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contents

Affidavit evidence: essential principles of style, format and content 58

Affidavit evidence is a core component of civil litigation in NSW. This article provides practical assistance by setting out the essential principles of drafting affidavits, particularly in light of the *Uniform Civil Procedure Rules 2005* (NSW).

Greg Sarginson BARRISTER, WINDEYER CHAMBERS

CASENOTES

- Discretion to order trial by jury in non-defamation civil litigation 61
  Maroubra Rugby League Football Club Inc v Malo

Matthew Bracks BARRISTER, GARFIELD BARWICK CHAMBERS

- Substantial miscarriage of justice when jury directed to disregard submissions 63
  Tory v Megna

Matthew Bracks BARRISTER, GARFIELD BARWICK CHAMBERS

- A just expert: discretion to allow further expert report 65
  Owners of Strata Plan 58577 v Banmor Developments Finance Pty Ltd

Toby Biddle DEACONS

THE COSTS COLUMN

The new costs cap in the Local Court 66

A capping of costs remniscent of the capping of personal injury claims under civil liability legislation has occurred in certain Local Court matters. This article sets out the changes and discusses.

Alyson Ashe LEGAL COSTS CONSULTANT

PRACTICE UPDATE 68

New and amended rules and practice notes, judicial speeches and other news

Information contained in this newsletter is current as at April 2007

Civil
PROCEDURE NEWS
NEW SOUTH WALES

Affidavit evidence: essential principles of style, format and content

Greg Sarginson
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Affidavit evidence is a core component of civil litigation in NSW. Other than criminal trials and personal injury hearings, the majority of evidence-in-chief in NSW jurisdictions is undertaken by way of affidavit. Consequently, it is important that all persons involved in the drafting of affidavits understand the principles that constitute the foundation of affidavit evidence. A 'good' affidavit not only saves time and money in the drafting stage by avoiding multiple re-drafts and extensive 'settling' by counsel, it can be the difference between winning and losing a case.

This article is not designed to extensively cover all aspects of affidavits. Rather, its object is to be of practical assistance by concentrating on the essential principles of drafting affidavits.

What is an affidavit?

An affidavit is sworn (or affirmed) evidence of a witness in written form. It is the evidence of the witness, not a 'script' created for the witness to adopt. Consequently:

- the evidence must be relevant to a fact in issue;
- the words used in the affidavit must be those of the witness (known as 'the deponent');
- the affidavit must comply with rules of evidence (*Evidence Act 1995* (NSW)); and
- the affidavit must be in the appropriate form required by the jurisdiction (usually Pt 35 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR)).

What is an annexure or exhibit?

An annexure or exhibit to an affidavit is a physical thing (usually a document) to which the deponent refers to in the affidavit. The rules pertaining to the method of attaching an annexure or exhibit are contained in r 35.6 of the UCPR.

It is a common fallacy that 'anything' can be annexed or exhibited to an affidavit. The process of annexing or exhibiting a physical thing to an affidavit is no different to the process of tendering an exhibit via a witness in the witness box. The annexure or exhibit must be admissible. The mere fact that the deponent annexes or exhibits something to an affidavit does not, of itself, mean that the annexure or exhibit is admissible.

The difference between an annexure and an exhibit is simply the size and nature of the object being referred to by the deponent. Lengthy documents should be exhibited rather than annexed. Prior to the introduction of the UCPR, any document over 50 pages had to be an exhibit rather than an annexure. This rule has now been abolished.

Rules of evidence

As discussed above, affidavits must comply with the rules of evidence contained in the *Evidence Act*. It is beyond the scope of this article to give a comprehensive review of the provisions of that Act; however, important rules of evidence are as follows.

Relevance

The most basic rule of evidence is that evidence must be relevant to be

admissible. The definition of relevance under s 55 of the *Evidence Act* is as follows:

> (1) … evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceedings.
>
> …

In other words, the evidence must be probative of a fact in issue in the proceedings. The first task of drafting an affidavit is to be satisfied that the evidence of the witness will assist the proof of a fact in issue. The second task is to ensure that, as much as possible, the affidavit is focused on relevant issues. Both tasks require the person drafting the affidavit to understand what the facts in issue are, and how the evidence of the witness is relevant to proving such facts.

Opinion evidence

Opinion evidence is inadmissible unless it falls within a class of exceptions to the rule. The reason behind the principle that opinion evidence is inadmissible is that rules of evidence are based upon the five senses (what the witness saw, heard, smelt and so on) to establish facts, not the construction of events into an 'opinion'. Section 76 of the *Evidence Act* enshrines the rule against opinion evidence. Notable exceptions are:

- evidence relevant for a non-opinion purpose: s 77;
- evidence of what the witness saw, heard or otherwise perceived about a matter of event, and such evidence is necessary to obtain an adequate understanding of the witness's perception of the matter or event: s 78;
- evidence of an expert, provided the evidence is wholly or substantially based on the study, training or experience of the expert: s 79; and
- evidence of an admission: s 81.

Hearsay

Hearsay is arguably the most difficult rule of evidence to understand. The rationale behind the hearsay rule is similar to that of the opinion rule. The fact that a person has been told that a certain event occurred is not the best evidence of the fact that the event occurred. However, the existence of many exceptions to the rule renders it difficult to understand and apply.

Section 59(1) states that:

> 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.

The major exceptions to the hearsay rule are as follows:

- where the evidence is relevant for a non-hearsay purpose: s 60;
- first-hand hearsay (ss 62–67) — this is defined in s 62 as 'a previous representation that was made by a person who had personal knowledge of an asserted fact'. First-hand hearsay may be admissible in civil proceedings, depending upon whether or not the person is available to give evidence, and appropriate notice has been given. More strict rules apply to first-hand hearsay in criminal proceedings: ss 65 and 66;
- hearsay contained in business records, subject to certain limitations: s 69 — this is a particularly important exception when business documents are annexed to an affidavit;
- contemporaneous statements about the health of a person: s 72;
- representations about marriage, family history or family relationships: s 73;
- evidence in interlocutory proceedings: s 75. This exception will be discussed in more detail below;
- representations about employment or authority: s 87(2);
- evidence of judgments or convictions: s 92(3); and
- admissions: s 81.

Tendency and coincidence

Tendency evidence is evidence of the character, reputation or conduct of a person or a tendency that the person has or had, the purpose of which is to prove that a person had or has a tendency to act in a particular way or have a particular state: s 97.

Coincidence evidence is evidence that two or more related events occurred which is intended to prove that, because of the improbability of events occurring coincidentally, a person did a particular act or had a particular state of mind: s 98.

Sections 97 and 98 set out the conditions for the admissibility of tendency or coincidence evidence, which are either:

- reasonable notice is given to all other parties of the intention to adduce tendency or coincidence evidence; or
- notice is dispensed with by the court under s 100; or
- the evidence had significant probative value; or
- the evidence is to explain or contradict other tendency or coincidence evidence.

However, the provisions of Pt 3.6 of the *Evidence Act* do not apply if the 'character, reputation, conduct or tendency' of a witness is a fact in issue: s 94(3).

Affidavits in interlocutory proceedings

Interlocutory proceedings are proceedings prior to the final hearing, and do not usually finalise the matters in dispute in the main proceedings. Interlocutory proceedings are commenced by filing and serving a notice of motion. There are many types of interlocutory proceedings, including interlocutory injunctions (that is, an injunction which applies until the final hearing); seeking discovery or interrogatories; seeking summary judgment; and defendants seeking an order that the plaintiff provide security for costs.

The principles for affidavits in interlocutory proceedings are the same as those applicable in substantive proceedings, with one important exception. Affidavits in interlocutory

proceedings may contain hearsay, provided that the source of the representation is identified: s 75, *Evidence Act*.

Affidavits and cross-examination

Deponents of affidavits which constitute evidence-in-chief in the substantive proceedings are usually required to give evidence, and will be cross-examined. Deponents of affidavits obtained in interlocutory proceedings (that is, notices of motion) will only be required for cross-examination if the opposing party gives reasonable written notice that the deponent is required for cross-examination.

The requirement of notice for cross-examination of the deponent to an affidavit is contained in r 35.2 of the UCPR.

Filing of affidavits

Prior to the introduction of the UCPR and the *Civil Procedure Act 2005* (NSW), all affidavits needed to be filed with the relevant court registry before being served. Now, under r 35.9 of the UCPR, the filing of affidavits with the court is not usually required.

Style and substance of affidavits

In *Rose's Pleadings Without Tears in Australia*,[1] Justice P W Young and Hugh Selby give a number of tips in respect of the drafting of affidavits, which I elaborate upon as follows.

1. *State facts only*. Except in the case of expert witnesses, do not state mere opinions. The object of all evidence is to prove facts in issue. As much as possible, the affidavit should concentrate on facts. Opinions are not only open to challenge as being inadmissible, they dilute focus from the facts in issue.
2. *Conversations must, as nearly as possible, be in direct speech*. It is important to state the time and place of the conversation being set out. The rationale for such a rule is that the best evidence of a conversation is the words actually spoken, rather than a 'summary' of what was said, or what the witness intended to say. The requirement that conversations be in direct speech creates a challenge for the person drafting an affidavit. Most witnesses do not recall every word of a conversation which occurred months or years ago, and are reluctant to commit to the words actually spoken. However, within the limitations imposed by the memory of the witness, the direct speech should be as close as possible to the witnesses' recollection of the words actually spoken. The person drafting the affidavit should avoid 'putting words in the mouth' of the witnesses.
3. *Hearsay is as much objectionable in an affidavit as it is in oral evidence*. The rules of evidence pertaining to hearsay are discussed above.
4. *The affidavit should follow some logical form, ordinarily but not necessarily, chronologically*. There is nothing more frustrating than an affidavit that is difficult to understand, or does not make sense, because it is poorly organised. Further, a poorly organised affidavit is more likely to omit important evidence, or even if all the relevant evidence is contained in the affidavit, the court does not place appropriate weight on the evidence due to confusion.
5. *Make sure the witness tells the whole story in the affidavit*. If this does not happen, the cross-examiner will almost certainly embarrass the witness by showing that a significant topic was omitted.
6. *The lawyer settling the affidavit should check the draft for accuracy, unlikelihood or absurdity*.
7. *Where possible, structure the affidavit so that its content is obviously relevant, interesting and thus persuasive*.

In addition to the above, I would add the following:

8. *Keep the content of the affidavit simple*. Avoid using words or phrases that the witness would not use. This can be challenging if the deponent is poorly educated, or from a non-English speaking background. However, always remember that the deponent is likely to be cross-examined on the content of the affidavit, and it is the evidence of the deponent, not a 'script' prepared by a solicitor for the deponent to adopt.

Ethical issues

The paramount ethical obligation of a practitioner is not to deliberately mislead the court. This obligation extends to the avoidance of drawing an affidavit which the practitioner knows contains false evidence. Further, a solicitor must not draw an affidavit alleging criminality, fraud, or serious misconduct unless the practitioner believes, on reasonable grounds, that there is factual material that provides the 'proper basis' for such an allegation. The obligations for solicitors are set out in rr 17.1 and 17.2 of the *Revised Professional Conduct and Practice Rules 1995* (NSW). Breach of such obligations constitutes professional misconduct, and can lead to a practitioner being struck off (see, for example, *Myers v Elman* [1940] AC 282). ●

Checklist for the drafting of affidavits

1. What are the facts in issue?
2. Why is the evidence of the witness relevant to the facts in issue?
3. Does the affidavit comply with the rules of evidence?
4. Does the affidavit comply with the UCPR?
5. Does the affidavit cover all relevant topics of evidence to which the witness can depose?
6. Is the affidavit logical and well-structured?
7. Does the affidavit use language that is simple and easy to understand?
8. Are all appropriate documents annexed to the affidavit?
9. Have all ethical obligations of the practitioner been complied with?

G J Sarginson, Barrister,
Windeyer Chambers, Sydney.

Endnote

1. Young P W and Selby H *Rose's Pleadings Without Tears in Australia* Federation Press, Sydney 1997.

Civil PROCEDURE NEWS NEW SOUTH WALES

CASENOTE

Discretion to order trial by jury in non-defamation civil litigation

Matthew Bracks BARRISTER, GARFIELD BARWICK CHAMBERS

MAROUBRA RUGBY LEAGUE FOOTBALL CLUB INC v MALO

[2007] NSWCA 39; BC200701510

The standard to be applied under s 85(2)(b) of the *Supreme Court Act 1970* (NSW) in determining whether the interests of justice require a trial by jury in non-defamation civil proceedings in the Supreme Court is high and absolute. Significant caution will be exercised before the court can be satisfied that the application of community values requires a departure from the general rule that civil proceedings be tried without a jury.

Background

The first respondent was a member of the Maroubra Lions team fielded by the appellant, the Maroubra Rugby League Football Club Inc, in a match against the Southeastern Rugby League Football Club in 1998. That match was part of a competition organised by second respondent, the South Sydney District Junior Rugby Football League Ltd. Six members of the Maroubra Lions attended for the match and five other players were recruited who had played in an earlier match. The Maroubra Lions thereupon fielded a team of 11 players against the opposition's full team of 13 players.

The first respondent suffered a spinal injury when he was tackled during the second half of the match. While the tackle was not unlawful, it was alleged that the first respondent had borne a greater than appropriate share of the burden of play and that he was prone to serious injury because he was highly fatigued. He sued the second respondent and the appellant, alleging negligence in the failure to prescribe rules to prevent matches taking place where a team was unable to field a full side. Damages were agreed but liability was in issue. The proceedings were instituted against the second respondent in 2001 and liability was governed by common law principles. The appellant was joined as a party in 2004, after the commencement of the *Civil Liability Act 2002* (NSW). The appellant invoked ss 5I and 5L of that Act, requiring consideration of the statutory concepts of 'inherent risk', 'obvious risk' and 'dangerous recreational activity'.

The first respondent obtained an order under s 85(2) of the *Supreme Court Act 1970* (NSW) that the proceedings be tried by a jury. That section, which commenced on 18 January 2002, provides that proceedings in any Division of the Supreme Court are to be tried without a jury unless the court orders otherwise, and that the court may order that proceedings be tried with a jury if a party files a requisition for trial with a jury, and pays the prescribed fee, and the court is satisfied that the interests of justice require a trial by jury.

> Significant caution will be exercised before the court can be satisfied that the application of community values requires a departure from the general rule that civil proceedings be tried without a jury.

The primary judge ordered that the proceedings be tried with a jury and endorsed the approach taken in *Muir v Council of Trinity Grammar School* [2005] NSWSC 555; BC200504120. This approach was said to comprise the notion that a case involving the consideration, determination or application of general community contemporary values or moral, ethical or general social values is the sort of case that may require a jury trial. The primary judge found that the case involved novel issues and questions concerning the extent to which administrators of community clubs ought to be held liable for injury resulting from their management decisions. On the basis that the claim involved an examination of the limits of liability of those who administer a quintessentially community activity, it was considered appropriate for the community, through the jury process, to be involved in its determination.

Court of Appeal

The appellant argued that the primary judge departed from the statutory test under s 85(2)(b), and that labeling the proceedings as novel and placing weight upon an amateur rugby league competition as a quintessentially community activity was wrong and irrelevant.

Relevant principles

Mason P, with whom Ipp and Tobias JJA agreed, noted that s 85 provides a general rule for non-defamation matters that civil proceedings in the Supreme Court are to be tried without a jury. The power, or discretion, to order otherwise is only engaged if a party files a requisition for trial with a jury and pays the prescribed fee, and the court is satisfied that the interests of justice require a trial by jury in the proceedings.

The 'interests of justice' refer to considerations going beyond the private interests of the parties, so that a party's

self-interested right to requisition for trial by jury is not to be endorsed in order to advantage that party. Rather, the court must be satisfied that the interests of justice require departure from the general rule of trial by judge alone. In focusing on that test, the court may consider the incidents of the two different modes of trial, but should recognise that each must be assumed to be a satisfactory and fair mode of trial.

The intention of Parliament in introducing s 85 is to be determined by the language of the enactment. The circumstances in which parliamentary statements may illuminate the meaning of statutory language are limited by s 37 of the *Interpretation Act 1987* (NSW) to confirming that the meaning of the provision is the ordinary meaning conveyed by the text, or determining the meaning of the provision if it is ambiguous or obscure, or if the ordinary meaning of the text leads to a manifestly absurd or unreasonable result. Although the Attorney-General disclosed, in moving the Second Reading of the Courts Legislation Amendment (Civil Juries) Bill 2001 (NSW), that the mischief perceived by the government was that jury trials can be more costly and time-consuming than trials before a judge alone, no weight could be attributed to later statements by the government about how it intended the legislation to operate.

It is wrong to approach the question of whether the interests of justice require a jury trial by identifying specific factors which indicate that trial by jury is warranted in the interests of justice, or by identifying a substantial reason which justifies and warrants a departure from the normal mode of trial. Although the applicant for a jury trial need not demonstrate unavoidable necessity, there is a significant difference between circumstances that *warrant* a course of action and circumstances that *require* it. The statutory language of the provision contemplates that which is obligatory, not that which is authorised.

Consideration of what ought or ought not to be resolved by a jury employing the commonsense and values of the average juror similarly involves an inappropriate departure from the test. The test is solely whether the interests of justice require departure from the general rule that civil proceedings are to be tried without a jury. Although it is often asserted that the range of views that jurors bring to a problem may be closer to the assumed thinking of the community than that of a judge sitting alone, the absence of a community viewpoint is not an inherent defect of trial by judge alone. Section 85(2)(b) does not allow the court to weigh which mode of trial is preferable and to prefer a jury trial if traditional considerations would have supported that mode. Nor does it permit the abandonment of judicial fact-finding on the basis that jurors may be seen as better placed to identify moral, ethical or general social values. The invocation of general community contemporary values is not the touchstone whereby the court decides whether the interests of justice require a trial by jury.

The invocation of general community contemporary values is not the touchstone whereby the court decides whether the interests of justice require a trial by jury.

Nor will the presence of fraud allegations or major credibility issues necessarily suffice. Such matters are frequently decided by judges, who disclose their reasons and thereby aid appellate accountability. Significant caution will be required before a court can be satisfied that community, moral, ethical or general social values are relevant to proceedings and that this could satisfy the judge that the interests of justice require departure from the general rule.

Determination

The court found that the power to order a trial by jury was not engaged and that the matters relied upon at first instance were extraneous to its exercise. It was wrong and irrelevant to label the proceedings as novel and to place weight upon an amateur rugby league competition as being a quintessentially community activity. There was nothing novel about a case involving serious injury in sport and, because a jury verdict lacks precedent effect, any contextual novelty added nothing to deciding whether the interests of justice required the participation of jurors.

Although community members are involved in amateur sport, and the issues in the proceedings will attract public attention, the matters of current interest to the public are not those that will require attention when the case comes to trial. Those matters will be the reasonableness of the conduct of the defendants in administering the conditions in which the game was played in 1998. Negligence will be determined as at that time, having regard to the standards and practices of sports administrators and what was known and what ought to have been known at the time.

Determining compliance with the standard of reasonable care of a sports administrator will be informed by the evidence, not by the perceptions of persons who play or watch sport. Although many people are involved in amateur sports administration, such community involvement could not alone lead the court to be satisfied that the interests of justice required a trial by jury. Cases arising out of injuries in amateur sport are common and there was nothing creating the reality or perception that the interests of justice would be undermined by judicial determination of these matters.

(It is understood that an application has been filed for special leave to appeal to the High Court.) ●

Matthew Bracks, Barrister,
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CASENOTE

Substantial miscarriage of justice when jury directed to disregard submissions

Matthew Bracks BARRISTER, GARFIELD BARWICK CHAMBERS

TORY v MEGNA
[2007] NSWCA 13; BC200700728

This appeal arose from a jury trial pursuant to s 7A of the *Defamation Act 1974* (NSW) in which the jury found that the appellant had published the matters complained of and that each imputation pleaded was conveyed and was defamatory of the respondent. In determining the appeal, the court considered the test to be applied under Pt 51 r 23 of the *Supreme Court Rules 1970* (NSW).

Background

The respondent was a councillor of Drummoyne Council between 1987 and 2000 and twice served as mayor during that period. The appellant was a long-time resident of the Drummoyne municipality and was involved in various local issues. The respondent complained about 17 anonymous community circulars or newsletters that were published between 1998 and 2000, and again in 2003. These were distributed to letterboxes in the municipality under the banners of organisations called the Drummoyne Council Ratepayers Association and Community View. The appellant denied publication at the trial and the case against him was largely circumstantial. Most of the evidence presented at the trial concerned this issue.

It was submitted on behalf of the appellant that, if the jury found that the he had published the material, it would find that the imputations pleaded were not conveyed because the ordinary, reasonable reader would not take any notice of the matters complained of. It was submitted that such a reader would not take the matters seriously because the publications were junk mail, rubbish and political scandal sheets, and that no impression would be conveyed to the reader as a result of those characteristics. The trial judge ruled that these were not matters for consideration by the jury. Rather, they were questions for later consideration by a judge pursuant to the defence of unlikelihood of harm under s 13 of the *Defamation Act*, should the matter advance beyond the trial under s 7A. The trial judge accordingly directed the jury to disregard the imputations submission as a matter of law. As a result of that direction, the appellant was left with no submission to be considered by the jury if the jury found the appellant to have been responsible for the publication.

Court of Appeal

The appellant identified the main issues to be:

- whether the imputations submission to the jury was available as a matter of law, in that it was permissible to consider the nature of the publication as being relevant to its meaning; and
- whether that submission, if allowed, was relevant to determining whether the imputations were conveyed or whether they were defamatory.

Relevant principles

Spigelman CJ, with whom Beazley and Bryson JJA agreed, observed that it is a significant matter for a trial judge to direct a jury to disregard a submission of counsel which is open to be accepted. It is not the case, however, that an appeal must be allowed whenever that occurs. The court is required to apply Pt 51 r 23 of the *Supreme Court Rules*, which provides that it shall not order a new trial on the ground of misdirection, non-direction or other error of law unless it appears that some substantial wrong or miscarriage of justice has been thereby occasioned. When interpreting those latter words, the court is required, by s 56 of the *Civil Procedure Act 2005* (NSW), to give effect to the overriding purpose of that Act and of rules of court in their application to civil proceedings — namely the just, quick and cheap resolution of the real issues in the proceedings.

The respect to be accorded to the role of the jury, in the performance of its functions under s 7A of the

Spigelman CJ … observed that it is a significant matter for a trial judge to direct a jury to disregard a submission of counsel which is open to be accepted. It is not the case, however, that an appeal must be allowed whenever that occurs.

Defamation Act, has been acknowledged in many contexts. Nevertheless, even in a criminal context an appeal court will allow an appeal on the basis that a jury decision is unsafe. Moreover, in determining the need for a new trial after the identification of a legal error, there is a well-established body of jurisprudence regarding the application of the proviso. The reasoning of the High Court in *Weiss v R* (2005) 224 CLR 300 at [12]–[18], regarding the application of the proviso in a criminal appeal, should be adopted for the purposes of test under Pt 51 r 23.

In *Weiss* the High Court said that consideration of the proviso should not be undertaken by attempting to predict what a jury would or might do. Instead, the task is to decide whether a substantial miscarriage of justice has actually occurred. Three fundamental propositions apply.

1. The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred.
2. The task of the appellate court is an objective task that is not materially different from other appellate tasks. It is to be performed on the basis of the record of the trial and is not an exercise in speculation or prediction.
3. The standard of proof of criminal guilt is proof beyond reasonable doubt. It is otherwise inadvisable to formulate additional rules or tests in so far as they distract attention from the relevant statutory test.

Determination

The court determined that no substantial wrong or miscarriage of justice had occurred, and dismissed the appeal. In determining whether or not there had been a substantial wrong or miscarriage of justice, it was significant that the appellant's case on the imputations submission at trial, and on appeal, was of an all or nothing nature. It had not been suggested that some of the imputations were more likely to be disregarded by the ordinary reasonable reader.

When the full range of the circulars was assessed in the comprehensive manner suggested in *Weiss*, it was clear that a reasonable jury could not have concluded that they should be disregarded as junk mail in the manner urged by the appellant. Although the circulars contained extravagant and colourful language (such as 'shocker', 'howlers', 'environmental shonk' and 'breathtaking deception'), and language that could be described as vulgarly abusive (such as 'sneak', 'vermin', 'grubs' and 'that idiot Megna'), those references were scattered through long passages of prose and generally were limited to two or three per circular. The references, as well as the use of harmless colloquialisms and a conversational style, did not allow the circulars to be characterised in the way for which the appellant contended.

Despite the use of strident language and the circumstances of their distribution, being unsolicited, unsigned and placed in letterboxes and under front doors, the circulars bore a number of characteristics that encouraged a reader to take them seriously. Those characteristics comprised the names of the resident organisations under which they were published, the regularity with which they were issued, the repetitive themes of council waste and mismanagement that were addressed, the detailed references to council business and events at a local government level, the operational and procedural nature of the council business that was highlighted, and the size of the newsletters, which generally ran to several pages of dense and detailed text and lacked stylistic devices such as pictures or enlarged text that were common in junk mail.

Those factors combined to create an overall impression that each newsletter was a serious attempt to communicate information. In those circumstances, a reasonable jury, properly instructed, could not have accepted the submission that the ordinary reasonable reader would have put any, let alone the entirety, of the publications aside, and there had been no substantial wrong or miscarriage of justice. ●

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CASENOTE

Rulings on experts' qualifications — law or fact?

Toby Biddle DEACONS

HAMOD v SUNCORP METWAY INSURANCE LTD
[2006] NSWCA 243; BC200606830

An appeal as of right from a judgment of the General Division of a NSW Local Court is only available in circumstances where a party contends that the judgment is 'erroneous in point of law' (*Local Courts Act 1982* (NSW), s 73(1)). In *Hamod v Suncorp Metway Insurance Ltd*, the NSW Court of Appeal considered whether a ruling on the admissibility of expert evidence can constitute an error in point of law.

Background

Mr Hamod brought proceedings against Suncorp Metway Insurance Ltd (Suncorp) following the theft of his Mitsubishi Magna. At first instance in the Local Court, the magistrate held that the Suncorp policy relating to the car did not cover Mr Hamod for the theft. The basis for this decision was a factual finding that the car had not been stolen as the 'thieves' had used a key belonging to Mr Hamod to access the vehicle.

In the course of the trial, the magistrate had rejected the tender of an expert report from a Mr Beard. In the report, Mr Beard put forward an opinion that it was possible to decode and re-program a car's engine immobiliser to accept a copy of a car's actual key. He also contended that this is what had occurred when Mr Hamod's car was stolen.

Mr Beard had experience as a motor mechanic and had also worked with computers. However, he had no experience with engine immobilisers. Accordingly, the magistrate rejected the tender of the report on the basis that Mr Beard lacked relevant expertise.

An appeal by Mr Hamod to the NSW Supreme Court was dismissed by Master Malpass. Leave to appeal the Master's judgment was granted to Mr Hamod but was restricted to whether the magistrate had erred in rejecting Mr Beard's report.

The Court of Appeal unanimously dismissed Mr Hamod's appeal. It found that while the rejection of Mr Beard's evidence may have involved the application of legal principles, the finding that Mr Beard lacked relevant expertise was essentially a finding of fact. The factual issue was whether a trained motor mechanic was an acceptable expert in relation to the operation of an engine immobiliser despite lacking any experience with engine immobilisers. The Court of Appeal could not discern any error of principle underlying the reasons given by the magistrate for finding that Mr Beard was not appropriately qualified.

The Court of Appeal added that even if there had been an error at law, Mr Hamod would still not have succeeded in the appeal. This was because, leaving aside how the car's engine was started, the thieves still would have needed a key to enter the car without activating the car's alarm. Mr Beard's report would have had no bearing on the magistrate's finding that the key used to access the car was Mr Hamod's key.

The Court of Appeal's reasoning leaves open the possibility that, in some circumstances, a ruling on the admissibility of expert evidence could be held to constitute an error of law (for example, if the rules of evidence are applied incorrectly). However, a ruling on admissibility relating only to the relevance of an expert's qualifications will generally not be held to be a legal error as it is essentially a finding of fact. ●

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the costs COLUMN

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The new costs cap in the Local Court

Key points

- Capped costs for solicitors and counsel in Local Court will require fresh disclosure to clients.
- An 'otherwise order' requires a formal application by motion.

A capping of costs reminiscent of the capping of personal injury claims under the *Civil Liability Act 2002* (NSW) has occurred in certain Local Court matters.

Effective from 1 March 2007, by direction of the Chief Magistrate, is Practice Note 2 of 2007. The Practice Note is reproduced below, followed by a discussion of implications.

Practice Note 2 of 2007

Issued pursuant to section 15 of the Civil Procedure Act 2005 (NSW) (CPA)

1. That so far as this Practice Note is inconsistent with Practice Note 1 of 2000, Practice Note 1 0f 2000 is superseded.

2. This Practice Note commences on 1 March 2007.

3. *Objectives and Purpose*
   3.1 The purpose of this Practice Note is to indicate a limitation on the maximum amount of costs that will generally be awarded in proceedings to which this Practice Note applies.[1] Where the amount claimed is $20,000 or less the Court's discretion as to costs in proceedings will in general terms be exercised so that the maximum amount of costs awarded in respect of the proceedings, after the first defence is filed, is limited pursuant to Rule 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR). Maximum costs should NOT be considered as the standard amount to be awarded. Costs will be subject to agreement or assessment in appropriate proceedings, however, the amount of costs should not exceed the maximum unless the court otherwise orders.
   3.3 Costs mentioned in this Practice Note do not include general disbursements but do include Counsel's fees.

4. *Limitation on Amount of Costs to be Awarded*
   4.1 This Practice note applies to proceedings in the General Division in which the amount claimed does not exceed $20,000 and to all matters transferred from the Small Claims Division to the General Division.
   4.2 Unless the court otherwise orders, this Practice Note applies to proceedings no matter when commenced where the first defence is filed or (in the case of a matter commended in the Small Claims Division) where the matter is transferred from the Small Claims Division to the General Division, after the commencement of this Practice Note.
   4.3 Unless the Court in a particular case determines otherwise, the discretion of the Court as to costs incurred after the first defence is filed will be exercised as if a maximum costs order under r 42.4 of the [UCPR] had been made in the proceedings at the time of filing of the first defence in the terms set out below ('the maximum costs order'). Costs up to and including the filing of the first defence will not be included in the amount specified in the maximum costs order, but may be ordered in addition to that amount.
   4.4 Rule 42.4 Maximum Costs Order
   The discretion of the court to award costs shall be exercised so as not to exceed the following amounts:
   (a) where the plaintiff succeeds — 25% of the amount awarded by the court
   (b) where the defendant succeeds — 25% of the amount claimed by the plaintiff.

5. *Maximum Costs Order for Matters Transferred From the Small Claims Division to the General Division*
   5.1 The Rule 42.4 Maximum Costs Order for matters commenced in the Small Claims Division and subsequently transferred to the General Division is as follows:
   1. Pursuant to Rule 42.4 of the UCPR, the maximum costs which may be recovered by a successful party shall be fixed at $2,500.

6. *Variation of Rule 42.4 Maximum Costs Order*
   6.1 An [sic] party seeking to vary the Rule 42.4 Maximum Costs Order or such other Rule 42.4 Orders as may be in force may make application at any time but not later than two weeks prior to the first Review date [sic].
   6.2 An application for a variation of the Rule 42.4 Maximum Costs Order or such other Rule 42.4 order as may be in force:
   6.2.1 must be made by way of notice of motion;
   6.2.2 must be served by the applicant on each party who may be affected by the application no later than five days before the return date of the motion.
   6.2.3 the notice of motion must be supported by an affidavit containing information as to the importance of the subject matter of the proceedings and the

complexity of the proceedings (section 60 [of the *Civil Procedure Act* 2005 (NSW)];
6.2.4 the supporting affidavit must include an estimate of the recoverable party/party legal costs of the party as at the date of the application, and an estimate of the recoverable party/party legal costs which will be incurred between the date of the application and the completion of the trial; and
6.2.5 the supporting affidavit must NOT annex a bill of costs of the party making the application.
6.2.6 The notice of motion must specify an amount sought as an alternative maximum costs order.

6.3 A party who may be affected by an application for variation of the Rule 42.4 Maximum Costs Order may file at the registry and serve on all other active parties an affidavit responding to the notice of motion. That affidavit may specify an amount sought as an alternative maximum costs order.

6.4 The Court will determine an application for a variation of the Rule 42.4 Maximum Costs Order up until the time of first Review and may make the following orders:

1. An order that the Rule 42.4 Maximum Costs Order shall continue to apply
2. An alternate Rule 42.4 order
3. Such order as the court deems appropriate.

7. *Court's Discretion as to Indemnity Costs*

7.1 This Practice Note does not affect the power of the Court to exercise its discretion to depart from the orders specified herein or make orders for indemnity costs in appropriate cases.

Discussion and implications

Small business usually wishes to pursue claims of between $10,000 and $20,000 and now they will be seriously disadvantaged as to costs. The defendant will have an advantage knowing the plaintiff is being screwed down to a cap of $5000 (maximum of 25 per cent of the result or, if the defendant wins, then plaintiff pays 25 per cent of the claim to the defendant for costs).

A prime example of the difficulties which will arise is where, for example, the claim results in a cross-claim for faulty workmanship and if the matter were 'worth more' would end up in the Supreme Court Building and Construction List. The Local Court matter still needs two experts, still needs a careful affidavit drawn and, like any other litigation, the plaintiff's costs are materially affected by intransigence in the opposition including failure to settle, and court delays and adjournments and other aspects of directions which require the expenditure of costs. The reality is that proper preparation of the claim may result in as much work as would be required for a much bigger claim or outcome than $20,000.

The cap may also be totally unrealistic where a country solicitor or even an interstate solicitor is involved.

Another likely result will be briefing of very junior counsel and a lack of solicitors instructing during hearing. Generally, there will be a degrading of the services provided to the court.

Summary

- The effect of the practice direction will be an important element in costs disclosure, and also a reason to re-estimate in appropriate cases.
- Opportunity to 'vary' is available during the interlocutory stages of the proceedings (see para 6 in the Practice Note). By reason of para 3.2 in the Practice Note, it will be necessary at the hearing to be alive to the Practice Direction and to have arguments and evidence available to persuade the court not only to order assessment (rather than make the 25 per cent order outright) but also to 'otherwise order' and remove the 'cap' otherwise the assessment will be hamstrung. ●

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Endnote

1. See Pt 6 of the *Civil Procedure Act 2005* (NSW).

PRACTICE update

Rule amendments

Two recent changes to the rules of court have been gazetted. These are included in the latest update to *Ritchie's Civil Procedure* looseleaf.

UCPR: Amendment 13

5 April 2007. The *Uniform Civil Procedure Rules (Amendment No 13) 2007* (NSW) were gazetted recently.

The object of these Rules is to make miscellaneous amendments to Pts 4, 6, 9, 19, 20, 21, 33, 36 and 45 of, and Schedule 8 to, the *Uniform Civil Procedure Rules 2005* (NSW).

Supreme Court rule amendments

5 April 2007. The *Supreme Court (Corporations) Amendment (No 6) Rules 2007* (NSW) were recently made.

The object of these Rules is to amend the *Supreme Court (Corporations) Rules 1999* (NSW):

- to provide that Pt 6 Div 8 of the *Uniform Civil Procedure Rules* applies to the determination of a question of law referred to the court by:
  - — the Takeovers Panel under s 659A of the *Corporations Act 2001* (Cth); or
  - — the Australian Securities and Investment Commission under s 61 of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- to ensure that the court's attention is drawn to s 659B of the *Corporations Act* in proceedings to which that section applies; and
- to make certain amendments consequent on the repeal of Pt 60 of the *Supreme Court Rules 1970* (NSW); and
- to make minor amendments by way of law revision.

These rules, in so far as they give effect to the object referred to in the first point above, are made in connection with *Uniform Civil Procedure Rules (Amendment No 13)*.

Judicial speeches

- Chief Justice Spigelman 'Access to justice and access to lawyers', address given to the 35th Australian Legal Convention, Sydney, 24 March 2007.
- Chief Justice Spigelman 'From text to context: contemporary contractual interpretation', address to the Risky Business Conference, Sydney, 21 March 2007.
- Justice Ipp 'Themes in the law of torts', 20 March 2007.
- Justice Ipp 'The metamorphosis of slip and fall', 16 March 2007.

Copies of speeches are available at <*www.lawlink.nsw.gov.au/sc*>.

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