdings Pte Ltd* [2022] NSWCA 249 at [101]; [154].

The court may set the registration aside if it is satisfied that the matter in dispute had been the subject of a final and conclusive judgment by a court having jurisdiction in the matter before the judgment was given: s 7(2)(b). If a matter has been litigated through to finality in one jurisdiction, that *may* preclude litigation in another forum (even one that has been contractually, albeit non-exclusively, chosen by the parties), but that will typically be because of the operation of doctrines of res judicata, issue estoppel and/or abuse of process: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [36]; *Nyunt v First Property Holdings Pte Ltd*, above, at [87]–[88]; [154].

As to the question of jurisdiction, reference should be made to the criteria set out in s 7(3)–(5). The focus of s 7(3)(a)(iii), which provides that a court will be taken to have jurisdiction where the judgment debtor had agreed, in respect of the subject matter of the proceedings, to submit to the court's jurisdiction, is on what the judgment debtor had agreed to prior to the commencement of the foreign proceedings, and not on any conduct of the judgment creditor: *Nyunt v First Property Holdings Pte Ltd*, above, at [73]; [154].

[9-0760] Stay of enforcement of registered judgment

If the court is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, the court may order a stay: s 8(1). If the appeal has not been made, the court must specify a time for it to be made: s 8(1). A condition of pursuing the appeal in an expeditious manner is imposed (s 8(3)), and other conditions may be imposed: s 8(4).

[9-0770] Exceptions

Non-money judgments are not, presently, covered by the legislative scheme, and must be enforced at common law. See *Conflict of Laws*, above. Also see s 104 of the *Family Law Act 1975* (Cth).

Legislation

- *Family Law Act 1975* (Cth) s 104
- *Foreign Judgments Act 1991* (Cth) ss 5, 6, 7, 8, 10
- *Foreign Judgments Regulations 1992* (Cth)
- *Foreign States Immunities Act 1985*, s 11

- *Service and Execution of Process Act 1992* (Cth) ss 5, 7, Pt 6
- *Trans-Tasman Proceedings Act 2010* (Cth)

Rules

- SCR Pt 71A
- UCPR Pt 53

References

- A Bell, "Private international law in practice across the divisions: some recent developments and case law" (2020) 14 *TJR* 229
- M Davies et al, *Nygh's Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney
- D Butler, "Enforcement of foreign judgments: does an issue estoppel arise from a foreign court's determination of its own jurisdiction?" (2019) 93 *ALJ* 558.

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Contempt

para

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Contempt in the face of the court

Acknowledgement: the following material was originally prepared by Mr David Norris, formerly of the Crown Solicitor's Office, NSW, who reviewed the chapter in May 2024. The material is otherwise updated by Judicial Commission staff.

Jurisdiction to deal with contempt in the face of the court

[10-0000] Supreme Court

The power to punish contempt in the face of the court is part of the inherent jurisdiction of the Supreme Court: *The King v Metal Trades Employers Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 241–243.

Proceedings for contempt in the face or hearing of the Supreme Court are assigned to the Division of the court (or the Court of Appeal, as the case may be) in which the contempt occurred: SCA ss 48(2)(i), 53(3)(a).

SCR Pt 55 sets out the procedure to be followed by the Supreme Court in prosecuting contempts of the court or of any other court.

[10-0010] District Court

The District Court has power to punish contempt of court committed in the face of the court or in the hearing of the court: DCA s 199.

[10-0020] Dust Diseases Tribunal

The Dust Diseases Tribunal has the same powers for punishing contempt of the Tribunal as are conferred on a judge of the Supreme Court for punishing contempt of a Division of the Supreme Court: s 26 of the *Dust Diseases Tribunal Act 1989*.

[10-0030] Local Court

The Local Court has the same powers as the District Court in respect of contempt of court committed in the face or hearing of the court: LCA s 24(1).

[10-0040] Meaning of contempt in the face of the court

There is a divergence of views (all obiter) as to the meaning of "contempt in the face of the Court … or in the hearing of the Court".

The narrow view is that the jurisdiction is restricted to conduct seen or heard by the judge: see, for example, *Fraser v R* [1984] 3 NSWLR 212 per Kirby P and McHugh JA. The wider view is that it extends to conduct, without geographic boundaries, "… which is sufficiently proximate in time and space to the trial of proceedings then in progress or imminent so as to provide a present confrontation to the trial": *Court of Appeal, Registrar of the v Collins* [1982] 1 NSWLR 682 at 684. Either view would appear to be open: *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 per Priestley JA at 463.

[10-0050] Alternative ways of dealing with contempt in the face of the court

Where the judge has formed the view that there has been a contempt in the face or hearing of the court, he or she should consider the following alternatives to a summary charge, bearing in mind the seriousness of the conduct and the degree of urgency involved, namely:

- whether a warning or reprimand would be sufficient
- whether, in cases of disruption of proceedings, the person should be excluded from the court
- whether, if the conduct involves a legal practitioner, the conduct should be made the subject of a complaint under Pt 5.2 *Legal Profession Uniform Law* (NSW)

- whether the matter should be referred to the DPP for consideration if a statutory offence has been committed; for example, perjury where the conduct consists of a constructive refusal to answer questions by an alleged inability to remember (see *Commissioner for the Police Integrity Commission v Walker (No 2)* [2006] NSWSC 696) or offences involving the threatening of judicial officers, witnesses or jurors: *Crimes Act 1900* ss 320–326, or
- whether, in the case of disrespectful behaviour in court, the matter should be referred to the Attorney General for prosecution of a statutory offence under SCA s 131, *Land and Environment Court Act 1979* s 67A, DCA s 200A, LCA s 24A or *Coroners Act 2009* s 103A,
- whether the registrar should be directed to commence proceedings under SCR Pt 55 r 11(1) or whether the matter may be referred to the Supreme Court under DCA s 203 or LCA s 24(4), as applicable.

The summary jurisdiction of the court to punish for contempt is exceptional and should be exercised with restraint and only in a clear and serious case, in which it is necessary to act immediately: *Keeley v Brooking* (1979) 143 CLR 162 at 173.

An important consideration for a judge in determining whether to use the summary procedure is whether the subject conduct has involved the judge personally in some way: *Attorney-General v Davis and Weldon* (unrep, 23/7/80, NSWCA) at 11. Giving a direction under SCR Pt 55 r 11(1) or referring a matter to the Supreme Court under DCA s 203 or LCA s 24(4) or (5) may be preferable in such cases. It will also overcome any jurisdictional doubt as to whether the conduct was in the face or hearing of the court.

A judge may alternatively refer a possible contempt to the Attorney General for consideration of contempt proceedings.

Procedure for dealing with contempt in the face of the court

[10-0060] Summary hearing before trial judge

SCR Pt 55 Div 2 and s 199 of the DCA set out the procedure for dealing with a summary charge of contempt by the trial judge. The same procedures apply to the Dust Diseases Tribunal (see s 26 of the *Dust Diseases Tribunal Act*) and to the Local Court: LCA s 24. Suggested steps for dealing with such a matter are as follows.

[10-0070] Initial steps

1. Where appropriate, the contemnor should be warned of the risk that the conduct, if persisted in, may constitute contempt, and that the possible penalty may be a fine or imprisonment.
2. The contemnor should be provided an opportunity to apologise and, where possible, (particularly in relation to a refusal to be sworn or to give evidence) an opportunity to reflect and to obtain legal advice.
3. If the contemnor is not present, an oral order should be made directing that the contemnor be brought before the court or, if necessary, a warrant issued for the contemnor's arrest: SCR Pt 55 r 2; DCA s 199(2).
4. If an alleged contempt arises during a jury trial, the jury should be sent out to avoid a risk of prejudice to the accused. In such circumstances, the media should be requested not to report that part of the proceedings conducted in the absence of the jury and warned that to do so may be a contempt.

[10-0080] The charge

Last reviewed: June 2024

5. The contemnor should be orally charged with contempt by the trial judge: SCR Pt 55 r 3; DCA s 199(3)(a). The charge or "gist of the accusation" should be distinctly stated: *Coward v*

Stapleton (1953) 90 CLR 573 at 579, 580; *Macgroarty v Clauson* (1989) 167 CLR 251 at 255;[1] cf *Inghams Enterprises Pty Ltd v Timania Pty Ltd* [2005] FCAFC 155 at [34], cited in *Z v Mental Health Review Tribunal (No 2)* [2022] NSWCA 131, together with *Doyle v Commonwealth* (1985) 156 CLR 510 at 516, in confirming that the charge of contempt "must be distinctly stated" so that the respondent is "given a proper opportunity to answer the charge".

Sample charge

[*Name*], you are hereby charged with contempt of court in that on [*date*] in the [*court*] at [*place*] in proceedings before me between [*names of parties*] [*set out conduct — eg when the witness AB was passing near you on the way to the witness box for the purpose of giving evidence, you loudly said words to the effect "you're fucked"*] and you did thereby conduct yourself in a manner that had a real tendency to interfere with the administration of justice.

[10-0090] Adjournment for defence to charge

Last reviewed: June 2024

6. The contemnor must be permitted an adequate opportunity (which may require an adjournment) to make a defence to the charge: SCR Pt 55 r 3; DCA s 199(3)(b). See *Fraser v R* [1984] 3 NSWLR 212 at 223. A short "cooling off" period may, in any case, lead to the contempt being purged by the contemnor.
7. When adjourning a matter, a contemnor should be informed that, if he or she is eligible, legal aid may be available from the Legal Aid Commission.
8. If the trial judge wishes to obtain the assistance of an amicus curiae for the conduct of the summary hearing, the Crown Solicitor should be contacted for this purpose. The Crown Solicitor will then invite the Attorney General to nominate the Crown Advocate or other counsel to seek leave to appear in this capacity. See, for example, *In the Matter of Reece George Barnes* [2016] NSWSC 133.
9. Pending disposal of the charge, the court may direct that the contemnor be kept in custody or that the contemnor be released subject to conditions such as the giving of security: SCR Pt 55 r 4; DCA s 199(4) and (5). See also s 90 of the *Bail Act 2013*.

[10-0100] Conduct of summary hearing

10. A trial judge may rely upon his or her own observations of the conduct, and upon hearsay evidence. The contemnor has no right of unrestricted cross-examination: *Fraser v R*, above, at 227. It is appropriate, however, that the judge inform the contemnor of such observations. It may also be possible to call witnesses to give evidence of their observations so that they may be cross-examined. This may be done by counsel appearing as amicus curiae.
11. In dealing with a summary charge of contempt, the person accused must be allowed a reasonable opportunity of being heard in his or her own defence, ie of placing before the court any explanation or relevant submission of fact or law: *Coward v Stapleton*, above, at 580.
12. In "requiring" a contemnor to make a defence to the charge, it should be made clear that the contemnor is not obliged to give evidence: *Court of Appeal, Registrar of the v Maniam (No 1)* (1991) 25 NSWLR 459.

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1 This case is cited as *Macgroarty v Clauson* in CLR and HCA reports, though the respondent was in fact the Attorney General. The ALR report cites the case as *Macgroarty v Attorney-General (Qld)*.

13. At common law, a contemnor was entitled to make a defence by way of an unsworn statement. Quaere whether s 31 of the *Criminal Procedure Act 1986* removed this right.
14. After hearing the contemnor, the court determines the matter of the charge and makes an order for the punishment or discharge of the contemnor: SCR Pt 55 r 3; DCA s 199(3)(d).

[10-0110] Appeal from summary conviction

Last reviewed: June 2024

An appeal from summary conviction for contempt in the Supreme Court lies to the Court of Appeal under SCA s 101(5). The appropriate respondent is the King: *Fraser v R* at 219.

As to an appeal from a summary conviction by the District Court or a Local Court, see DCA s 201 and LCA s 24(3)(c), respectively.

[10-0120] Supreme Court and Dust Diseases Tribunal — Direction to Registrar

Last reviewed: June 2024

A trial judge may, as an alternative to proceeding on the judge's own motion, direct the registrar to take proceedings for criminal contempt: SCR Pt 55 r 11(1). The court may obtain advice from the Crown Solicitor before giving such a direction, see *In the matter of the Compensation Court of NSW* (unrep, 20/12/1985, NSWCA).

An order under SCR Pt 55 r 11(1) is executive and not judicial in character, and it has been held that there is no right for a contemnor to be heard on whether a direction should be given under r 11(1): *Killen v Lane* [1983] 1 NSWLR 171 at 179 (cf a referral by the District Court under DCA s 203 or by the Local Court under LCA s 24. In *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277 the Court of Appeal held that there was an obligation to afford procedural fairness in such cases, but distinguished *Killen*, above, as to directions under SCR Pt 55 r 11(1)). However, it is suggested that the contemnor be given such an opportunity. There is no right to make a formal application for a direction, eg by notice of motion, and no appeal is available: *Killen* at 177, 179.

For examples of contempt in the face of the court dealt with by way of direction under r 11(1), see *Prothonotary v Wilson* [1999] NSWSC 1148 (and on appeal *Wilson v The Prothonotary* [2000] NSWCA 23); *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *Prothonotary v Hall* [2008] NSWSC 994; *Prothonotary of the Supreme Court of NSW v Coren* [2017] NSWSC 754; *R v WE (No 15)* [2020] NSWSC 332; *R v Coskun (No 4)* [2022] NSWSC 696.

Under SCR Pt 55 r 6, proceedings may be commenced either by motion in the proceedings or by summons as an independent proceeding.

As to the scope of when a contempt is committed "in connection with proceedings in the Court" for the purposes of SCR Pt 55 r 6, see *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 at 564 and the cases there cited.

There appears to be no power to detain a contemnor in custody pending the commencement of proceedings by the registrar. Once proceedings have been commenced, the contemnor may be arrested and detained if "… it appears to the court that the contemnor is likely to abscond or withdraw … from the jurisdiction of the Court": SCR Pt 55 r 10 and see *Schnabel v Lui* (2002) 56 NSWLR 119. As to the power to detain a contemnor following arrest, see *ASIC v Michalik (No 2)* (2004) 62 NSWLR 115, in which Palmer J also sets out the form of warrant used, and *Huang v Liao* [2021] NSWSC 1706 and [2022] NSWSC 141.

The registrar's summons will not, of its own force, compel the attendance of the contemnor on hearing. An order may be made to compel the attendance of a contemnor on hearing: see *Court of Appeal, Registrar v Ritter* (1985) 34 NSWLR 641 at 651, 653; *Scott v O'Riley* [2007] NSWSC 560; *Prothonotary of NSW v Russell Alan Jarvie* [2016] NSWSC 1249. A warrant may be issued under s 97 of the CPA if the contemnor fails to attend in answer to the order: *Mirembe Pty Ltd v Dangar* [2009] NSWSC 94.

Sample order directing proceedings for contempt

Pursuant to Pt 55 r 11(1) of the Supreme Court Rules, I make an order directing the Prothonotary to commence proceedings for contempt of court against [*name*] in respect of his conduct in [*eg having been duly sworn, refusing to answer material questions put to him in cross examination*] in proceedings before me in the Supreme Court on [*date*]. I further order that the charges against [*name*] may be framed and particularised as the Prothonotary may be advised by the Crown Solicitor or by counsel briefed by the Crown Solicitor.

[10-0130] District Court and Local Court — Referral to the Supreme Court

As an alternative to proceeding under s 199 of the DCA, or where jurisdiction under that section is not available, is doubtful or is undesirable, an apprehended contempt may be referred to the Supreme Court for determination: DCA s 203; LCA s 24(4). Such proceedings are assigned to the Common Law Division of the Supreme Court: SCA s 53(4). Such a reference may be made where:

- it is alleged to the court, or
- it appears to the court on its own view,

that a person is guilty of contempt of court, whether committed in the face or hearing of the court or not.

The power to make a reference is executive and not judicial in nature. There is no right in a party or any other person to make a formal application for such a reference: cf SCR Pt 55 r 11(1); *Killen v Lane*, above, see [10-0110]). No appeal is available from a decision under s 203: *Johnston v Nationwide News Pty Ltd* (2005) 62 NSWLR 309.

Before exercising its power of referral in either form, the referring court must afford procedural fairness to a proposed contemnor: *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277; *Prothonotary of the Supreme Court of NSW v Chan (No 23)* [2017] NSWSC 535. Failing to do so may render subsequent proceedings in the Supreme Court a nullity: *Dangerfield* at [49]; *Chan* at [64].

This is because (at least where the prospective contempt is in the face or hearing of the referring court) the referral power involves potential prejudice to the proposed contemnor, as the penalty which can be imposed by the Supreme Court is greater than that which the District Court or Local Court can impose if it decides to deal with the contempt itself: *Dangerfield* at [56]; *Chan* at [29].

Exercising the power of referral for an apparent contempt requires the court to make two decisions:

1. whether it appears to the court on its own view that the person is guilty of contempt of court, and
2. whether the court should refer the matter to the Supreme Court for determination: *Dangerfield* at [52].

Before referring an apparent contempt, the referring court should make findings of fact in relation to the conduct and determine that it is capable of amounting to contempt: *Mohareb v Palmer* [2017] NSWCA 281 per Basten JA, with whom Sackville AJA agreed, at [17] ff.

The suggested approach

(see *Dangerfield* at [51]ff and *Chan* at [59]–[61]):

In addition to the initial steps referred to earlier (warnings, the opportunity to apologise and/or purge the contempt, and to obtain legal advice), see [10-0070].

1. identify, with sufficient particularity, the conduct in question;
2. invite submissions as to whether the court should form a view that it is capable of amounting to contempt;
3. if the court has power to deal with the contempt by way of a summary hearing (ie if it is in the face or hearing of the court) explain the two procedural options available and their consequences (including in relation to penalty);
4. invite submissions as to what course the court should adopt, ie:
    - deal with the matter itself by way of summary hearing (if jurisdiction is available), or
    - refer the matter to the Supreme Court, or
    - exercise a discretion to take no further action.
5. provide an adjournment, if necessary, to enable the putative contemnor to obtain advice and/or representation for the purpose of making submissions; and
6. consider whether to provide a party raising an allegation of contempt with the opportunity to respond to any submissions.

A reference is made by forwarding a report of the matter to the prothonotary. The report should identify the contemnor and the relevant conduct. It should specify whether the reference is made on the basis of an alleged contempt or whether the court has formed a view that it is capable of amounting to contempt.

There is no need to charge a contemnor for the purposes of a reference under s 203 or s 24(4): *Court of Appeal, Registrar of the v Maniam (No 1)*, above.

In instances where the referring court comes to its own view that conduct is capable of amounting to contempt, the referral of the matter to the Supreme Court requires proceedings to be commenced by the prothonotary without any further direction by the Supreme Court: SCR Pt 55 r 11(3). Referrals of alleged contempts require consideration by the Supreme Court of exercising its power to direct a prosecution, under SCR Pt 55 r 11(1). SCR Pt 55 r 11(6) cannot be engaged in such a situation: *Chan* at [54].

Sample orders

(a) *where the referring court has formed a view that conduct has occurred that is capable of constituting a contempt, and wishes to engage SCR Pt 55 r 11(3):*

> On [*date*] in proceedings between [*names of parties*] in the [*court*] at [*place*], [*name of contemnor*] [*describe conduct — eg refused to answer material questions put to him/her in cross examination, as indicated in the attached transcript*]. I have formed the view that this conduct is capable of amounting to a contempt of court. Pursuant to s 203 of the *District Court Act 1973*, I refer this matter to the Supreme Court for determination in accordance with Pt 55 r 11(3) of the Supreme Court Rules.

(b) *where the referring court wishes to report an alleged contempt to be dealt with under SCR Pt 55 r 11(1):*

> It has been alleged that on [*date*] in proceedings between [*names of parties*] in the [*court*] at [*place*], [*identify contemnor and describe conduct — eg when the witness AB was passing near XY on the way to the witness box for the purpose of giving evidence, XY loudly said words to the effect "you're fucked"*]. Pursuant to s 203 of the *District Court Act 1973*, I refer this alleged contempt of court to the Supreme Court for consideration of giving a direction under Pt 55 r 11(1) of the Supreme Court Rules.

[10-0140] Standing of other persons to commence proceedings

The right of any other person to commence proceedings for contempt is preserved: SCR Pt 55 r 11(2). A person with an interest in proceedings will have standing to bring proceedings for contempt: *European Asian Bank AG v Wentworth*, above, per Kirby P at 459. Indeed, "prima facie any person can bring proceedings for contempt in relation to proceedings in a State Court": *Public Prosecutions, Director of v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 595.

Penalty

[10-0150] General

Last reviewed: June 2024

Contempt of court is a common law offence and there is no maximum penalty, subject to the Bill of Rights 1688: *R v Smith* (1991) 25 NSWLR 1 at 13 et seq; SCR Pt 55 r 13. However, where the District Court or a Local Court is exercising its jurisdiction under s 199 DCA in respect of a contempt in the face or hearing of the court, the maximum penalty which may be imposed is a fine of 20 penalty units or imprisonment for 28 days. Imprisonment is a punishment of last resort: *He v Sun* (2021) 104 NSWLR 518 at [68].

SCR Pt 55 is declaratory of the Supreme Court's power of punishment and does not exhaust it: *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314. The *Crimes (Sentencing Procedure) Act 1999* does not apply in imposing a penalty for either civil or criminal contempt where the Court is exercising civil jurisdiction: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [43]–[45]. In committing a person to prison for contempt of court, the Court is operating in its civil jurisdiction: *Dowling* at [57].

As to matters relevant to penalty, see *Maniam (No 2)*, above, at 314–315; *Wilson v The Prothonotary*, above; *Jando*, above, and *Live Group Pty Ltd v Rabbi Ulman* [2018] NSWSC 393. For a list of factors to be considered by the court on the question of an appropriate penalty, see *Matthews v ASIC* [2009] NSWCA 155 at [129], citing with approval the primary judge.

See also *Sentencing Bench Book* at **[20-155]**.

[10-0160] Refusal to give evidence

Last reviewed: June 2024

Relevant authorities in relation to sentence for refusal to be sworn or to give evidence and in relation to reprisals against judges (in this case throwing a container of water at the presiding judge) are collected in *Principal Registrar of Supreme Court of NSW v Drollet* [2002] NSWSC 490.

As for matters relevant to penalty in relation to contempt by refusal to be sworn or to give evidence, see *Registrar of the Court of Appeal v Gilby* (unrep, 20/8/91, NSWCA) at 26–29; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393 (which attaches a schedule of comparable sentences for contempts of that type); *Prothonotary of the Supreme Court of NSW v A* [2017] NSWSC 495 and *Prothonotary of the Supreme Court of NSW v Ibrahim* [2023] NSWSC 1275 (including consideration of contemnor's fears for safety and mental illness).

See also "Refusal to attend on subpoena or give evidence", *Sentencing Bench Book* at **[20-155]**.

Legislation

- *Bail Act 2013* s 90
- *Coroners Act 2009* s 103A
- *Crimes Act 1900* ss 320–326
- *Criminal Procedure Act 1986* s 31
- DCA ss 199, 199(3)(d), 199(4), 199(5), 200A, 203
- *Dust Diseases Tribunal Act 1989* s 26
- *Land and Environment Court Act 1979* s 67A
- *Legal Profession Uniform Law* (NSW) Pt 5.2
- LCA ss 24(1), 24(3)(c), 24(4), 24A, 25(5)
- SCA ss 48(2)(i), 53(3)(a), 53(4), 101(5), 131

Rules

- SCR Pt 55 rr 2, 3, 4, 11(1), (3), (6), 13

Further references

- D Rolph, *Contempt*, Federation Press, 2023

[The next page is 10111]

Contempt generally

Nature of contempt

[10-0300] Civil and criminal contempt

Last reviewed: December 2024

Contempts of court still fall to be classified as civil or criminal. Contempt by breach of an order or undertaking is regarded as a civil contempt unless "it involves deliberate defiance or, as it is sometimes said, if it is contumacious": *Witham v Holloway* (1995) 183 CLR 525 at 530. See *He v Sun* (2021) 104 NSWLR 518 as to "contumacious disregard of orders".

The High Court has described the distinction as "unsatisfactory" and "complex and artificial" in at least one respect in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109. In *Witham v Holloway*, above, the High Court held that the criminal standard of proof applies to all contempts (cf *ASIC v Sigalla (No 4)* [2011] NSWSC 62 at [92]–[94], but see *Central Coast Animal Care Facility Inc v Wyatt* [2023] NSWSC 741 at [32]–[36]). However, the distinction remains for some purposes. For example, an appeal may be brought against acquittal on a charge of civil contempt but not in the case of acquittal of criminal contempt: see s 101(6) of the SCA and *Hearne v Street* (2008) 235 CLR 125, in which the Court held that the "substantial character" of the contempt proceedings is relevant, with the test being whether "it clearly appears that the proceedings are remedial or coercive in nature" as distinct from being punitive: at [133], applied in *Novelly v Tamqia Pty Ltd* [2024] NSWCA 167 at [27]–[29], [47]. The time for assessing the character of the contempt proceedings for the purpose of appellate rights is at the time of their commencement: *Microsoft Corporation v Marks (No 1)* (1996) 69 FCR 117 at 137B–C; *Street v Hearne* (2007) 70 NSWLR 231 at [59]; *Novelly*, above, at [31]–[32], [83]. For discussions of the distinction see *Matthews v ASIC* [2009] NSWCA 155; *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69; and *Novelly* at [17]–[26] (Gleeson JA) and [67]–[98] (Kirk JA).

Civil contempts are normally left to the offended party to enforce, whereas the Attorney General or the court has a more clearly defined role in the prosecution of criminal contempts since these more directly involve interference with the administration of justice.

In *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89, *Witham v Holloway* (1995) 183 CLR 525 at 534 and *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [35] (applied in *Sader v Elgammal* (2024) 113 NSWLR 394 at [85]) the High Court held that while contempt of court may be criminal in nature, proceedings for punishment of contempt were brought in the civil jurisdiction of the court and were "civil proceedings". Hence, where a charge of criminal contempt is brought in the Supreme Court by motion in "civil proceedings", as defined in the CP Act, s 3(1), that Act and the UCPR apply: CPA, s 4(1), Sch 1; UCPR, r 1.5(1), Sch 1: *Kostov v YPOL Pty Ltd* [2018] NSWCA 306 at [16], [17].

The power to punish for contempt in civil proceedings is not fettered by criminal law statutes relating to procedure and sentencing: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; at [43]–[45]; *He v Sun* [2021] 104 NSWLR 518 at [66]. The *Crimes (Sentencing Procedure) Act 1999* does not apply to sentence proceedings for contempt in the court's civil jurisdiction: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [12], [57]–[58]; *He v Sun* [2021] NSWCA 95 at [38]; [62]. The power to suspend a sentence, although no longer available under the *Crimes (Sentencing Procedure) Act 1999*, survives in cases of contempt by virtue of Pt 55 r 13 of the Supreme Court Rules. Rule 13(3) relevantly provides that the court may make an order for punishment on terms, including a suspension of punishment: *He v Sun* at [39]–[40]; [66]. In committing a person to prison for contempt in civil proceedings, while the court

may apply general law protections afforded to persons accused of a criminal offence, the court is nevertheless operating in its civil jurisdiction and criminal statutes are not engaged: *Dowling* at [46], [57]–[58]; [139];

Section 101(5) of the *Supreme Court Act 1970* provides that the Court of Appeal, rather than the Court of Criminal Appeal, has jurisdiction to hear and determine an appeal from a judgment or order of the Supreme Court in proceedings relating to contempt of court. Note also that the *Mental Health (Forensic Provisions) Act 1990* (rep) has been held not to apply to criminal contempt proceedings: *Prothonotary of the Supreme Court of NSW v Chan (No 15)* [2015] NSWSC 1177; *Kostov v YPOL Pty Ltd* at [19]. Note: the 1990 Act has been replaced by the *Mental Health and Cognitive Impairments Forensic Provisions Act 2020* (commenced 27 March 2021).

The common-law requirement that a criminal trial not proceed unless the accused is fit to plead is a safeguard applicable to civil proceedings for criminal contempt: *Kostov v YPOL*, at [18], [19].

[10-0305] Sentencing principles for contempt

Last reviewed: June 2024

See *Thunder Studios Inc (California) v Kazal (No 2)* [2017] FCA 202 at [4]–[5]; *Seven Network (Operations) Ltd v Dowling (No 2)* [2021] NSWSC 1106 at [2]–[12] and *NHB Enterprises Pty Ltd v Corry (No 8)* [2022] NSWSC 97 at [26]–[33] for the principles and rationale for sentencing for contempt.

Sentencing principles summarised by the court in *Commissioner for Fair Trading v Rixon (No 5)* [2022] NSWSC 146 include:

- Despite the non-application of the *Crimes (Sentencing Procedure) Act*, alternatives to full-time imprisonment are available as part of the power to punish an individual for contempt: at [24] (for an example of the use of a *Griffiths* remand, see *Council of the NSW Bar Association v Rollinson (No 2)* [2023] NSWSC 1390).
- The underlying rationale of every exercise of the contempt power is the necessity to "uphold and protect the effective administration of justice": at [25].
- It is not however clear that, in the absence of a legislative basis, there is a foundation for allowing a discount based solely on the utilitarian value of a plea of guilty given the potential discriminatory effect. It can be accepted that, while these proceedings are not criminal in nature, the same policy considerations that apply with respect to pleas of guilty to criminal offences apply: at [59].

See also *Sentencing Bench Book* at **[20-155]** and N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29/2/2020, Canberra.

Contempt by publication

[10-0310] Time at which the law of contempt commences

For the purposes of sub judice contempt, the law of contempt does not begin to operate until proceedings are pending in a court. It is not sufficient that proceedings be imminent: *James v Robinson* (1963) 109 CLR 593.

[10-0320] Test for contempt

To amount to a sub judice contempt of court, a publication must have, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: *John Fairfax & Sons Pty Ltd and Reynolds v McRae* (1955) 93 CLR 351. The tendency to prejudice proceedings must be clear,

or "real and definite". There should be a substantial risk of serious interference: *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [76]–[78], [84].

The tendency of a publication to prejudice proceedings is to be determined objectively having regard to the nature of the material published and the circumstances existing at the time of publication: *Attorney General v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 386; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626. As to the time at which an internet publication takes place, see *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [145].

[10-0330] Intention

While the act of publication must be intentional, an intention to prejudice the due administration of justice is not an element of contempt: *John Fairfax & Sons Pty Ltd and Reynolds v McRae* (1955) 93 CLR 351 at 371.

[10-0340] Relevant considerations

Factors to be considered in determining whether a publication has the necessary tendency to cause serious prejudice to a trial include (per Mason CJ in *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 28):

- the nature and the extent of the publication
- the mode of trial (whether by judge or jury), and
- the time which will elapse between publication and trial.

The practical tendency of a publication to endure and influence prospective jurors must be viewed against its background of pre-existing legitimate publicity: *Attorney General v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695 at 711.

The likely delay between the date of publication and the commencement of the subject proceedings is an important consideration. It is also appropriate to take into account that, during this period, jurors will be assailed by the media with sensational reports of other events: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 136; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, per Spigelman CJ at [100].

[10-0350] Influencing the tribunal of fact

The most common and obvious form of media contempt is influencing the tribunal of fact. There will generally not be a danger of this in civil proceedings, where no jury will usually be present. It is essentially established that a publication or broadcast will not be regarded as presenting a substantial risk of prejudice by influencing a judge: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation*, above, at 58.

The same principle has been extended to magistrates: *Attorney General v John Fairfax & Sons Ltd and Bacon*, above.

[10-0360] Influencing witnesses

Contempt may be committed by publications that have a real tendency to influence the evidence of witnesses or to deter them from attending. Publication of photographs may risk contamination of identification evidence: *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598.

The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses: see *Attorney General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374.

[10-0370] Influencing parties

Improper public pressure upon litigants, which has a real tendency to deter or influence them in relation to proceedings, may amount to contempt: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27.

[10-0380] Fair and accurate report of proceedings permitted

A fair and accurate report of judicial proceedings may be published in good faith notwithstanding that it may present a risk of prejudice to pending proceedings: *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 257.

[10-0390] Public interest in publication

No contempt will be established unless it can be demonstrated that the risk of prejudice to the administration of justice, is not outweighed by the public interest in freedom of discussion on matters of public concern: *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 per Mason CJ at 27, Wilson J at 43 and Deane J at 51; *Attorney General v X* (2000) 49 NSWLR 653.

[10-0400] Contempt by prejudgment

There is an arguable basis of contempt by prejudgment in that, even if the tribunal of fact is unlikely to be influenced, such as when it is constituted by a judge only, prejudgment by the media may undermine public confidence in the administration of justice. The principle has been doubted in Australia: *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 553–560, 570, 571.

[10-0410] Scandalising contempt

Last reviewed: June 2024

Unwarranted criticism of the court may amount to contempt by having a real tendency to undermine public confidence in the administration of justice: *The King v Dunbabin, Ex parte Williams* (1935) 53 CLR 434 at 442. For more recent consideration, see *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; *State Wage Case (No 5)* [2006] NSWIRComm 190; *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219; *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [193] et seq. As to the subcategory of "scurrilous abuse", see *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 per Simpson JA at [170]–[224].

Misconduct in relation to parties, witnesses, etc

[10-0420] Misconduct in relation to pending proceedings

Last reviewed: June 2024

Conduct that has a real tendency to improperly influence or deter a witness, judicial officer, juror, party or other person having a role in judicial proceedings may amount to contempt.

The test at common law is whether the action taken against the person had a tendency to interfere with the administration of justice: In the matter of *Samuel Goldman, Re; sub nom Re Goldman* [1968] 3 NSWR 325 at 327, 328. It is not necessary to show actual interference: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 29.

Cases involving pressure upon parties to proceedings will often require an assessment of whether that pressure was improper: *Bhagat v Global Custodians Ltd* [2002] NSWCA 160, per Spigelman CJ at [35]. The mere fact that something that is lawful is threatened does not mean that the pressure is

necessarily proper: *Harkianakis*, above, at 30. Contempt by improper pressure on a party or witness may derive from misuse of the court's processes, such as by filing, or threatening to file, defamatory material by affidavit: eg *Y v W* (2007) 70 NSWLR 377.

As to threats to seek costs, including costs against lawyers, see *Nuclear Utility Technology & Environmental Corp Inc (Nu-Tec) v Australian Broadcasting Commission (ABC)* [2009] NSWSC 78. As to inappropriate use of statutory powers to gain an advantage, see *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 cf *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10 and *Kiangatha Holdings Pty Ltd v Water NSW; Natale v Water NSW* [2022] NSWCCA 280 at [72]–[84].

In *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [77], the court noted the distinction to be drawn between a contempt arising from conduct that interferes with the administration of justice in a particular case and interference with the administration of justice generally. In the former case, no contempt will have been committed unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. In *The Prothonotary v Collins* (1985) 2 NSWLR 549, McHugh JA observed, at 567:

> Time and again the courts have said that there can be no contempt unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. Cases of interference with the administration of justice as a continuing process are no doubt an exception to this rule. Their rationale is different from publications which interfere with particular proceedings. They rest on the need to protect the courts and the whole administration of justice from conduct which seeks to undermine the authority of the courts and their capacity to function.

See also *Mirus Australia Pty Ltd v Gage* [2017] NSWSC 1046 per Ward CJ in Eq at [130]ff.

Improper pressure on prospective parties, before any proceedings have been commenced, can constitute a contempt. This is upon the basis that it represents an interference with the administration of justice generally: *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759.

[10-0430] Reprisals

Liability for misconduct in relation to those discharging a role in judicial proceedings is not confined to something said or done while the proceedings are pending, or even in the course of being heard. Reprisals may influence or deter the person affected, and persons generally, in relation to access to the courts (in the case of parties), or the performance of such roles. See *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 (witness); *Prothonotary v Wilson* [1999] NSWSC 1148 at [21(c)] (judge); *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354 (party); *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506 at [20] (counsel); *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389 (juror); *Tate v Duncan-Strelec* [2014] NSWSC 1125.

Temporal and geographical elements may be relevant, but it is immaterial whether the conduct was committed in or outside the court so long as it is an interference with the administration of justice.

[10-0440] Intention

An intention to interfere with the administration of justice is not an element of contempt of court: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371; *Harkianakis* at 28. However, intention is relevant and sometimes important: *Lane v Registrar of the Supreme Court of NSW* (1981) 148 CLR 245 at 258.

What needs to be established is an intention to do an act that has a clear objective tendency to interfere with the administration of justice: *Principal Registrar v Katelaris*, above, at [23].

If the likely effect of the conduct is not self-evident (for example, if it is not clear whether the action has been taken to influence a person in relation to proceedings, or as a reprisal arising from

proceedings) further inquiries may be made regarding motive, in order to demonstrate a nexus to the subject person's role in the legal proceedings, see *Registrar of the Supreme Court of NSW (Equity Division) v McPherson* [1980] 1 NSWLR 688 at 699, and, on appeal, *Lane*, above, reviewed in *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at [54].

If intention to influence or deter can be proved, that is usually sufficient to establish liability: *Harkianakis* at 28.

[10-0450] Statutory offences

Part 7 Div 3 of the *Crimes Act 1900* contains offences relating to threats to or reprisals against, judicial officers, witnesses, jurors, etc.

Breach of orders or undertakings

[10-0460] Validity of orders

An order made by an inferior tribunal is invalid if made without jurisdiction. It is regarded as a nullity and breach of it will therefore not constitute a contempt: *Attorney General v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [27]. The situation is otherwise in respect of the order of a superior court of record, which is taken to be valid until set aside: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620; see also *Papas v Grave* [2013] NSWCA 308 and *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506.

As to the validity of suppression orders see **[1-0410]**.

[10-0470] Construction of orders

Last reviewed: June 2024

As to the construction of court orders (including the relevance of the context in which the order was made), see *Athens v Randwick City Council* (2005) 64 NSWLR 58. Hodgson JA observed at [27] that:

> [t]he construction of an order in respect of which a finding of contempt is sought may involve two inter-related questions. First, what does the order require, on its true construction? And second, is this sufficiently clear to the person affected by the order to support enforcement of that order against that person?

In order to support a prosecution for contempt, an order must be clear in its terms, but if it is, it is no defence that the contemnor may have been mistaken as to its effect: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483. For a discussion of the relevance of the contemnor's understanding of the relevant order or undertaking, see *Bathurst Real Estate Pty Ltd v Fairbrother* [2022] NSWSC 351 at [60]–[63].

For recent judicial consideration, see *City of Canada Bay v Frangieh* [2020] NSWLEC 81 at [61]; see also *Rafailidis v Camden Council* [2015] NSWCA 185 and *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717.

[10-0480] Breach of orders and undertakings

Last reviewed: June 2024

Wilful (rather than casual, accidental or unintentional) breach of an order or undertaking by which a person is bound and of which the person has notice, will amount to contempt: *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*, above. It is not necessary to prove a specific intention to disobey the court's order: *Anderson v Hassett* [2007] NSWSC 1310. It must be shown beyond reasonable doubt that the conduct was a deliberate breach of the order and the prosecutor bears the onus of establishing that the alleged contemnor did something or failed to do

something that he could have otherwise done: *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 at [250]. For a helpful review of applicable principles, see *Commonwealth Bank of Australia v Salvato (No 4)* [2013] NSWSC 321 at [126]–[130]; *Doe v Dowling* [2017] NSWSC 202 at [39]–[50] and *Yuan v Huang* [2023] NSWSC 1021 at [19]–[23].

Civil contempt cannot be brought for a breach of a judgment debt (as opposed to an order to pay money) where there was no operative judicial act which gave rise to the judgment debt: *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* (2019) 106 NSWLR 479 at [184]–[187]. In this case, the judgment against the respondent was entered pursuant to the operation of s 25(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) and was not preceded by a decision of a court.

As to the requirement for notice of orders, see *Amalgamated Televisions Services Pty Ltd v Marsden* (2001) 122 A Crim R 166. As to the availability of inferring notice of an order on the basis that "informed instructions" must have been given to legal representatives, see *Young v Smith* [2016] NSWSC 1051.

A court may generally accept an undertaking from a party in substitution for making an order, subject to the same jurisdictional limitations: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 165. For the purposes of the law of contempt, an undertaking given to the court is treated as if it was an order. Aliter if undertaking given inter partes: *Srotyr v Clissold* [2015] NSWSC 1770. As to the status of undertakings, see also *Novelly v Tamqia Pty Ltd (No 2)* [2023] NSWSC 1091 at [70]–[74].

While the Commonwealth and the State are expected to comply with court orders, enforcement by contempt proceedings is not available: *Hoxton Park Resident's Action Group Inc v Liverpool City Council* [2014] NSWSC 704.

Breach of suppression orders

There are several distinct categories of contempt of court under the common law; breach of suppression orders is one: *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 46; *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [78]. To establish guilt, the applicant must prove beyond reasonable doubt that the respondent published the article (or caused it to be published); the publication of the article frustrated the effect of the suppression order because it contained material that was contrary to or that infringed the terms of the order; and when the article was published, the relevant respondent's knowledge of the terms and effect of the order was such that a reasonable person with that knowledge would have understood that the continued publication of the article would have the tendency to frustrate the efficacy of the order: *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [81]. Where the breach of an order relied upon is deliberate breach of a suppression order, proceedings could be brought under s 16 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) which provides for a penalty of 1,000 penalty units or imprisonment for 12 months for breaching an order for an individual, or 5,000 penalty units for a body corporation.

[10-0490] Implied undertakings in relation to use of documents provided in proceedings

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence … : *Hearne v Street* (2008) 235 CLR 125 at [96].

The types of material disclosed to which this principle applies include documents inspected after discovery (as to which see also UCPR r 21.7), documents produced on subpoena, witness statements served pursuant to a judicial direction and affidavits: *Hearne v Street* (2008) 235 CLR 125 at [96]. While previously categorised as an "implied undertaking" to the court, this is an obligation of substantive law, and binds third parties who receive the documents knowing of their origin.

As to considerations relevant to granting leave, see *Prime Finance Pty Ltd v Randall* [2009] NSWSC 361 (application for leave to provide copies of affidavits to police on the basis that they disclosed criminal offences). As to the scope of the obligation in relation to affidavits, see *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 533 cf *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [188].

[10-0500] Deliberate frustration of order by third party

Deliberate frustration of court orders will amount to contempt, provided that the purpose of the orders is clear: *CCOM Pty Ltd v Jiejing Pty Ltd* (1992) 36 FCR 524 at 531; *Attorney General v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 355; *Baker v Paul* [2013] NSWCA 426.

For a consideration of the liability of a director for orders directed to a company, see *Mahaffy v Mahaffy* (2018) 97 NSWLR 119.

[10-0505] Misleading the court

Last reviewed: June 2024

An intentional misleading of the court is conduct which may interfere with the administration of justice because the effective administration of justice relies on litigants telling the truth to the court as to what has happened of relevance to the proceedings before the court: *Mahaffy v Mahaffy* [2013] NSWSC 245 at [130]; *Yuan v Huang* [2023] NSWSC 1021 at [58].

Refusal to attend on subpoena/give evidence

[10-0510] Liability for refusal to attend on subpoena or to give evidence

Refusal to attend in response to a subpoena is a contempt of court, though it is not a contempt "in the face of the court": *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459; see also UCPR r 33.12.

Refusal to be sworn, or refusal to answer material questions, will constitute contempt, in the absence of any relevant privilege: *Smith v The Queen* (1991) 25 NSWLR 1; *Registrar of the Court of Appeal v Craven (No 2)* (1995) 80 A Crim R 272.

See also procedure, including for the issue of warrant, under s 194 of the *Evidence Act 1995*.

As to proofs required for contempt by failure to comply with a subpoena to produce documents, see *Markisic v Commonwealth* (2007) 69 NSWLR 737 at 748; *Mahaffy v Mahaffy*, above, at [152].

[10-0520] Duress

Duress may be raised as a defence to contempt: *Registrar of the Court of Appeal v Gilby* (unrep, 20/8/91, NSWCA). The principles to be applied are those set out in *R v Abusafiah* (1991) 24 NSWLR 531 at 545. It is not sufficient that there be a generalised fear or apprehension of retaliation, although this may be a matter relevant to penalty: *Gilby*, above; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *R v Razzak* (2006) 166 A Crim R 132 at [24].

[10-0530] Prevarication

While the giving of false answers in the courts of evidence is likely to interfere with the administration of justice, such conduct will not usually constitute contempt. It may amount to contempt if it consists in giving palpably false answers so as to indicate that the witness is merely fobbing inquiry: *Coward v Stapleton* (1953) 90 CLR 573 at 578–579; see also *Keeley v Brooking* (1979) 143 CLR 162 at 169, 172, 174, 178; *Commissioner for the Police Integrity Commission v Walker (No 2)* [2006] NSWSC 696.

Jurisdiction and procedure

[10-0540] Supreme Court and Dust Diseases Tribunal

Contempt of court in the face, or in the hearing of, the Supreme Court may be dealt with under the summary procedure in SCR Pt 55 Div 2 (see [10-0060]) or by directing the registrar to commence proceedings under SCR Pt 55 Div 3. Contempt not in the face or hearing of the court must proceed under Div 3: see [10-0120].

Proceedings for contempt in the face or hearing of the Supreme Court, or for breach of orders or undertakings, are assigned to the division of the court (or the Court of Appeal, as the case may be) in which the contempt occurred: SCA ss 48(2), 53(3). Contempt proceedings in respect of contempts of the Supreme Court, or of any other court, are otherwise assigned to the Common Law Division: SCA s 53(4).

The Dust Diseases Tribunal has the same powers for punishing contempt of the tribunal as are conferred on a judge of the Supreme Court for punishing contempt of a division of the Supreme Court: *Dust Diseases Tribunal Act 1989* s 26.

[10-0550] District Court and Local Courts

The District Court has power to punish contempt of court committed in the face of the court or in the hearing of the court: DCA s 199.

The Local Court has the same powers as the District Court in respect of contempt of court committed in the face or hearing of the court: LCA s 24(1).

The District Court may refer an apparent or alleged contempt to the Supreme Court under DCA s 203 and the Local Court may refer an apparent or alleged contempt to the Supreme Court under LCA s 24(4) (see **[10-0130]**).

A possible contempt may alternatively be referred to the Attorney General for consideration of appropriate action.

Legislation

- *Building and Construction Industry Security of Payment Act 1999* (NSW), s 25(1)
- *Civil Procedure Act 2005* (NSW), 3(1), 4(1), Sch 1
- *Crimes Act 1900*, Pt 7 Div 3
- DCA ss 199, 203
- *Dust Diseases Tribunal Act 1989*, s 26
- *Evidence Act 1995*, s 194
- LCA s 24(1), (4)
- *Mental Health (Forensic Provisions) Act 1990* (rep)
- *Mental Health and Cognitive Impairments Forensic Provisions Act 2020*
- SCA ss 48(2), 53(3), 101(5), (6)

Rules

- SCR Pt 55 Div 2
- UCPR rr 1.5(1), 21.7, 33.12
- Supreme Court (General Civil Procedure) Rules 2005 (Vic)

Further reading

- N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29/2/2020, Canberra

[The next page is 10171]

Purging contempt

[10-0700] Power to discharge contemnor

Last reviewed: June 2024

If the Supreme Court has committed a contemnor to a correctional centre for a term, the court may order the contemnor's discharge before the expiry of the term: SCR Pt 55 r 14. See, for example, *Menzies v Paccar Financial Pty Ltd* (2016) 93 NSWLR 88 and *Armidale Local Aboriginal Lands Council v Moran* [2020] NSWSC 442.

No express power is provided to the District Court and it must therefore be inferred if a contemnor is to be released prior to the expiration of a sentence imposed by the court. The power to suspend a sentence under DCA s 199(8) may be used for this purpose.

Section 24(1) of the LCA provides the Local Court with the same powers as the District Court in relation to contempt. However, s 24(2) appears to go further in that it provides, without limiting s 24(1), "the Local Court may vacate or revoke an order with respect to contempt of court".

[10-0710] Principle of purgation

Last reviewed: June 2024

Contempt in the form of breach of orders may be purged by apology, payment of compensation/reparation and payments of costs: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 489; *Evans v Citibank Ltd* [2000] NSWSC 1017.

In some cases a contemnor may be given an opportunity to purge such a contempt by being given further time to comply: for example, *Globaltel Australia Pty Ltd v MCI Worldcom Australia Pty Ltd* [2001] NSWSC 545. The same opportunity should generally be given to a contemnor who refuses to give evidence: *Smith v The Queen* (1991) 25 NSWLR 1.

In relation to continuing breaches of court orders, it is open to a court to suspend a fine for a certain period, or to impose a fine for a continuing breach after a specified date, in order to effectively allow a contemnor to purge the contempt: see for example, *Liverpool Plains Shire Council v Rumble (No 3)* (2014) 205 LGERA 170; *Camden Council v Rafailidis (No 5)* [2014] NSWLEC 85 and *BCEG International (Australia) Pty Ltd v Xiao (No 3)* [2023] NSWSC 554.

Contempt by refusal to give evidence may be purged by later doing so. A contempt will still be made out, but purgation will be relevant to penalty: eg *Prothonotary of the Supreme Court of NSW v A* [2017] NSWSC 495.

The doctrine does not provide a freestanding enforceable right to claim damages: *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 340.

[10-0720] Disability of party in contempt or prima facie in contempt

Last reviewed: June 2024

Subject to some exceptions, a contemnor "… against whom an order for committal has been made, cannot be heard or take proceedings in the same cause until he has purged his contempt; nor while he is in contempt can he be heard to appeal from any order made in the cause …": *United Telecasters*, above, at 340. This principle was reviewed in detail *Leaway Pty Ltd v Newcastle City Council (No 2)* (2005) 220 ALR 757 and, more recently, by Pembroke J in *Malek Fahd Islamic School Ltd v Australian Federation of Islamic Councils Inc* [2016] NSWSC 672: it may be that this is not a

rule (albeit subject to exceptions), but the provision of a discretion. The rule extends to a case where a party is considered to be prima facie in contempt, such as when the court can see the party has disobeyed its order: *Young v Jackman* (1986) 7 NSWLR 97.

Legislation

- DCA s 199(8)
- LCA s 24(1), (2)

Rules

- SCR Pt 55 r 14

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