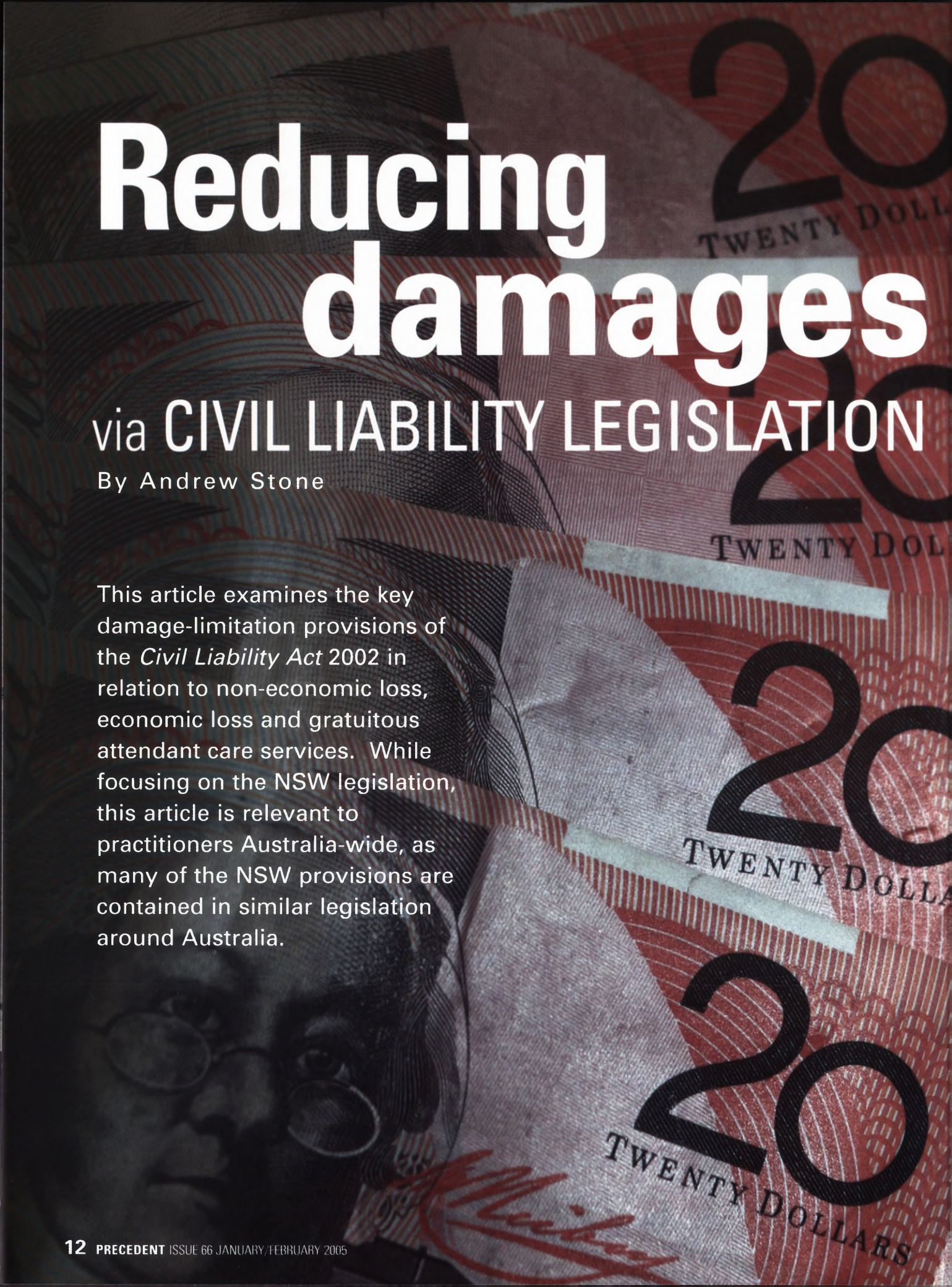
Reducing damages via CIVIL LIABILITY LEGISLATION

By Andrew Stone



This article examines the key damage-limitation provisions of the *Civil Liability Act* 2002 in relation to non-economic loss, economic loss and gratuitous attendant care services. While focusing on the NSW legislation, this article is relevant to practitioners Australia-wide, as many of the NSW provisions are contained in similar legislation around Australia.

The Ipp Review recommended that the various states and the Commonwealth adopt a uniform approach to negligence and the assessment of damages. (Ironically, the common law already provided a relatively uniform mechanism for assessing damages – a unity that has been fractured by allowing each jurisdiction to introduce its own regime.) Any such hopes for a uniform approach (however unrealistic) were shattered when the NSW government passed the *Civil Liability Act* 2002 ['the CLA'] before the Ipp review made its recommendations.

The NSW CLA was itself largely based on damage-limitation provisions from the *Motor Accidents Act* 1988 (NSW). A number of motor accident cases are referred to in this article, as they illustrate the likely interpretation of the CLA.

NON-ECONOMIC LOSS

Section 16 prescribes that the maximum amount of damages to be awarded to a claimant for non-economic loss is $350,000, indexed annually on 1 October. As at October 2004, the maximum had been indexed to $400,000 – significantly higher than the $250,000 maximum allowed under the *Trade Practices Act* (TPA). All claimants are to have non-economic loss assessed as a percentage of a most extreme case, with a deductible that provides that there is no recovery for non-economic loss up to 14% and restricted recovery of non-economic loss between 15% and 32% of a most extreme case.

The table is similar to that under s79A of the *Motor Accidents Act* 1988, so that motor accident cases dealing with awards of non-economic loss such as *Dell v Dalton*[1] and *Reece v Reece*[2] are relevant under the CLA.

In *Dell v Dalton* the NSW Court of Appeal held that 'a most extreme case' involved a category of catastrophic injuries rather than the most gruesome and extreme injury that could be imagined. Accordingly, injuries such as quadriplegia, paraplegia and gross brain injury could all constitute a most extreme case.

The principal vulnerability of the deductible is judicial activism elevating awards of damage to higher percentages in order to provide greater compensation for the injured. The NSW Court of Appeal has, from time to time, cracked down on this approach. In *Currie v Azouri*,[3] a ten-year-old female plaintiff had suffered an extensive laceration to her lower right leg in a car accident, which left unsightly scarring. The Court of Appeal reduced the trial judge's assessment of 29% of a most extreme case down to 18%.

Recently, in *Owners of Strata Plan 156 v Gray*,[4] the Court of Appeal considered injuries to be assessed under the CLA. The plaintiff had suffered extensive soft-tissue injury to her left ankle in a fall on stairs, which had significantly restricted her ongoing enjoyment of life. Ms Gray was unable to stand for long periods of time, run on a beach or engage in physical activity that involved bearing weight on her left ankle. The trial judge in the district court had initially assessed non-economic loss at 33% of a most extreme case, which entitled Ms Gray to $127,000. The Court of Appeal reduced the assessment of non-economic loss to 20%, which in turn reduced damages under that head to $9,500.

One principle that has clearly emerged in NSW motor accident cases is the discounting of awards for non-economic loss to the elderly when compared with younger plaintiffs with similar injuries. This is because an aged plaintiff can be expected to have to live with the disability for a shorter period of time than a younger plaintiff. The principle is most clearly set out in *Reece v Reece*, in which the Court of Appeal reduced the award for non-economic loss to a 64-year-old female plaintiff with significant injuries from 33% to 22.5% of a most extreme case.

NSW cases have clearly emphasised that trial judges should not first determine an adequate lump sum for general damages and then locate that lump sum on the non-economic loss table and award the relevant percentage (see *Padovan v Ratkovic*[5]). The applicable percentage must be determined first.

ECONOMIC LOSS

Section 12 of the CLA fixes the maximum recoverable weekly award for past and future economic loss, and loss of expectation of financial support, at three times the plaintiff's average weekly earnings as at the date of the award.

A similar provision in the *Motor Accidents Compensation Act* 1999 was analysed by the Court of Appeal in *Kaplantzi v Pascoe*.[6] The case involved a claim by a widow following the death of her husband in a car accident. The deceased's earnings were well in excess of the statutory threshold under the motor accident regime which, like the CLA, is subject to annual indexation.

Both the trial judge and the Court of Appeal held that past economic loss was to be capped at the statutory maximum rate as at the date of trial. There was no need to calculate and apply the maximum cap for each year between the date of accident and trial. The trial judge also allowed the widow the sum of $500,000 – her share of the loss of anticipated growth in the family business. The judge distinguished between capital losses (which he held should not be restricted) and weekly earnings, which are capped by the legislation.

The Court of Appeal disagreed with this approach, preferring a broader construction to the term 'gross weekly earnings'. It was held that financial benefits to be received by way of capital gains or other lump sums must be included in any weekly loss. The $500,000 award was set aside.

The Court of Appeal also held that the benefit of superannuation contributions made by an employer should be taken into account when assessing weekly earnings. There can thus be no additional allowance of superannuation benefits above and beyond the statutory maximum for weekly economic loss.

Section 13 of the CLA places a further restriction upon future economic loss. A court cannot make an award of damages for future economic loss unless it is satisfied that >>

the assumptions on which the award is to be based represent the claimant's *'most likely future circumstances but for the injury'*. In other words, there can no longer be future economic loss compensation for the 'loss of a chance', unless that chance is in fact a probability (that is, over 50%), rather than a possibility.

In *Macarthur District Motor Cycle Sportsman Inc v Ardizzone*[8] the trial judge, Delaney DCJ, had assessed the loss of earnings of a plaintiff who was only 19 years old at the date of trial. Due to the speculative nature of the plaintiff's future earning loss, the trial judge considered that it was appropriate to award a cushion or buffer to reflect the restricted earning capacity the plaintiff may face in various occupations that he might have pursued had he not been injured. However, the trial judge then quantified this loss as $100 net per week, calculated over the plaintiff's working life for 46 years. The 5% tables were applied and a reduction of 20% for vicissitudes was made. This gave a rounded out figure of $75,000 for reduced earning capacity.

> It is difficult to imagine that Parliament intended that a mother rendered quadriplegic – as a consequence of gross negligence by a defendant – could not recover the cost of domestic care needed for her three young children.

It is interesting to consider this change as against the first instance judgment of Hulme J in *Blake v Norris*,[7] in which the injured actor, Mr Jon Blake, was awarded some $33 million in past and future economic loss, principally upon the 10% chance that in the course of his acting career he might have been 'the next Mel Gibson'. Although the Court of Appeal significantly reduced the damages, and rejected the trial judge's method of calculation, the approach adopted by the trial judge would not have been permissible under the CLA.

Further, having determined that the claimant's most likely future circumstances have been established, the court is required to further adjust the damages 'by reference to the percentage possibility that the events might have occurred'.

The NSW Court of Appeal has now determined two cases addressing s13 or its motor accident equivalent. In both cases, the Court of Appeal commented that, having reviewed s13, it was of the opinion that the section required urgent parliamentary re-assessment and amendment.

On appeal, the defendant complained that the trial judge had not, as required by the Act, sufficiently articulated that 'the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury'.

The key elements of the Court of Appeal decision were:

- Section 13 does not preclude an award for future economic loss where the claimant's most likely future circumstances cannot be established on the balance of probabilities.
- The reference to *'most likely future circumstances'* in the Act should be interpreted as *'the circumstances more likely than any other scenario'*. They do not have to be greater than a 50% possibility.
- The phrases *'percentage possibility'* and *'the relevant percentage'* in the Act refer to the requirement to apply an appropriate percentage reduction for vicissitudes to an award for future economic loss.

The Court of Appeal revisited s13 of the CLA in *Penrith City Council v Parkes*.[9]

Justice Giles made the following observations about s13 generally:

'A claimant's entitlement to damages for future economic loss, in concept for earning capacity, involves a comparison between the economic benefit to the claimant from exercising earning capacity before injury and the economic benefit from exercising earning capacity after injury. I agree that s13(1) appears to address the former.'

There was consensus between the three judges in *Parkes* that s13(2) required the court to make an adjustment of 15% (or some other appropriate percentage) for vicissitudes that reflected the possibility that the claimant may not have achieved his or her most likely future circumstances, even if the accident had not occurred.

With regards to s13(3), the Court of Appeal was unanimous that it did not preclude an award of a buffer or cushion for future economic loss.

Justice Giles held:

'I consider that it is still open to assess damages by way of a so called 'buffer'. The occasion for a buffer is when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine. There is still a comparison between the economic benefits, although the difference cannot be determined otherwise than by the broad approach of a buffer. Section 13(1) can be fulfilled, and the assumptions as to exercising earning capacity before injury can be stated. Having determined damages for future economic loss by way of a buffer, because of the broad approach there is no question of percentage adjustment, and so in the application of s13(2) the percentage adjustment is nil.'[10]

In summary, applying the principles set out by the Court of Appeal in

Macarthur District Motor Cycle Sportsman Inc v Ardizzone and *Penrith City Council v Parkes*, the following approach should be adopted in relation to an award of future economic loss under s13 of the CLA:

1. Assess the 'most likely' of the possible future economic circumstances facing the claimant but for the accident [including type of employment, duration of employment and remuneration];
2. Assess the claimant's economic prospects as a consequence of the accident;
3. Compensate the claimant for the difference between [1] and [2], including, where appropriate, the use of a buffer;
4. Adjust [3] by an appropriate percentage (including, where appropriate, by 0%) for vicissitudes to reflect the possibility that the claimant may not have achieved [1], even had the accident not occurred;
5. Include a statement of the assumptions made as to the claimant's most likely future circumstances and the appropriate percentage adjustment.

GRATUITOUS ATTENDANT CARE SERVICES

Section 15 of the CLA defines gratuitous attendant care services broadly, but consistently with the *Griffith v Kirkemeyer* principles. No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:

(a) There is or was a reasonable need for the service;
(b) The need has arisen *solely* because of the injury to which the damages relate; and
(c) The service would not have been provided but for the injury.

In an echo of s72 of the *Motor Accidents Act*, there is the further provision in s15(3) that:

'No damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
(a) for less than six hours per week, and
(b) for less than six months.'

This means that gratuitous services must extend for more than six months *and* for more than six hours per week for there to be an entitlement to an award. In *Gaegen v D'Aubert*,[11] the Court of Appeal determined (in relation to the motor accident legislation) that the 'and' between subsections (a) and (b) is to be read as 'or'.

Consequently, there is no entitlement for compensation for gratuitous care where care is provided for ten hours per week for five months, or for two hours per week indefinitely. It follows that it is probably the case that if (for example), assistance drops from eight hours per week to four hours per week >>

after two years, entitlement to compensation ceases.

It can be very difficult to prove that domestic assistance is being provided for seven hours per week rather than five hours per week. Keeping a diary of the assistance provided by the family can help to provide precision, but also provides fertile grounds for cross-examination by the defendant. It is all too easy for a defendant to cross-examine as to whether making the beds really only takes five minutes rather than ten minutes per day. In *Richard Ronald McConachie t/as Willancorah Pastoral Co v Pack,*[12] the Court of Appeal rejected an insurer's challenge to a trial judge's award for voluntary domestic assistance. Justice Stein (with whom Hodgson and Bryson JA concurred) held:

> *'The written submissions of the appellant take on an air of unreality. They express a mechanical and arithmetic approach to the calculation of gratuitous domestic care services, which the subject matter will not easily bear. As Foster AJA said in Werner v Crahe [2002] NSWCA 168 at [27] precision is impossible in this area and the question is largely one of impression.'*

Specific consideration has recently been given to the provisions of s15 of the CLA by the Court of Appeal in *Woolworths Ltd v Lawlor.*[13] The trial judge had allowed for past voluntary domestic assistance, as well as for future assistance, of nine hours per week for two years post-trial, and seven hours per week for 24 years thereafter. Her Honour had calculated that the plaintiff's husband was providing assistance around the home of 20 hours per week, but reduced that assessment by half to take account of the extent to which Mr Lawlor would have provided those services in any event, given that he was retired while the respondent had continued to work. The calculation was further reduced by the trial judge to take into account the fact that Mr Lawlor perhaps performed some tasks more slowly than someone more experienced in undertaking household chores.

The appellant challenged the award for gratuitous care on the basis that the trial judge had failed to take into account that the tasks were performed not just for the benefit of the plaintiff, but for the benefit of the household as a whole. In short, as Mr Lawlor benefited from living in a clean house, his household maintenance was as much for his own benefit as for the claimant's.

The Court of Appeal dismissed this argument in brief fashion, merely stating that the trial judge had made allowance for such matters in her assessment.

Where interpretation of the CLA becomes particularly difficult is in *Sullivan v Gordan*-style claims for the provision of lost domestic services for children.[14] On a narrow interpretation of ss15(1) and (2) of the CLA, the provision of care to a child of the claimant may not be an 'attendant care service' or a 'gratuitous attendant care service' as defined by the Act.

It is difficult to imagine that Parliament intended that, in the case of a mother rendered quadriplegic as a consequence of gross negligence by a defendant, there could be no recovery of the domestic care needed to maintain her three young children. Nonetheless, insurers contend that this is the proper construction of the Act. It remains to be seen whether (as with s13 in relation to future economic loss), the Court of Appeal will reach a broad interpretation of s15 to preserve *Sullivan v Gordan* claims. It is worth noting that the same issue arises under the *Motor Accidents Compensation Act* 1999 (s142), so a judicial determination may arise first in relation to that Act.

In *Woolworths v Lawlor,* the Court of Appeal also considered (at greater length) the question of what is a need that has arisen solely because of the injury to which the damages relate. Mrs Lawlor had a pre-existing degenerative back condition. On the evidence, the need for attendant care services provided by the husband arose solely because of the injuries to which the claim related. However, Justice Beasley made *obiter dicta* comments that where the need for attendant care services had more than one cause, then damages may be awarded for that portion which is solely attributable to the accident, provided the requirements of the Act are otherwise satisfied.

CONCLUSION

This brief examination of damage limitation provisions in NSW under the CLA reveals that efforts to codify mechanisms for the award of damages can give rise to a host of interpretative questions. The guidance provided here in relation to NSW civil liability legislation may also offer some clues as to how similar legislation elsewhere might be interpreted.

When claiming damages for gratuitous care, a diary of the assistance provided can help to provide precision, but also provides fertile grounds for cross-examination. ■

Notes: **1** *Dell v Dalton* (1991) NSWLR 533. **2** *Reece v Reece* (1994) 19 MVR 103. **3** *Currie v Azouri* (1998) 28 MVR 406. **4** *Owners of Strata Plan 156* [2004] NSWCA 304. **5** *Padovan v Ratkovic* NSWCA unreported, 17 March 1995. **6** *Kaplantzi v Pascoe* [2003] NSW CA 386. **7** [2003] NSWSC 199. **8** *Macarthur District Motor Cycle Sportsman Inc v Ardizzone* [2004] NSWCA 145. **9** *Penrith City Council v Parkes* [2004] NSWCA 201. **10** *Ibid,* para 15. **11** *Gaegen v D'Aubert* (2002) NSWCA 260. **12** [2004] NSWCA 148. **13** *Woolworths Ltd v Lawlor* [2004] NSWCA 209. **14** *Sullivan v Gordan* (1999) 47 NSWLR 319.

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