Case Notes – Australia

Editor: Michael Legg

SECURITY FOR COSTS IN THE PROBATE JURISDICTION

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INTRODUCTION

Applications for security for costs are commonly made by commercial litigants in the Supreme Court of New South Wales (Supreme Court). The principles governing the resolution of applications for security for costs made pursuant to r 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*)[1] and (more rarely) the Court's inherent jurisdiction[2] are relatively settled and are applied routinely, particularly in the Commercial List of the Supreme Court.[3] Conversely, such applications are very rarely made in probate proceedings.[4]

Indeed, the decision of Meek J in *Re Guamani* (*Re Guamani*) is only the third such application.[5] This decision emphasises that although the principles governing the resolution of applications for security for costs across the various parts of the Supreme Court's civil jurisdiction are the same, "the particular jurisdiction that the Court is exercising is relevant to how security for costs principles are applied."[6] Accordingly, those principles will be applied uniquely in probate proceedings (and, indeed, in other types of civil litigation) according to the peculiar characteristics, objects and purposes of that jurisdiction.

While some of the matters the Court may have regard to in determining whether to make an order for security for costs[7] will be routinely assessed in the context of probate litigation (like other types of civil claims),[8] some factors assume particular importance and will be applied in a manner peculiar to the probate jurisdiction. This case note focusses on three of the matters in r 42.21(1A) of the *UCPR* which are significant for security for costs applications in probate proceedings and which demonstrate how security for costs principles may be applied uniquely in different types of civil litigation, namely: (1) whether the plaintiff is effectively in the position of a defendant;[9] (2) whether the proceedings involve a matter of public importance;[10] and (3) the costs of the proceedings.[11]

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[1] See the threshold requirements in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1).

[2] See *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, 447–448 (Holland J); *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598; [2002] NSWCA 157, [52] (Hodgson JA, Mason P agreeing). The inherent jurisdiction to award security for costs is broader than under *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1): see, eg, *Mitchell v Roads and Maritime Services* [2022] NSWSC 500, [10] (Ball J).

[3] Recent examples of such applications include: *Re IPM Developments Pty Ltd* [2023] NSWSC 1443; *Kupang Resources Pty Ltd v Commonwealth (No 2)* [2023] NSWSC 1337.

[4] See Raffael Maestri, "Once in a Blue Moon – the Curious Case of Security for Costs in Contested Probate Litigation Pt 1" (2019) 21(1) *Retirement & Estate Planning Bulletin* 8, 8.

[5] After *Hyland v Burbidge; The Estate of Charles Keith Hyland* (Unreported, Supreme Court (NSW), Powell J, 23 October 1992); *Re Condon* [2017] NSWSC 1813.

[6] *Re Guamani* [2023] NSWSC 502, [175].

[7] *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A).

[8] For example, the prospects of success or merits of the proceedings (*Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A)(a) (*UCPR*)), the impecuniosity of the plaintiff (*UCPR* r 42.21(1A)(c)), whether an order for security for costs would stifle the proceedings (*UCPR* r 42.21(1A)(f)) and the timing of the application for security for costs: *UCPR* r 42.21(1A)(l).

[9] *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A)(e). Also relevant, as will be seen, to the threshold jurisdictional requirement contained in *UCPR* r 42.21(1)(a).

[10] *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A)(g).

[11] *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A)(j).

FACTS

Washington Manuel Guamani (the deceased) died on 6 September 2021, aged 76 years. At the time of his death, he was married to the applicant, whom he married in Peru in 2015. The deceased did not have any biological children but did have two adult stepchildren from his marriage to the applicant. The applicant was the first defendant in the probate proceedings. The deceased had five siblings: Adelaida, Rosa, Pastora, Elisa and Juan. Adelaida and Rosa predeceased the deceased, as did his parents. The respondents to the application, being the deceased's sister Pastora, his niece Lidia (a daughter of Adelaida) and Omar (a son of Juan) commenced the probate proceedings. As the respondents' designation as the substantive plaintiffs was in issue during the application, this case note will refer to the parties as the applicant and the respondents.[12]

In November 2018, the deceased made a Will with the NSWTG (2018 Will). By that Will, the deceased appointed the NSWTG as executor and gave his estate on trust to, in effect, be divided into 10 parts. He left one part to the applicant, and divided the remaining parts equally among the respondents. In September 2021, the deceased is said to have executed a further Will (2021 Will) by which the applicant was appointed as executor and the deceased's stepchildren as alternate executors. By the 2021 Will, the deceased gave his interest in his chattels to the applicant as well as the right of use and access to his digital assets and a right to occupy his principal place of residence (the St Peters property). The deceased left the residue of his estate to the applicant.

Following the deceased's death, the applicant published a notice of intended application for probate of the 2021 Will. The respondents filed two probate caveats. Other than filing a summons seeking a grant of probate in common form, which was rejected due to the respondents' caveat, the applicant took no further steps to progress the matter. The respondents then filed a statement of claim propounding the 2018 Will and challenging the validity of the 2021 Will, rather than a further caveat, and thus came to be at least the nominal plaintiffs in the proceedings. The applicant filed a cross-claim propounding the 2021 Will. Importantly, there was no dispute as to the validity of the 2018 Will. The applicant then applied for security for costs.

WHO IS THE "PLAINTIFF" FOR THE PURPOSES OF UCPR RR 42.21(1)(A) AND 42.21(1A)(E)?

The application was made pursuant to r 42.21(1)(a) of the *UCPR* and sought security in the amount of $90,000 or such other amount as the Court saw fit, principally on the basis that the respondents are resident in Ecuador. The applicant did not rely on the Court's inherent jurisdiction.[13] Rule 42.21(1)(a) provides the Court with a discretion to, upon the application by a defendant, order a plaintiff to give security if it appears to the Court that the plaintiff is ordinarily resident outside Australia. The Court may, in determining whether it is appropriate to make such an order, have regard to the non-exhaustive list of matters set out in r 42.21(1A).

Accordingly, before making an order for security pursuant to r 42.21(1)(a), the Court in *Re Guamani* had to be satisfied that the respondents were "plaintiffs" ordinarily resident outside Australia. Before determining whether the respondents were "plaintiffs" for the purposes of r 42.21(1)(a), Meek J noted that when construing, exercising or applying a procedural rule, a court must consider the juristic nature of the proceedings in which it is asked to make an order.[14] Significant consideration should therefore be given to the rules of substantive law applicable to that jurisdiction.[15]

[12] The NSW Trustee & Guardian (NSWTG) was the second defendant to the probate proceedings, being the named executor in a Will propounded by the respondents, but it did not play any relevant part on the application for security for costs.

[13] *Re Guamani* [2023] NSWSC 502, [31], [125].

[14] *Re Guamani* [2023] NSWSC 502, [147], citing as examples *Re Rosie (No 2)* [2022] NSWSC 1750 and *Singer v Berghouse* (1993) 67 ALJR 708.

[15] *Re Guamani* [2023] NSWSC 502, [147].

Meek J observed that some legal literature might, at least on first glance, suggest that Court rules regarding security for costs do not operate in probate proceedings explicitly differently than in other proceedings. His Honour opined that such a suggestion would appear to be contrary to an understanding that the particular jurisdiction that the Court is exercising is relevant to the application of a procedural rule.[16] Such statements cannot, therefore, overcome the proposition that the Court's overriding purpose and objects are to be understood having regard to the nature of the jurisdiction being exercised.[17] Accordingly, the application of security for costs principles depends upon, among other things, the "peculiarities of the nature of the proceedings before the Court... – being, relevantly, here the nature and characteristics of probate litigation".[18]

One peculiarity of the probate jurisdiction relevant to the application of the power to order security for costs pursuant to r 42.21(1)(a) is that the characterisation of a party in probate proceedings must be addressed as a matter of substance.[19] Another is that where several Wills "are contenders for being the final Will and within the proceedings the chronologically last [Will] is disputed, but there is no dispute as to the validity of an earlier [Will], the Court, as a matter of procedure and practice, will call almost invariably upon the party with the burden of proof of the last contested Will as being the effective applicant or moving party in the proceedings."[20] That is so "irrespective of whether that party is nominally a cross-claimant and the party that was propounding the earlier uncontested Will is nominally a plaintiff."[21] Furthermore, the onus of proving that an instrument is the Will of the alleged testator lies on the party propounding it.[22]

In construing r 42.21, Meek J observed that there was no general definition of "plaintiff" in the *UCPR*,[23] nor in the Dictionary at the end of the *UCPR*. However, the *Civil Procedure Act 2005* (NSW) (*CPA*) defines "plaintiff" as "a person by whom proceedings are commenced, or on whose behalf proceedings are commenced by a tutor, and includes a person by whom a cross-claim is made or on whose behalf a cross-claim is made by a tutor".[24] By operation of s 11 of the *Interpretation Act 1987* (NSW), his Honour determined that the meaning of "plaintiff" in r 42.21 of the *UCPR*, in the absence of a contrary intention, has the same meaning as "plaintiff" in the *CPA*.[25]

While, at least nominally, the respondents were "plaintiffs" in the probate proceedings,[26] his Honour found that the decisions in *Hyland v Burbidge* and *Willey v Synan* suggested that the question of who is a "plaintiff" and who is a "defendant" in probate proceedings is to be approached by determining, substantively, who the real actor or claimant is in the proceedings.[27] In Meek J's assessment, having regard to the peculiarities of the probate proceedings mentioned above, the real issue in the proceedings was whether the 2021 Will propounded by the applicant in the cross-claim was the last true Will of the

[16] *Re Guamani* [2023] NSWSC 502, [174]–[175].

[17] *Re Guamani* [2023] NSWSC 502, [176].

[18] *Re Guamani* [2023] NSWSC 502, [177], citing *Re Condon* [2017] NSWSC 1813, [74] (Lindsay J) and *Ball v Saint* [2022] NZHC 3607, [16] (Robinson J).

[19] *Re Guamani* [2023] NSWSC 502, [154], citing *Hyland v Burbidge; The Estate of Charles Keith Hyland* (Unreported, Supreme Court (NSW), Powell J, 23 October 1992) 29; *Willey v Synan* (1935) 54 CLR 175, 184–185 (Dixon J, Rich J agreeing); *Re Condon* [2017] NSWSC 1813, [72] (Lindsay J).

[20] *Re Guamani* [2023] NSWSC 502, [168].

[21] *Re Guamani* [2023] NSWSC 502, [168].

[22] *Bailey v Bailey* (1924) 34 CLR 558, 570–572 (Isaacs J, Gavan Duffy and Rich JJ agreeing), cited in *Re Guamani* [2023] NSWSC 502, [164].

[23] *Re Guamani* [2023] NSWSC 502, [198]–[199].

[24] *Civil Procedure Act 2005* (NSW) s 3.

[25] *Re Guamani* [2023] NSWSC 502, [207].

[26] *Re Guamani* [2023] NSWSC 502, [209].

[27] *Re Guamani* [2023] NSWSC 502, [211].

deceased.[28] The validity of the 2021 Will, being the last Will of the deceased, was disputed, but there was no dispute regarding the validity of the 2018 Will. Accordingly, as a matter of conventional probate practice and procedure, the applicant, as the party with the burden of proving the validity of the 2021 Will, would be the effective moving party on the ultimate hearing of the proceedings.[29]

Therefore, while the respondents did commence the probate proceedings by filing a statement of claim propounding the 2018 Will, Meek J determined that the respondents were not, substantively speaking, "plaintiffs" for the purposes of r 42.21(1)(a).[30] Although this determination was arguably sufficient to dismiss the application, his Honour proceeded to consider the matters listed in r 42.21(1A). In relation to r 42.21(1A)(e), by which the Court may have regard to whether the plaintiff is effectively in the position of a defendant, Meek J stated that for the same reasons as above, his Honour considered that the respondents were defendants to the real issue in the proceedings.[31] Ultimately, Meek J held that even if the respondents might be said to be "plaintiffs" for the purposes of r 42.21(1)(a), the Court would have declined, on the material then before it, to make an order for security for costs against the respondents.[32]

THE PUBLIC IMPORTANCE ASPECT OF PROBATE PROCEEDINGS: R 42.21(1A)(G)

In determining whether it is appropriate to make a security for costs order, the Court may consider whether the proceedings involve a matter of public importance.[33] The extent to which issues of public importance arise in proceedings will obviously vary across different types of civil litigation.[34] In *Re Guamani*, Meek J identified unique substantive and procedural aspects of the probate jurisdiction which colour analysis of r 42.21(1A)(g) of the *UCPR*.

First, there is a public interest in the Court ensuring that the last Will of a free and capable testator is recognised and upheld,[35] in part because a grant of probate is not merely a court order, it is also an instrument of title to property.[36] Secondly, the concept of "parties" in probate proceedings is uniquely broad. Ordinary civil litigation generally only resolves a dispute between the parties. The successful party in contested probate proceedings, however, usually obtains an order for a grant of probate in solemn form which operates *in rem* and binds third parties, including persons who have an interest in the proceedings but who are not parties to the proceedings.[37] Thirdly, the public importance attaching to a grant is such that the Court will not make an order for a grant based merely on the consent of the parties[38] – it does not "rubber-stamp" probate applications,[39] and there must be evidence which satisfies

[28] *Re Guamani* [2023] NSWSC 502, [212].

[29] *Re Guamani* [2023] NSWSC 502, [214]–[216].

[30] *Re Guamani* [2023] NSWSC 502, [217]. Should the threshold requirement in r 42.21(1)(a) have been satisfied, the evidential onus would have shifted to the respondents to establish that security should be refused or ordered in a lesser amount than that sought by the applicant: see *Re IPM Developments Pty Ltd* [2023] NSWSC 1443, [9] (Ball J); *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245, [30] (Beazley JA, Meagher and Barrett JJA agreeing).

[31] *Re Guamani* [2023] NSWSC 502, [275].

[32] *Re Guamani* [2023] NSWSC 502, [317].

[33] *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1A)(g).

[34] Whether by virtue of the subject matter of some types of proceedings or by force of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*). For example, a plaintiff in judicial review proceedings is not required to give security for costs "except in exceptional circumstances": *UCPR* r 59.11(1).

[35] *Re Guamani* [2023] NSWSC 502, [153(1)], citing *Re Dowling* [2013] NSWSC 1040, [23] (Young AJ).

[36] *Re Guamani* [2023] NSWSC 502, [153(10)] (*Re Guamani*), citing *Re Brooker-Pain* [2019] NSWSC 671, [60(a)] (Lindsay J); *Re Konakas* [2014] NSWSC 786, [228]–[233], [275]–[283] (Lindsay J). See also *Re Guamani*, [172].

[37] Assuming they have notice of the proceedings and had a reasonable opportunity to intervene in them: *Re Guamani* [2023] NSWSC 502, [153(4)], citing *Re Brooker-Pain* [2019] NSWSC 671, [60(d)] (Lindsay J); *Osborne v Smith* (1960) 105 CLR 153, 158–159 (Kitto J, Menzies and Windeyer JJ agreeing); *Re Dowling* [2013] NSWSC 1040, [24] (Young AJ); *McKeown v Harris* [2018] QSC 87, [13] (Crow J).

[38] *Re Guamani* [2023] NSWSC 502, [153(11)], citing *Bear v Bear* [2022] NSWSC 1687, [111].

[39] *Lando v Sutton* [2011] QSC 339, 5 (Philippides J).

the judge that the order sought *should* be made.[40] Similarly, a defendant's submitting appearance does not by itself entitle a plaintiff to relief.[41]

Accordingly, his Honour concluded that the proceedings involved "a matter of some public importance" as they concerned an application for probate of a Will.[42] Generally speaking, the public character of probate proceedings is a matter which would tend against the making of an order that a plaintiff provide security for costs.

COSTS IN PROBATE PROCEEDINGS: R 42.21(1A)(J)

By virtue of r 42.21(1A)(j) of the *UCPR*, the Court may have regard to the costs of the proceedings in determining whether it is appropriate to make a security for costs order. There are principles peculiar to the probate jurisdiction in relation to costs, particularly with respect to the costs of unsuccessful parties, which bear upon consideration of r 42.21(1A)(j). Generally speaking, "[t]he ordinary rule that costs follow the event is not necessarily applicable in a probate suit",[43] and there are aspects of probate litigation, including those below, which influence whether "some other order" (for the purposes of r 42.1 of the *UCPR*) should be made.[44]

It follows from the public interest in investigating the validity of a propounded Will that there is "a public interest in the incurring of some level of costs in cases where there is genuine doubt about the validity of a [W]ill".[45] Judicial and academic commentary commonly identifies two exceptions to the general mandate in r 42.1 of the *UCPR* that costs follow the event in probate litigation by reference to *Re the Estate of Hodges* (*Re Hodges*).[46] Those are to the effect that (1) where the cause for the litigation can be fairly attributed to the testator, the costs of unsuccessfully opposing a grant of probate may be ordered to be paid out of the deceased's estate;[47] and (2) if the creation of the deceased's Will arises out of circumstances which reasonably invite investigation by the Court, the Court may leave the costs of that course to be borne by the parties who respectively incurred them.[48] Importantly, however, Meek J emphasised, by reference to older academic commentary,[49] that the Court has greater flexibility in determining how the costs of unsuccessful parties in probate litigation are to be borne than merely the two exceptions referred to in *Re Hodges*.[50]

In addition to the Court making an assessment at the time of the application that the respondents might be relieved at the final hearing, even if unsuccessful, of any burden of paying the successful party's costs,[51] Meek J noted the availability of alternative mechanisms in probate proceedings to a security for costs order. Accordingly, the necessity for, and utility of, a security for costs order may be nullified where (1) the respondents to the application have an interest in the deceased's estate regardless of the outcome of the proceedings which is commensurate to the security sought by the applicant;[52] or (2) there

[40] *Re Guamani* [2023] NSWSC 502, [153(12)], citing *Re Dowling* [2013] NSWSC 1040, [25] (Young AJ).

[41] *Re Guamani* [2023] NSWSC 502, [153(7)], citing *Trust Co of Australia Ltd v Perpetual Trustees WA Ltd* (1995) 36 NSWLR 654, 660C-E (Young J).

[42] *Re Guamani* [2023] NSWSC 502, [288].

[43] *Re Guamani* [2023] NSWSC 502, [169], quoting *Micallef v Linney* [2020] NSWSC 1457, [6] (Emmett AJA).

[44] *Re Guamani* [2023] NSWSC 502, [183], citing *Gray v Hart* (2012) 10 ASTLR 379, [4] (White J); [2012] NSWSC 1562.

[45] *Re Guamani* [2023] NSWSC 502, [184], citing *Gray v Hart* (2012) 10 ASTLR 379, [5] (White J); [2012] NSWSC 1562.

[46] *Re the Estate of Hodges* (1988) 14 NSWLR 698, 709E-G (Powell J).

[47] *Re Guamani* [2023] NSWSC 502, [185(1)].

[48] *Re Guamani* [2023] NSWSC 502, [185(2)].

[49] Viz, Roland Hastings and George Weir, *Probate Law and Practice* (The Law Book Co of Australasia Pty Ltd, 2nd ed, 1948) 336–338: *Re Guamani* [2023] NSWSC 502, [189]–[190]. See also the reference to GE Dal Pont, *The Law of Cost*s (LexisNexis, 5th ed, 2021) 315–321: *Re Guamani*, [191].

[50] *Re Guamani* [2023] NSWSC 502, [190].

[51] *Re Guamani* [2023] NSWSC 502, [194(1)].

[52] *Re Guamani* [2023] NSWSC 502, [194(2)].

are associated proceedings (eg, a family provision claim) likely to be heard together with, or close to, the hearing of the probate proceedings in which the respondents have an arguable case to relief in an amount commensurate with the security being sought by the applicant.[53] In relation to (1), any order for costs awarded against the respondents at a final hearing may be able to be set off[54] against the respondents' entitlements to property in the estate during the administration of the estate.[55]

Importantly, his Honour held that based on the evidence as it then stood, it was probable at the final hearing of the matter that there would be no order as to costs made against the respondents or that they may have their costs paid out of the deceased's estate. These outcomes were said to result from there being a legitimate inquiry as to whether the deceased's 2021 Will constituted the last Will of a free and capable testator or the "well arguable case of matters occasioning doubt as to the validity of that Will".[56] The above demonstrates that the unique costs principles in probate claims and the alternative mechanisms available for securing a defendant's entitlement to costs in probate proceedings militate against the making of a security for costs order in such cases.

Conclusion

Ultimately, Meek J rejected the application by applying the *UCPR* in the context of probate proceedings and having regard to the peculiarities of that jurisdiction. Defendants should keep in mind the overarching purpose of the *CPA*, and consider how the characteristics, objects and purposes of the jurisdiction in which they are litigating may bear upon an application for security for costs, before making any such application.

[53] *Re Guamani* [2023] NSWSC 502, [194(3)].

[54] According to the principles in *Cherry v Boultbee* (1839) 4 My & Cr 442; 41 ER 171.

[55] *Re Guamani* [2023] NSWSC 502, [195], citing *Public Trustee v Gittoes* [2005] NSWSC 373, [138] (White J).

[56] *Re Guamani* [2023] NSWSC 502, [316].

PURE ECONOMIC LOSS: IN AN ACTION FOR THE TORT OF NEGLIGENCE, WHEN DOES A DUTY OF CARE ARISE?: *MALLONLAND PTY LTD v ADVANTA SEEDS PTY LTD*

Jeremy Harrison*

Can a duty of care, such as a duty of care to avoid the risk of pure economic loss, arise where a plaintiff does not allege an infringement of a right to person or property and there is no "assumption of responsibility" by the defendant? What is an "assumption of responsibility"? What is the status of the "salient features" approach?

THE ISSUE

An essential element of the tort of negligence is that the defendant owes the plaintiff a duty to take reasonable care when engaging in an activity to avoid causing the plaintiff a particular type of damage or loss that is reasonably foreseeable.

The issue in the present appeal was whether the respondent owed the appellants a duty of care to avoid the risk of pure economic loss. Accordingly, the members of the High Court, particularly Edelman J, analysed and re-explained the law as to when a duty of care arises in an action for the tort of negligence.

PRIOR TO THE DECISION IN CALTEX, A DUTY OF CARE WAS EITHER "ASSUMED" BY THE DEFENDANT OR IMPOSED UPON THE DEFENDANT BY LAW

By way of background, prior to the decision in *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad*[1] (*Caltex*), a duty of care could be owed to a plaintiff if the duty was (1) imposed by law, relevantly, a duty of care that was imposed by law upon a defendant corresponded with a plaintiff's right to person or property, or (2) based upon an objective assumption of responsibility by an express or implied undertaking by the defendant to the plaintiff or a class of persons of which the plaintiff was a member.

The duties of care that are imposed by law based on rights to person or property are concerned with the protection of that which has long been regarded as a person's natural rights. The securing of those rights has been said to be the essence of a State's duty.

The source of the modern application of assumption of responsibility in the law of torts is *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[2] which recognised that liability could also arise based upon the breach of an undertaking which, because there is no consideration, was not enforceable under the rules of contract.

Accordingly, in Australia, an assumption of responsibility is sufficient for the law of torts to recognise a duty to take reasonable care when that is what had been expressly or impliedly undertaken.

An assumption of responsibility involves a duty of care owed only by those who objectively provide the undertaking and owed only to those to whom such undertaking is provided.

Further, where a duty to take reasonable care to avoid causing pure economic loss is said to arise out of such an assumption of responsibility, the defendant can negate or limit that assumption, and thus the duty of care, by words or conduct directed to that person or class. Such a negation or limitation amounts to a denial of an assumption of responsibility on the part of the defendant which the person or class cannot ignore or reject.

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[1] *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529.

[2] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

The "General" Rule Is That Damages Are Not Recoverable in Negligence for Pure Economic Loss

Apart from duties assumed by undertaking referred to above, the longstanding general rule at common law is that damages are not recoverable in the tort of negligence for pure economic loss, being loss that is not consequential upon injury to person or property.

This general rule is said to reflect policy concerns about the potentially excessive scope of liability for financial loss. Further, indeterminacy of liability, in the sense that the defendant's liability cannot be realistically calculated, will ordinarily deny the existence of such a duty of care.

Caltex Introduced the "Salient Features" Approach to the Determination of Whether a Duty of Care Exists

Caltex was a case of pure economic loss caused to a plaintiff by negligent infringement of the property rights of a third party. *Caltex* purported to recognise a new species of duty of care, one which imposed an abstract duty to take care not to expose a person to loss, independently of a right to person or property, in circumstances involving undefined "salient features".

Since *Caltex*, one decision produced a non-exhaustive list of 17 "salient features". Salient features often concern the defendant's knowledge as well as the defendant's control, or conversely the plaintiff's vulnerability, with respect to the risk in question.

"[T]wo Errors" in Caltex

The reasons of Stephen J in *Caltex* have come to be treated as the basis for recovery of pure economic loss in the law of tort. Stephen J's approach involved an attempt to find "sufficient proximity between tortious act and compensable detriment" by reference to "salient features".

Edelman J said that the first error made by Stephen J was to treat his "salient features" approach as an extension of the recognition of a duty of care that arose in cases based upon an assumption of responsibility.

Edelman J said that the error was to utilise the assumption of responsibility principle as the basis for recognition of duties of care that are not *assumed* by a defendant, but rather are *imposed* upon a defendant.

Edelman J said that the second error made by Stephen J was to treat the concept of a duty of care as abstract, that is, not referable to any right of the plaintiff to person or property, but based upon a class of potentially unlimited "salient features".

The Present Appeal

The respondent (the "producer") produced a seed which was sold in 20 kg bags contaminated with the seed of another plant. The appellants (the "growers") were commercial farmers and they could not detect the contamination. They planted the seed and they were subsequently required to take costly action to eliminate the contaminant.

The growers commenced a class action in the Supreme Court of Queensland. The growers alleged that they purchased contaminated seed from a distributor authorised by the producer. The distributor was not, however, a party to the proceeding. The growers alleged that they suffered pure economic loss in the form of reduced income and increased expenditure.

The bags of seed bore prominent labels which included "Minimum Purity: 99%, Maximum Other Seeds: 0.1%" and there was no finding that the seed did not conform.

Relevantly, the labelling upon the bags also contained a "disclaimer", including that the risk of using the seed lay with the buyer and that the producer was not accepting responsibility for loss caused by negligence on its part.

The primary judge found that the contamination arose because there was a failure by the producer to exercise a reasonable standard of care in seed production. It was not disputed that such failure caused the

claimed economic loss. The producer accepted that the growers' losses were reasonably foreseeable in the absence of due care by the producer. The producer also admitted in "carefully confined" terms that, before supplying the contaminated seed to the market, it knew of facts that gave rise to risks of economic loss to growers posed by contaminated seed.

Both the primary judge and the Court of Appeal of the Supreme Court of Queensland, however, found that the producer was not liable to the growers in negligence because the producer did not owe the growers a duty of care.

Reasons Why No Duty of Care Was Owed

The joint reasons of Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ as well as Edelman J's separate reasons concluded that no alleged duty of care was owed.

There could be no duty of care imposed by law in the traditional sense noted above given that the growers did not allege that the contaminant caused them property damage or that their economic loss was consequential on property damage, and there was no allegation of injury to a person.

There was no assumption of responsibility by the grower. On the contrary, the words on each bag of seed communicated to the class of potential future purchasers that the producer was positively not assuming the responsibility which was at the core of the alleged duty of care.

With respect to the "salient features" approach to the determination of whether a duty of care arose, no party challenged the validity of this approach. Accordingly, Edelman J said that, until *Caltex* and the decisions which have followed *Caltex* are challenged or rationalised, it is "necessary" to apply that approach. A duty of care based upon salient features, however, "must be confined as narrowly as possible".

Here, the "salient features" did not justify a conclusion that the alleged duty of care existed. The kind of knowledge to which the producer admitted was "far distant" from the kind that has been identified in other cases as supporting the case for finding a duty of care to avoid economic loss. The producer's control of the risk of contamination was not absolute, as communicated by the packaging, and the growers were able to protect themselves by making an informed decision as to whether to plant the seed.

Outcome

The appeal was, accordingly, dismissed with costs.

BRUCE LEHRMANN WENT BACK FOR HIS HAT AND LOST HIS SHIRT: COSTS IN AUSTRALIAN LITIGATION

Michael Legg and Felicity Bell*

At the end of 2023 the Australian public was captivated by the defamation case of *Lehrmann v Network Ten Pty Ltd* (*Lehrmann v Network Ten*).[1] Mr Lehrmann alleged that he had been defamed by the reporting of an interview with former parliamentary staffer Brittany Higgins, who alleged that she had been raped at Parliament House in the early hours of 23 March 2019. Mr Lehrmann was not named but it was alleged that the reporting indicated that he was the perpetrator. Judgment was handed down in April 2024. Justice Lee of the Federal Court of Australia found that, on the balance of probabilities, Mr Lehrmann raped Ms Higgins at Parliament House in 2019 and Mr Lehrmann's claim failed.[2]

Attention then switched to the question of costs. While media focus was on the sheer scale of costs – reporting that some of the many counsel involved in the proceedings charge upward of $8,000 per day,[3] though this was shown, in a subsequent judgment, to be slightly off the mark, the amount being $11,000 per day[4] – the *Lehrmann* case well illustrates the dual costs risks of litigating civil matters in Australia. In short, unsuccessful parties may have to pay both their own lawyers, and the legal costs of their opponent/s.

Mr Lehrmann avoided the first set of costs by having a conditional fee arrangement with his lawyers.[5] However, in going "back for his hat", as Justice Lee metaphorically described the bringing of the defamation suit after the criminal trial of Mr Lehrmann for the alleged rape of Ms Higgins was abandoned,[6] Mr Lehrmann appears to have now "lost his shirt" by being liable for the bulk of Network Ten's costs on an indemnity basis. If Network Ten pushes to recover these costs, it may lead to Mr Lehrmann's bankruptcy.[7]

The *Lehrmann* case illustrates how legal costs work in Australian litigation. Legal costs, their incurrence and award, have a significant impact on access to justice for everyday Australians, regardless of whether they are seeking compensation for personal injury, contravention of consumer protection laws or challenging a decision or law of government.

SOME BASIC RULES OF COSTS IN LITIGATION – "LOSER PAYS"

In nearly all Australian courts, the starting point of legal costs or the usual order is that the unsuccessful litigant is required to pay the costs of the successful party. This is often referred to as "the loser pays", or "costs follow the event". It means that generally, the outcome of the substantive proceedings guides which side is liable for costs. For example, if one party is successful in their claim against another, that other party will likely be liable for the first party's costs. The reason for this approach is that a successful

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[1] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369.

[2] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369.

[3] Naomi Neilson, "'Rolls-Royce matter': Costs to Run Lehrmann Defamation Trial Revealed", *Lawyers Weekly*, 27 June 2024 <https://www.lawyersweekly.com.au/corporate-counsel/40002-rolls-royce-matter-costs-to-run-lehrmann-defamation-trial-revealed>.

[4] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 706, [14].

[5] Amanda Meade, "Bruce Lehrmann Had No-win, No-fee Deal with Lawyers, Federal Court Told", *The Guardian*, 8 May 2024 <https://www.theguardian.com/law/article/2024/may/08/bruce-lehrmann-defamation-trial-no-win-no-fee-deal-ntwnfb>.

[6] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369, [1091].

[7] Note, Mr Lehrmann has filed an appeal: Patrick Bell, "Bruce Lehrmann Widens Appeal after His Failed Defamation Case against Network Ten, Lisa Wilkinson", *ABC News* (Online), 13 September 2024 <https://www.abc.net.au/news/2024-09-13/act-bruce-lehrmann-amended-notice-of-appeal-failed-defamation/104350204>.

party should be compensated for expenses it has incurred because it has been obliged to litigate by the unsuccessful party.[8]

The loser pays approach does not apply in all Australian jurisdictions or types of case. In family law proceedings, the starting point is that each side will bear their own costs.[9] In public interest litigation, the court may in some circumstances also relieve a litigant from the ordinary costs rules.[10] This is in recognition that persons may otherwise be deterred from litigating important public interest issues, such as environmental issues, by the risk of incurring prohibitive costs.

The loser pays approach is also not an inflexible rule. Courts have a wide discretion when it comes to awarding (or not awarding) costs, and on what basis. The discretion must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation. Loser pays may be explained on the basis that the most important consideration when courts exercise their costs discretion is the result of the litigation.[11]

The starting points can be affected by various factors, which include how successful one side was (did they succeed in all the claims they made, or just one?) and their behaviour in bringing or defending the litigation and the manner of its conduct. Offers of compromise (also referred to as *Calderbank* offers or letters, after the English case of *Calderbank v Calderbank*[12]) may also be relevant. If a party rejected an offer from the other side that was on par with, or more generous than, the remedy eventually obtained from the court, the party who made the offer may receive some costs protection.

Types of Cost Award

Even where a party does succeed in obtaining a costs order against the other side, this is unlikely to be equal to the legal costs they have actually expended. This is because typically, where a party is successful in litigation, they will be awarded their costs on a "party/party" basis. These costs are sometimes termed "ordinary costs" since they represent the usual basis of the award. They are costs necessarily or properly incurred by the party in bringing or defending a claim, but are not necessarily equivalent to what a party actually paid their lawyers.[13]

As occurred in *Lehrmann v Network Ten* in relation to some of Network Ten's costs, courts may also award costs on an "indemnity" basis, which is the most generous award for the party receiving his or her costs. It is presumed that all costs incurred by the party will be reimbursed, unless they were incurred unreasonably. The objective of an indemnity costs award is said to be to compensate a party more fully for costs incurred and is not a punitive measure.[14] An award of indemnity costs can be based on various different factors but generally involves misconduct on the part of the party against whom costs are awarded. Indemnity costs might be awarded where a party brought or maintained a cause of action that had no real prospect of success; was for an ulterior motive; was brought with wilful disregard for known facts or clearly established law; or was conducted in an inefficient manner.

Legal Costs

Lawyers are entitled to charge fees which are fair and reasonable. Legal fees may be charged in a number of ways, including through an hourly rate, fixed fee, retainer or conditional fee. Time-based billing involves charging the client by reference to the time taken to complete the work required, multiplied by

[8] *Northern Territory v Sangare* (2019) 265 CLR 164, [24]–[25]; [2019] HCA 25.

[9] *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, Pt 12.

[10] *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11.

[11] *Northern Territory v Sangare* (2019) 265 CLR 164, [24]–[25]; [2019] HCA 25.

[12] See Jonathan Adamopoulos, "What Is a Calderbank Offer? Settlement Offers and Indemnity Costs", *Law Society Journal* (Online), 4 October 2022, <https://lsj.com.au/articles/what-is-a-calderbank-offer-settlement-offers-and-indemnity-costs/>; *Calderbank v Calderbank* [1975] 3 All ER 333.

[13] Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 12th ed, 2020) [18.10], [18.80].

[14] Cairns, n 13, [18.130]; *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [28].

each lawyer's hourly rate. In a fixed fee arrangement, the lawyer agrees to act for the client in exchange for a specified fee, regardless of the time needed to perform the service. Fixed fees have become prevalent in property law (conveyancing), estate law (drafting wills) and simple litigation matters such as debt recovery.

It is illegal for the amount payable to a law practice to be "calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates": commonly called a contingency fee.[15] In other words, a lawyer cannot ask a client to agree to pay the lawyer a percentage of their eventual settlement. An exception to this is class actions in the State of Victoria where a court may order a group costs order that is similar to a contingency fee in that legal costs are calculated as a percentage of the award or settlement, and shared among the members of the class.[16]

However, conditional billing (also termed a "no win no fee" agreement), is permitted. Conditional billing involves the lawyer's fee only becoming payable to the lawyer if a successful outcome is achieved. Conditional billing may also be combined with an uplift fee agreement where the lawyer takes his or her usual fee plus an agreed amount or percentage of this usual fee (up to a maximum of 25%) – the uplift – if the action succeeds.[17]

It emerged during the costs hearing in *Lehrmann v Network Ten* that Mr Lehrmann had a conditional fee arrangement with his own lawyers.[18] As his defamation case was unsuccessful, therefore, he was not required to pay his own legal costs. Nevertheless to the extent that this implies that unsuccessful defendants incur no costs at all in relation to their own legal team, it is misleading. Usually, for instance, a conditional fee arrangement would not exclude disbursements such as counsel's fees, expert's fees or court fees.

How Mr Lehrmann "Lost His Shirt"

As is now well known, Mr Lehrmann was unsuccessful in his defamation suit against Network Ten, although he has filed an appeal.[19] Pursuant to the loser pays approach, it was to be expected that he would be required to pay Network Ten's costs. Justice Lee was at pains to point out "there are no real winners in this litigation" and to highlight that some of Network Ten's conduct was "unreasonable".[20] Nonetheless, Mr Lehrmann was held to be liable for Network Ten's costs. The only exception was that Mr Lehrmann was not required to pay costs that Network Ten had incurred in relation to affidavits that were found to be unhelpful to the proceedings.[21]

However, Mr Lehrmann was not just liable for costs, he was liable on an indemnity basis. This is unusual. Justice Lee found that Mr Lehrmann had brought the action against Network Ten on a "fanciful and knowingly false premise" that was at the heart of the litigation – that he had not had sexual intercourse with Ms Higgins.[22] In Justice Lee's view, this amounted to misconduct as Mr Lehrmann advanced a case "he knew was false" and which caused cost and delay in the running of the case.[23] His Honour also noted that Lehrmann's rejection of a *Calderbank* offer would also, separately, have justified a partial award of indemnity costs against him from the date of the letter onward.[24] The difference between an award of

[15] See, eg, *Legal Profession Uniform Law* (NSW/Vic/WA) s 183.

[16] *Supreme Court Act 1986* (Vic) s 33ZDA.

[17] See, eg, *Legal Profession Uniform Law* (NSW/Vic/WA) s 182.

[18] Meade, n 5.

[19] Bell, n 7.

[20] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [1], [5], [37].

[21] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [44]–[46].

[22] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [54].

[23] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [56].

[24] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [60].

costs on the party/party or ordinary measure and an award of indemnity costs is not clear cut, but in very general terms it is a difference between recovering 60%–70% and recovering 90%–100% of a litigant's costs.[25]

However, Justice Lee did not award Network Ten all of its costs on an indemnity basis. His Honour considered that one particular argument run by Network Ten (referred to as the statutory qualified privilege defence) was insufficiently strong.[26] This defence to the charge of defamation required the conduct of Network Ten in publishing the impugned material to be (among other things) "reasonable in the circumstances", which Justice Lee did not accept. His Honour found, rather, that Network Ten unquestioningly accepted Ms Higgins' allegations without appropriately testing them.[27] Accordingly, the judge ordered that those costs incurred in relation to that particular defence be limited to party/party costs.[28]

That is not likely to give much comfort to Mr Lehrmann, who was ordered to pay $2 million toward Network Ten's costs.[29] The amount may have been higher except for Mr Lehrmann being "a man of modest means", as Justice Lee stated that he thought "it likely that the figure of $2 million is a real discount, perhaps a significant discount".[30]

The Australian loser pays system dissuades unmeritorious litigation and compensates those who have been obliged to litigate by the unsuccessful party. However, this approach to costs may also deter litigation by the risk averse or those who cannot accurately determine their likely prospects of success – most often individuals with something to lose but who, equally, are not wealthy. However, as Mr Lehrmann's case illustrates, not everyone is deterred, thus using court resources as well as imposing costs on their opponent. Indemnity costs are the court system's response to this. If Network Ten seeks to enforce the costs orders in its favour, and Mr Lehrmann cannot pay, he may be forced to declare bankruptcy. The loser pays system is what will cost Mr Lehrmann his shirt.

[25] The authors rely on Victorian Law Reform Commission, *Civil Justice Review - Report 14* (2008) 648 and anecdote, which is why the difference is expressed in very general terms. The award of costs on the party/party or ordinary measure will vary depending on jurisdiction, type of matter and the manner in which the litigation is run.

[26] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [42]–[46], [57].

[27] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369, s K.4.

[28] *Lehrmann v Network Ten Pty Ltd (Costs)* [2024] FCA 486, [57].

[29] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 706, [16], [18].

[30] *Lehrmann v Network Ten Pty Ltd* [2024] FCA 706, [4], [16].