RECURRING ISSUES IN THE COURT OF APPEAL

District Court Annual Conference 2016, 29 March 2016

The Hon MJ Beazley AO, President, Court of Appeal[*]

1 In 2015, 106 cases were commenced in the Court of Appeal seeking to challenge decisions of the District Court – just under 30 per cent of the Court's work. Of those, 63 were by way of appeal by right, the monetary amount in issue being greater than $100,000.[1] 27 proceedings in the Court originated by way of summons for leave to appeal and 16 by way of summons seeking judicial review.[2]

2 There were 154 cases decided in 2015, including a number commenced in 2014. Of those, 115 (or about 75 per cent) were dealt with by reserved or ex tempore judgment, 28 were settled or discontinued, 3 were struck out and 3 were disposed of otherwise. 39 appeals were allowed, including those allowed in part – about a third of those matters which proceeded to judgment.

3 Those numbers are very small in comparison to the thousands of cases heard in the District Court – the latest figures available to me are from 2014, in which the court finalised 4,740 civil cases. From that, we can assume that the proportion of District Court matters subject to challenge in the Court of Appeal is under 5 per cent, and the proportion subject to successful challenge much smaller again – figures of which the District Court might rightly be proud.

4 The cases brought from the District to the Court of Appeal in 2015 traversed a wide variety of subject areas. Torts claims, and particularly negligence claims, were the most common. Other substantial areas included contracts, matters relating to costs and costs assessment, criminal matters heard in the civil jurisdiction, trade practices matters, and succession matters.

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[*] I would like to thank my Researcher, Chris Frommer, for assistance with the preparation of this paper.

[1] *Supreme Court Act 1970*, s 101(2)(r).

[2] These numbers do not, of course, include criminal proceedings, which go to the Court of Criminal Appeal.

5 As in previous years, I will focus on a small number of topics which have been raised relatively frequently on appeal and which may therefore be of interest and utility. The two topics I will canvass today are:

(1) Contributory negligence, focussing on the application of s 5R of the *Civil Liability Act*; and

(2) Issues relating to the jurisdiction of the District Court.

Contributory negligence under the *Civil Liability Act*

6 The *Civil Liability Act 2002* (NSW), Pt 1A deals with various aspects of negligence. Division 8 deals with contributory negligence. In accordance with the usual principles of statutory construction it is necessary to commence with the text of the provision. As the High Court stated in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

> "… the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[3]

7 However, before looking at the text of ss 5R and 5S it is perhaps salutary to consider the position pre-*Civil Liability Act*. Contributory negligence, since it ceased to be a complete defence, has had dual aspects: first, whether a person has been contributorily negligent; and secondly, if so, to what extent.

8 In *Joslyn v Berryman*[4], McHugh J described the common law of contributory negligence, that is, the first aspect, as being made out when a plaintiff exposed himself or herself to a risk of injury which might reasonably have

[3] [2009] HCA 41; 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.
[4] [2003] HCA 34; 214 CLR 552 at [16].

been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed.

9 It is also worth noting that the High Court approved the approach taken in *McLean v Tedman*[5] that contributory negligence had to be approached on the footing that the tortfeasor had failed to discharge its obligation to take reasonable care – in that case by failing to provide a safe system of work. In considering whether there was contributory negligence, the circumstances and conditions in which the contributory negligence occurred, including the failure to provide a safe system of work, had to be taken into account.

10 The second aspect of contributory negligence, that is apportionment, has always been a creature of statute. The *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9 abolished the common law principle by which contributory negligence was a complete defence and established, by s 9(1)(b), the system of apportionment, in which:

> "[T]he damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

11 The classic statement on apportionment in Australia is found in *Podrebersek v Australian Iron & Steel Pty Ltd*.[6] The High Court there held that the apportionment, for the purposes of contributory negligence:

> "… involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man … and of the relative importance of the acts of the parties in causing the damage … It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."[7] (citations omitted)

[5] [1984] HCA 60; 155 CLR 306 at 305.
[6] [1985] HCA 34; 59 ALJR 492.
[7] Ibid 494.

12 What then is the position under the *Civil Liability Act*? In answering that question it is wise to bring to mind the observation of the High Court in *Adeels Palace Pty Ltd v Moubarak*[8], commenting upon whether there was anything to be gained from considering common law causation when the case fell to be determined under the Act:

> "It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied."[9]

13 Part 1A Div 8 makes provision for contributory negligence in three respects: first the standard of care required of the plaintiff: s 5R; secondly, the extent of reduction in damages, which under s 5S can be 100%; and thirdly, the application of contributory negligence to claims under the *Compensation to Relatives Act 1897* (NSW) in which it is alleged that the deceased person was contributorily negligent: s 5T.

14 For today's purposes, I propose to focus on s 5R. That section provides as follows:

> "**5R Standard of contributory negligence**
>
> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
>
> (2) For that purpose:
>
> (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
> (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time."

15 The effect of s 5R is to import the statutory concepts stated in ss 5B and 5C, relating to breach of a defendant's duty of care, to the determination of the

[8] [2009] HCA 48; 239 CLR 420.
[9] Ibid [44].

question whether a plaintiff has been contributorily negligent. It is necessary therefore to consider the terms of ss 5B and 5C.

16 Section 5B provides:

> "**5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
>
> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm."

(I will return to s 5C.)

17 It is fairly much accepted that these general principles are a statement of the common law, with a modification to the not "*far-fetched or fanciful*"[10] test in *Wyong Shire Council v Shirt*. The test in 5B(1)(b) is formulated as a "*risk of harm*" that "*was not insignificant*".[11]

[10] *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 at 47.
[11] See, for instance, *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320 at [105].

18 What then is the alignment – or is it an intersection – between ss 5B and 5C on the one hand, and s 5R on the other, for the purposes of determining whether a person has been contributorily negligent?

19 Dealing first with s 5B and s 5R, there are three critical components to which regard must be had:

(1) Section 5B refers to taking precautions against a **"*risk of harm***".

Section 5R refers to taking precautions against **"*the risk of that harm***". So identification of the risk of harm is critical: see *Solomons v Pallier*, discussed below.

(2) Section 5B provides that the risk must have been "foreseeable (that is, it is a risk of which the [defendant] knew or ought to have known)".

Section 5R provides that **"*the matter is to be determined on the basis of what* [*the plaintiff*] *knew or ought to have known at the time*"**.

In both cases, the question of relevant knowledge is both subjective ("*knew*") and objective ("*ought to have known*").

(3) Section 5B precludes liability in respect of failure to take precautions against the risk of harm unless **"*a reasonable person in the* [*defendant's*] *position would have taken those precautions*"**.

Section 5R provides that contributory negligence will be made out where there is a failure by the plaintiff to take precautions against a risk of harm, on the basis of a standard of care determined by reference to a **"*reasonable person in the position of the* [*plaintiff*]".**

> The precautions that the plaintiff ought to have been taken for the purposes of s 5R will differ from those that ought to have been taken by the defendant pursuant to s 5B.

20 The third of these components is perhaps the key to understanding how s 5R operates, a matter that was discussed in *Grills v Leighton Contractors Pty Limited*[12]. In that case, the appellant, a police officer who was seriously injured when he collided with a boom gate while conducting an urgent security sweep of the Eastern Distributor by motorcycle, appealed against a finding of contributory negligence against him.

21 I described the role of s 5R as follows, in a judgment with which Barrett and Gleeson JJA agreed:

> "161 The effect of s 5R … is to require the court, in determining whether a person is contributorily negligent, to apply the provisions of s 5B and s 5C, being the statutory provisions applicable to determining breach. There may be a question whether any aspect of the common law continues to apply to the determination. However, that question does not need to be determined in this case.
>
> 162 As has been remarked in various cases in this Court, there is a conceptual difficulty in applying the general principles identified in ss 5B and 5C to the determination of contributory negligence: the question of breach is directed to whether a person has breached a duty owed to another person; contributory negligence, however, requires a determination whether a person has taken reasonable care for the person's own safety. Once this difference in the fact finding task is recognised, the manner of application of s 5B becomes apparent. Consideration is required to be given to the statutory prescriptions in s 5B. In doing so, it is to be borne in mind that s 5B(2) is not limited to the factors identified in s 5B(2)(a)-(d) and that pursuant to s 5R(2), the standard of care is that of a reasonable person in the position of the plaintiff and the matter is to be determined on the basis of what the person knew."

22 In the result, the Court overturned the finding of contributory negligence, primarily on the basis that the appellant had acted reasonably in the context of urgent duties involving a number of competing demands on his attention.

[12] [2015] NSWCA 72.

23 Contributory negligence has been the subject of recent High Court attention in *Allen v Chadwick*.[13] The respondent in that case was injured when the car in which she was a passenger struck a tree, propelling her out of it and causing her severe spinal injuries.

24 The focus in the case was on the specific provisions of the *Civil Liability Act 1936* (SA) relating to presumptions as to contributory negligence in cases where an injured passenger knows of the intoxication of the driver and the presumption relating to failure to wear a seatbelt. In New South Wales, equivalent (though not identical) provisions are found in the *Motor Accidents Compensation Act 1999*, s 138(2).

25 The *Civil Liability Act 1936* (SA) also has, in s 44(1), a close equivalent to s 5R(1) of the New South Wales Act.[14] Section 32 of the South Australian Act is also identical to s 5B of the New South Wales Act. In relation to s 44(1), the High Court said:

> "[The section] precludes any suggestion that the reasonable care and skill expected of a plaintiff for the protection of his or her own interests is something different from the reasonable care and skill expected of a defendant for the protection of the interests of others."

26 This reasoning adopts what the Ipp Report[15] intended by a provision such as s 5R. As was stated in the Report:

> "Leading text book writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same. … This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported."

[13] [2015] HCA 47.
[14] Section 44(1) provides: *"The principles that are applicable in determining whether a person has been negligent also apply in determining whether a person who suffered harm (the "plaintiff") has been contributorily negligent."*
[15] Properly titled *Review of the Law of Negligence: Final Report*.

27 I would suggest that that is the same approach we took in *Grills* – namely that liability in negligence is approached from the position of a defendant having a duty of care to others, while contributory negligence is approached through the lens of a plaintiff who is expected to take care of, or to use the language of the High Court, protect, his or her own interests.

28 Before considering how these principles have worked themselves out in the case law, it is important not to overlook ss 5B(2) and s 5C.

29 Section 5B(2) specifies four matters to which regard must be had for the purposes of s 5B(1). Subsections (2)(a), (b) and (c) would be relevant to s 5R considerations. Section 5B(2)(d) rarely features in any appreciable way in determining whether a defendant would have taken precautions – presumably because it goes without saying in almost every case. The same may be said in respect of its application under s 5R. For instance, there is usually no utility in speeding – which is often an indicator of negligence – except in rare situations as when emergency vehicles have to speed to get to an accident. Even that factor would only cause the reasonable precautions to be taken against a risk of harm to be different (presumably lesser) – it would not licence the driver of an emergency vehicle to take no precautions at all.

30 Section 5C is also somewhat of a forgotten relative in negligence cases. It provides as follows:

> "**5C Other principles**
>
> In proceedings relating to liability for negligence:
>
> > (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
> >
> > (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

31 Section 5C(a) relates back to s 5B(2)(c). There may be cases in which it applies under s 5R, but it might be thought that would not be often. Section 5C(b) would appear to be relevant to s 5R. Section 5C(c) does not appear to apply to s 5R.

Apportionment

32 I mentioned at the outset that, since the abolition of contributory negligence as a complete defence, it has had dual aspects: first, whether there was contributory negligence; and secondly, what apportionment should be made. In my opinion, leaving aside s 5S, the *Civil Liability Act* says nothing directly about apportionment, save to the extent that that assessment is inherent in determining whether a person failed to take reasonable precautions against a risk of harm.

33 On one view, that may leave apportionment to be determined pursuant to s 9(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW). An exception is in motor accident cases, in which the *Motor Accidents Compensation Act 1999* (NSW) s 138(3) provides for apportionment, in terms which are similar but not identical to those of s 9(1)(b):

> "The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case."

Case law on apportionment

34 One of the matters where there has been a difference of opinion in the authorities is whether the fact a motor vehicle can cause considerable damage is relevant to the apportionment of contributory negligence.

35 In *Gordon v Truong*[16], a pedestrian, Mr Truong, was struck and injured while crossing Regent St near Central Station. The appellant driver conceded liability at trial, such that the live issues in the case were contributory negligence, which was not made out at trial, and damages.

36 The appellant alleged that Mr Truong had been contributorily negligent by, among other things, a failure to keep a proper lookout. The trial judge had rejected that contention on the basis, it appeared, of Mr Truong's evidence that he was "*checking right and left as* [he was] *crossing*"[17].

37 The trial judge's finding was reversed in the Court of Appeal. Basten and Macfarlan JJA found, on the basis of calculations derived from other evidence accepted by the trial judge, that the van would have been visible from the moment Mr Truong started to cross the road, and that his failure to see it must therefore have been a failure to keep a proper lookout.[18] Simpson JA dissented on that point, finding that the inference that Mr Truong had not kept a proper lookout could not stand against his explicit evidence, accepted by the trial judge, that he had continued checking left and right.

38 Basten and Macfarlan JJA agreed in the result that an allowance of 35 per cent ought be made in respect of Mr Truong's contributory negligence. However, their Honours reached that apportionment in quite different ways.

39 Basten JA noted[19] that the principles to be applied in the determination of contributory negligence pursuant to s 5R of the *Civil Liability Act* included s 5B. His Honour held that:

> "Applying these principles as required by the statute is not without its difficulties. Where the plaintiff and defendant are both drivers in control of similar vehicles, questions of negligence and contributory negligence can readily be assessed according to the same broad standards. However, where

[16] [2014] NSWCA 97.
[17] Extracted at ibid [92].
[18] Ibid [10] (Basten JA); [46] (Macfarlan JA).
[19] Ibid [15].

> the plaintiff is a pedestrian and the defendant a driver of a vehicle, the negligence of the defendant is to be assessed against the risk of harm to the plaintiff, while the contributory negligence of the plaintiff is, generally, to be assessed against a risk of harm to him- or herself. … The harm which the motor vehicle is likely to cause to the pedestrian is, on one view, precisely the same harm which should have been foreseeable to the pedestrian. However, the precautions which each should reasonably take will be different in kind."

40 His Honour concluded that:

> "20 … the responsibilities of each [of the parties] for the accident fell within a similar range. Thus, each should have seen the other in ample time to take evasive action. …
>
> 21 In terms of possible responses, the culpability of the driver was probably greater. If he had seen the plaintiff in reasonable time, he could either have slowed down or changed lanes so as to leave ample room to avoid the plaintiff. The options open to a pedestrian may be more limited."[20]

41 Basten JA thus held that the different level of control of the situation available to each party was relevant to the apportionment exercise. This is very much consistent with *Podrebersek*. His Honour did not take into account the differential severity of the damage each could do to others. It is the relevance of that latter factor that remains controversial.

42 Macfarlan JA, in a passage which did not explicitly raise the potential effect of the *Civil Liability Act*, held as follows:

> "Relevant to the apportionment exercise in this case is in my view the fact that the appellant was in charge of a fast moving vehicle that had the potential to do great harm to people or things in its path, whereas the consequence of carelessness on the part of the plaintiff was more likely to be, as it was, only harm to himself."[21]

[20] Ibid [21]-[22].
[21] Ibid [50]. His Honour cited *Pennington v Norris* [1956] HCA 26; 96 CLR 10 at 16; *Anikin v Sierra* [2004] HCA 64; 79 ALJR 452 at [46], [48] - [52]; and *Smith v Zhang* [2012] NSWCA 142; 60 MVR 525 at [12] - [16].

43 Macfarlan JA's approach, as Beech-Jones J has noted, is in accordance with the approach to contributory negligence taken prior to the enactment of s 5R.[22]

44 The issue arose again in *Boral Bricks Pty Ltd v Cosmidis (No 2)*.[23] In that case, the respondent, a tanker driver returning on foot to his truck at Boral's premises, was hit from behind by a forklift being driven by an employee of Boral. In a previous case, a finding that the respondent had not been contributorily negligent had been set aside, such that the remaining issue in the case was apportionment.

45 There was no dispute that the *Motor Accidents Compensation Act 1999* (NSW) applied to the claim. Section 138(1) of that Act and s 3B of the *Civil Liability Act* have the effect that the provisions of the *Civil Liability Act*, including s 5R, apply with respect to claims arising from motor accidents (subject to exceptions outlined in s 138(2) relating to alcohol, drugs, and use of seatbelts and helmets).

46 Basten JA, with whom Emmett JA agreed, found that a purposive approach to s 5R required that it be interpreted so as to override previous cases that held that the fact that the severity of damage that may be done by a vehicle is a factor to be taken into account in apportionment. His Honour held that, as a result of s 5R:

> "… no distinction is made between the fact that from one perspective the driver is in control of a vehicle that could cause serious harm to a pedestrian, whilst from the perspective of the pedestrian, it was the likelihood of serious harm which was to be considered. If the plaintiff were aware, or ought to have been aware, of the presence of a large forklift operating in the area and if the forklift driver were aware, or should have been aware, of the likely presence of pedestrians, and if each were equally careless, liability should be shared equally."[24]

[22] Beech-Jones J, 'The Civil Liability Act 2002 – Some Continuing Issues', speech, unpublished.
[23] [2014] NSWCA 139.
[24] Ibid [99].

47 In the result, Basten JA found the respondent to be 30 per cent contributorily negligent, taking into account the fact that both parties had failed to keep a proper lookout but that Boral had control of the site and of ensuring adequate safety systems.[25]

48 McColl JA dissented. Her Honour considered that s 5R, though relevant to a determination that a person had been contributorily negligent, said nothing as to how the relative culpability between the parties was to be apportioned.[26] Her Honour thus found that the approach to apportionment remained that outlined in *Podrebersek*, as elaborated in subsequent cases, effectively taking Macfarlan JA's position in *Gordon v Truong*.

49 The result was that her Honour considered a wider range of factors going to apportionment than did Basten JA, including the fact that the forklift driver was in charge of a powerful and dangerous vehicle and the fact that the respondent's conduct did not endanger anybody but himself, and assessed the respondent's contributory negligence at only 10 per cent.

50 In *T and X Company Pty Ltd v Chivas*[27], a taxi owned by the appellant struck and fatally injured a pedestrian who, ignoring a red pedestrian light, had run across Market Street in the CBD. Liability of the taxi driver was made out at trial, on the basis of excessive speed, and a challenge on appeal was not successful.

51 The trial judge assessed the contributory negligence of the deceased at 40 per cent. He identified the relevant factors as including not only the taxi's excessive speed and failure to taken any evasive action but also its "*far greater capacity to cause damage*". Factors relevant to the pedestrian included that he created the danger; that he was able to observe the

[25] Ibid [114]-[118].
[26] Ibid [48].
[27] [2014] NSWCA 235.

oncoming taxi; and that he stepped out on to the road permitting the driver minimal opportunity to avoid the impact.[28]

52 Basten JA, with whom Barrett JA agreed, held as follows:

> "The significant, if subtle, change of emphasis which arises from the enactment of the *Civil Liability Act* raises a doubt as to the emphasis in past cases placed on the capacity of a motor vehicle to cause far greater damage, … That factor should be understood from the perspective of both the driver and the pedestrian, rather than as an independent consideration. To treat it as an independent consideration may lead to the conduct of the driver being judged against a higher standard than that of the pedestrian. Each should be equally conscious of that factor and adjust his or her behaviour accordingly…. It appears to have been this factor, however, which led the trial judge to place a greater share of responsibility on the driver than the pedestrian."[29]

53 His Honour considered that the "*weighty factor*" in assessing relative responsibility for the accident was the "*unpredictable step*" on to the road taken by the pedestrian against a red pedestrian light and in the face of oncoming traffic.[30] He assessed the pedestrian's contributory negligence at 75 per cent.

54 I dissented. I considered that the greater harm that might be done by a motor vehicle remained relevant to the determination of contributory negligence as a factor which went to the considerations in s 5B(2), and particularly s 5B(2)(b), which requires the court to consider "*the likely seriousness of the harm*". In that context, it was relevant that the taxi "*was likely to do serious, if not fatal injury to a pedestrian should he collide with one at the speed he was travelling*."[31] I would not have disturbed the trial judge's finding that the pedestrian had been 40 per cent contributorily negligent.[32]

[28] Ibid [40].
[29] Ibid [54].
[30] Ibid [56].
[31] Ibid [15].
[32] Ibid [17].

55 I should note in passing that Basten JA also considered that s 5R(2) raised another interesting question as to the nature of the "*reasonable person in the position of*" the plaintiff. The plaintiff in *T and X Company* was affected by Asperger's Syndrome, which might have raised a question as to his ability to judge the behaviour of other road users. Basten JA held:

> "This in turn might have raised a question as to whether, although in assessing damages the tortfeasor must take the plaintiff with his or her personal frailties and idiosyncrasies, that is not so in the case of an assessment of contributory negligence."[33]

His Honour found it unnecessary to answer that question and it remains at large, although I would suggest that it might follow from s 5R(1) that, absent contrary statutory requirements, the position should be the same as between negligence and contributory negligence.

56 For my part, if it was open to me to do so, I would adhere to the view I took in *T and X Company*. It seems to me that if a person is in control of a motor vehicle or a piece of equipment which is capable of great harm if not driven or operated without negligence, that must be relevant to the standard of care imposed by the Act, which is that of a reasonable person in the position of the of the defendant. I see no distinction between that concept and the finding in *Boral Bricks* that it was relevant that Boral had control of the site where the accident occurred and of ensuring adequate safety systems.

57 Is that the law? I suspect that it is not, given the majority view in *T & X Company* and in *Boral Bricks.* However, *Truong* appears to be authority that the degree of control of a particular situation and the extent to which there were more options available to one party rather than another are relevant.[34]

58 While it is clear from what the High Court has said (and from previous jurisprudence) that the identity of the plaintiff or defendant as such is not a

[33] Ibid [55].

[34] [2014] NSWCA 97 at [21], [49].

relevant factor in determining the allowance to be made for contributory negligence, the dispute remains as to what factors *are* relevant, and the jurisprudence will no doubt continue to develop.

Other issues arising in 2015

59 There were a few other issues raised about contributory negligence, apportionment and the operation of s 5R in 2015 Court of Appeal cases.

60 *Verryt v Schoupp*[35] concerned a skateboarding accident in which the respondent, a 12 year old boy, *was* injured. The boy, along with two slightly older friends, were "*skitching*" a ride up a hill on their skateboards by holding on to the boot latch at the back of a motor vehicle as it drove slowly up a hill. None of the three wore helmets. The injury occurred when the respondent let go of the car and fell backwards, striking his head on the bitumen roadway.

61 A claim was brought against the driver of the car, who was the father of a fourth friend and was known to the respondent. The only live issues, at trial in the District Court and on appeal, related to the contributory negligence of the respondent and to damages.

62 The primary judge found the respondent had been contributorily negligent in failing to exercise reasonable care for his own safety in four respects, being:

> "(a) Riding a skateboard holding onto the defendant's vehicle while it was moving.
>
> (b) Voluntarily engaging in an activity that was inherently dangerous.
>
> (c) Failure to take adequate precautions for his own safety.
>
> (d) Failure to wear a protective helmet."[36]

63 In relation to particulars (a) – (c), the primary judge was taken to have held that a reasonable 12 year old in the respondent's circumstances would, in

[35] [2015] NSWCA 128.
[36] *Schoupp v Verryt* [2014] NSWDC 28 at [92], [118].

taking reasonable care, have appreciated the risk and not engaged in "*skitching*" at all. Causation was thus made out in respect of (a) – (c).

64 However, there was no evidence at trial as to the extent to which the respondent's injuries would have been less serious had he been wearing a helmet. As such, and as the onus lies on the defendant to prove contributory negligence, the primary judge held that causation was not made out in respect of particular (d).

65 In making that finding, the primary judge proceeded on the basis that it followed from s 5R that in order to prove causation for the purpose of contributory negligence, the respondent was required to satisfy the elements in s 5D of the *Civil Liability Act*.[37] That approach was in error, as the appellant conceded. Meagher JA held that:

> "The 'principles' referred to in s 5R(1) as applicable in determining whether a person has been negligent are those in s 5B … They do not include those in s 5D(1) which are directed to a different question, namely, whether for the purpose of attributing liability, negligence caused particular harm."[38] (citations omitted)

His Honour held that the correct factual question was whether the respondent's injuries were caused or materially contributed to by his failure to wear a helmet in accordance with the common law principles outlined in *March v E & M H Stramere Pty Ltd*.[39] However, his Honour did not find error in the trial judge's overall finding that causation with respect to the helmet was not made out.

66 Notwithstanding his finding that the respondent was contributorily negligent in the remaining three respects, the primary judge concluded that it was just and equitable for the appellant driver to bear 100 per cent of the responsibility for

[37] Ibid [133].
[38] [2015] NSWCA 128 at [27].
[39] [1991] HCA 12; 171 CLR 506.

the accident, finding that the child's negligence "*was totally eclipsed and overshadowed by the overwhelming negligence*" of the driver.[40]

67 That finding was overturned, albeit partially, on appeal. Meagher JA, with whom Gleeson JA and Sackville AJA agreed, held that the appellant, as the responsible adult in the situation, bore "*by far the greater responsibility*"[41]. However, his Honour held that:

> "… some account must be taken of the respondent having engaged in an activity that he understood carried some risk of injury and which, in accordance with the primary judge's findings… a reasonable 12 year old in his position would have appreciated was dangerous."[42]

His Honour considered that the appropriate apportionment required a reduction of the damages awarded to the child by 10 per cent.

68 In *Solomons v Pallier*[43], an appeal from the Common Law Division of the Supreme Court, the plaintiff, a 16 year old boy, accepted a lift home from a party from a driver who was on his P-plates and had a blood alcohol concentration of 0.07 – just over the legal limit for holders of full licences and substantially over the zero limit for holders of provisional licences. It was found, at trial and on appeal, that the accident occurred when the driver deliberately drove partly off the roadway in order to "*take out a guidepost*" and scare the passengers. In performing that manoeuvre, the car struck a culvert and rolled, killing the front passenger and injuring the plaintiff. The issue on appeal was whether the trial judge had erred in finding that the plaintiff had not been contributorily negligent.

69 Meagher JA, with whom Macfarlan JA (subject to a qualification) and Simpson JA agreed, found that his Honour had erred. A primary issue was identification of risk of harm. Meagher JA found that s 5B, in its application to

[40] [2014] NSWDC 28 at [162].
[41] [2015] NSWCA 128 at [61].
[42] Ibid.
[43] [2015] NSWCA 266.

contributory negligence pursuant to s 5R, focusses attention on the relevant risk of harm to the plaintiff against which it is said he or she should have taken precautions.[44] Without a sufficiently precise formulation of the risk of harm, it was not possible to determine what precautions a reasonable person would have taken for the purposes of s 5B.[45]

70 The trial judge had expressly left open the question of whether the relevant risk of harm was that of an accident caused by the driver's intoxication or the more precise risk of the driver deliberately driving off the roadway.[46] However, it appeared that he nevertheless determined the case by reference to the latter.[47] Meagher JA held that that was in error. His Honour found:

> "From the perspective of a reasonable person in the respondent's position, [the risk of harm] fell to be considered as a whole. It could not be dissected into the risk of the appellant driving carelessly and the risk of his doing so deliberately and dangerously, if in each case the risk was a result of his intoxication."[48]

71 His Honour found that, regardless whether the driver's conduct was deliberate, it was causally connected to his intoxication, and the risk of injury caused by the driver's intoxication was a risk against which a reasonable person in the respondent's position would have taken precautions, specifically by refusing to travel in the car.

72 The trial judge had also made a finding, in the alternative, that if the respondent was contributorily negligent, it was just and equitable not to reduce his damages. That finding was also held to be in error. Notwithstanding the extremely irresponsible and reckless conduct of the driver and the comparatively minimal carelessness of the young respondent in accepting a lift with a mildly intoxicated driver, in circumstances in which he

[44] Ibid [63]-[65].
[45] Citing *Perisher Blue Pty Ltd v Nair-Smith* [2015] NSWCA 90; 320 ALR 235.
[46] *Pallier v Solomons (No 2)* [2014] NSWSC 1524 at [85].
[47] Ibid [93].
[48] [2015] NSWCA 266 at [68].

had been told to leave the party they were at, the respondent's damages were reduced by 10 per cent.

The scope of the District Court's appellate jurisdiction

73 It is trite law that absent jurisdiction, a Court may not determine a matter. It is also important to understand the extent of a Court's jurisdiction. The District Court's jurisdiction is entirely statutory. It has such jurisdiction as is conferred on it by statute and within that jurisdiction such powers as are provided for by statute, including by necessary implication. It follows that the task of determining the court's jurisdictional limits is one of statutory construction.

74 The District Court's trial jurisdiction, conferred under Pts 3 and 4 of the *District Court Act 1973* (NSW), that is its civil and criminal jurisdiction respectively, is rarely controversial.

75 Its jurisdiction conferred by other statutes, and particularly its appellate and review jurisdiction, raises more difficulties. That jurisdiction includes jurisdiction in relation to:

- appeals from the Small Claims Division of the Local Court;[49]
- appeals from the Local Court in its criminal jurisdiction;[50]
- appeals from the Children's Court, in both its civil[51] and criminal[52] jurisdictions;
- appeals against civil penalties imposed by the NSW Civil and Administrative Tribunal where the tribunal was not constituted by any senior judicial officer;[53]

[49] The *Local Court Act 2007* (NSW), s 39(2) provides: "*A party to proceedings before the Court sitting in its Small Claims Division who is dissatisfied with a judgment or order of the Court may appeal to the District Court, but only on the ground of lack of jurisdiction or denial of procedural fairness.*"
[50] *Crimes (Appeal and Review) Act 2001* (NSW), s 11.
[51] Under, for instance, the *Children And Young Persons (Care And Protection) Act 1998* (NSW), s 91.
[52] For the purposes of the *Crimes (Appeal and Review) Act 2001* (NSW), the Local Court is defined to include the Children's Court: s 3.

- review of decisions made under certain workers compensation provisions, being such functions as were not transferred to the Workers Compensation Commission on the abolition of the Compensation Court;[54] and

- appeals against determinations of the costs assessment review panel.[55]

76 These provisions do not provide for further appeal to the Court of Appeal. The Supreme Court's jurisdiction (including that of the Court of Appeal) is by way of judicial review. Section 127 is limited to an appeal in an action.

The District Court's criminal appellate jurisdiction

77 The District Court's criminal appellate jurisdiction is conferred by the *Crimes (Appeal and Review) Act 2001* (NSW). Section 11 provides for an "*appeal*" as of right to the District Court from a conviction in the Local Court.

78 Section 18 provides that appeals against convictions are by way of rehearing, as follows:

> "**18 Appeals against conviction to be by way of rehearing on the evidence**
>
> (1) An appeal against conviction is to be **by way of rehearing** on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.
>
> (2) Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.
>
> ..." (emphasis added)

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[53] *Civil and Administrative Tribunal Act 2013* (NSW), ss 82(3)(b) and 83(2).
[54] See, for instance, the *Police Act 1990* (NSW), s 216A; Police Regulation (Superannuation) Act 1906 (NSW), s 21; *Workers' Compensation (Dust Diseases) Act 1942*, s 8I.
[55] *Legal Profession Uniform Law Application Act 2014* (NSW), s 89.

79 Section 19 provides for additional circumstances in which the Court may direct a person to attend and give evidence in person. Section 20 provides for the powers of the District Court on appeal as follows:

> "**20 Determination of appeals**
>
> (1) The District Court may determine an appeal against conviction:
>
> (a) by setting aside the conviction, or
> (b) by dismissing the appeal, …"

80 These provisions raise three questions of practical importance:

(1) First, what is the nature of the proceeding in the District Court: that is what is meant by the phrase, ***"appeal by way of rehearing";***

(2) Secondly, what additional evidence may be adduced; and

(3) Thirdly, (a) what orders may be made by the District Court and

(b) what is the effect of those orders.

81 The authorities in the Court of Appeal do not speak with one voice on these questions. I will try to simplify the jurisprudence as much as is possible.

What is meant by an appeal by way of rehearing?

82 In *Allesch v Maunz*[56], Gaudron, McHugh, Gummow and Hayne JJ described an appeal by way of rehearing as one in which the powers of the court may be exercised only if the appellant can demonstrate legal, factual or discretionary error underlying the order appealed against. However, their Honours went on to say:

> "At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance." (citation omitted)

[56] [2000] HCA 40; 203 CLR 172 at [23].

83 In *Charara v The Queen*[57], Mason P observed that this involved a consideration of the Local Court transcript supplemented by such evidence as was admitted by leave under s 18(2). Regard was to be had to the advantage enjoyed by the magistrate in hearing the witnesses.[58] This is important when question of credit arise on such an appeal. This has been confirmed in, for instance, *Mordant v DPP*.[59]

84 The question in contention is whether it is necessary for the District Court to be satisfied that there was error in the decision of the magistrate. There are two strands of authority:

(1) The authorities (or judges) who have stated that the Court must find error before setting aside the conviction include *Mulder v Director of Public Prosecutions (Cth)*[60] and *AG v Director of Public Prosecutions (NSW)*[61] per Basten JA.

(2) Those authorities (or judges) who have stated s 18 does not require a finding of error include *Gianoutsos v Glykis*[62] and *AG v Director of Public Prosecutions (NSW*) per Simpson J.

Dyason v Butterworth[63] purported to state that error was required although the reasons may not be clear.

85 A reference to each of the cases is warranted. The key finding in *Gianoutsos v Glykis* was as follows:

> "The District Court has power to rehear issues at trial but does not have power to remit the matter back to the Local Court. It follows that the District

[57] [2006] NSWCCA 244; 164 A Crim R 39 at [23].
[58] See *Fox v Percy* [2003] HCA 22; 214 CLR 118.
[59] [2007] NSWCA 121; 171 A Crim R 510 at [53].
[60] [2015] NSWCA 92.
[61] [2015] NSWCA 218.
[62] [2006] NSWCCA 137; 65 NSWLR 539.
[63] [2015] NSWCA 52.

> Court's powers under s 18 of the [Appeal and Review Act] are not dependent upon a finding of error at the original trial."[64]

This approach reflects the High Court's qualification in *Allesch v Maunz.*

86 In *Mulder v Director of Public Prosecutions (Cth)*, judicial review was sought of two separate prosecutions of Federal offences in the Local Court. Each was subject of an unsuccessful appeal to the District Court under s 11 of the *Crimes (Appeal and Review) Act*. Gleeson JA, with whom Ward JA and Johnson J agreed, held:

> "As the appeal to the District Court is by way of rehearing, it is necessary for the appellant to demonstrate that the order the subject of the appeal is the result of a legal, factual or discretionary error in which event the District Court can substitute its own decision based on the facts and law as they then stand. Accordingly, it was the duty of Judge Hock and Judge Toner to form their own judgment of the facts and, in particular, to determine whether the evidence before the Magistrates was sufficient to demonstrate Mr Mulder's guilt on the charges beyond reasonable doubt."[65]

87 The Court in *Mulder* therefore clearly determined that an appeal under s 11 was an appeal by way of error. In the result, no error was found in the District Court's approach and the summonses were dismissed. However, as Simpson JA noted in *AG*, it is clear that the District Court in the *Mulder* appeals did not in fact proceed by way of error; rather, in both appeals the District Court judge independently considered the Local Court evidence and declared satisfaction beyond reasonable doubt.[66] Simpson JA noted:

> "If it were correct that a s 11 appeal depended upon identification of error in the Local Court, then, absent some identification of error, it would have been inappropriate for Hock DCJ and Toner DCJ to have proceeded to the final exercise of determination of guilt. The appropriate order in each case would, in that circumstance, have been dismissal of the appeal, without engagement with the facts, or the inferences to be drawn from them."[67]

[64] [2006] NSWCCA 137; 65 NSWLR 539 at [39].
[65] [2015] NSWCA 92 at [28].
[66] Ibid at [68] and [93].
[67] [2015] NSWCA 92 at [93].

88 *Dyason v Butterworth* was also not entirely consistent on this point. In that case, judicial review was sought in respect of an appeal under s 11 against the making of an order under s 19 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). McColl JA, with whom Barrett and Gleeson JA agreed, held as follows:

> "70 It is apparent from the primary judgment that the primary judge did not, with respect, form her own judgment as to the facts and whether they warranted the conclusion that the elements of [s 19] ... her Honour did not consider whether, in all the circumstances… an APVO was warranted.
>
> 71 Further, in determining that the Magistrate's orders should be confirmed, the primary judge did not examine the evidence before the Magistrate, nor did she consider whether his Honour had adequately identified and dealt with the matters with which he was required to deal."

89 That passage would appear to have it both ways: the District Court was found to have failed *both* to form its own view of the sufficiency of the evidence to found the orders made *and* to properly consider whether error on the part of the magistrate had been made out. The correct outcome if those questions were answered differently was not clear. However, in his brief concurring note, Barrett JA, without explicitly averring to the distinction, presented the task as one of an independent assessment of the evidence.[68]

90 The applicant in *AG v Director of Public Prosecutions (NSW*) was convicted in the Local Court of four counts of aggravated indecency committed against his step-daughter and granddaughter. The case turned almost entirely on the credibility of the complainants as against the defendant.

91 An appeal against conviction to the District Court pursuant to the *Crimes (Appeal and Review) Act*, s 11 was successful in relation to one of the counts. The applicant sought judicial review in relation to the remaining three counts, contending that the District Court judge misapprehended his jurisdiction under ss 11 and 18.

[68] [2015] NSWCA 52 at [83].

92 Basten JA found that *Gianoutsos* was not controlling authority on the issue. His Honour considered that if there was no requirement to demonstrate error, but rather a requirement that the judge on appeal be satisfied to the requisite standard, such satisfaction would not be possible without the judge having heard the relevant evidence her or himself (at least in any case turning on credibility). His Honour held:

> "Adopting that conclusion would, to a large extent, make the appeal a de novo hearing where the case is one of oath against oath. That is entirely inconsistent with the conventional understanding of an appeal by way of rehearing; it is also inconsistent with the common statements that the appeal judge should be conscious of the "natural limitations" on his or her power to assess the record of evidence given before the magistrate. Those comments have never been accompanied by a suggestion that the judge should have the witnesses recalled; rather, at least implicitly, they assume that the judge should accept the credibility findings of the magistrate in the absence of some demonstrated reason to doubt them."[69]

93 It followed, on his Honour's approach, that it was necessary to find error. He held that the primary judge had performed the correct task, and had identified error in respect of one of the convictions and overturned it, and dismissed the summons.

94 Simpson JA took the contrary approach. Her Honour considered that the authorities demonstrated that no finding of error was necessary, but commented that authorities in the Court of Appeal and Court of Criminal Appeal were "*not so easy to reconcile*."[70] Her Honour considered the history of s 18, which had previously provided that:

> "(1) An appeal against conviction is to be way of rehearing *on the basis of certified transcripts* of evidence given in the original Local Court proceedings, except as provided by s 19." (emphasis added)

[69] [2015] NSWCA 218 at [28].
[70] Ibid [85]-[86].

95 That provision had been interpreted, in *Charara v The Queen*,[71] so as to "*impliedly direct*" the District Court to consider the reasons of the magistrate, on the basis that otherwise it "*would be driven to speculation or deciding the issue entirely afresh*", which would be contrary to the statutory purpose. The Act was then amended in conformity with that decision.[72] Simpson JA, having referred to the report on which the amendment was based, held that the intention was:

> "… that the District Court judge would exercise an independent judgment of the guilt of the accused, aided (in the absence of the opportunity to observe witnesses and make his or her own credibility assessment) by the credibility findings of the magistrate."[73]

96 In the result, however, Simpson JA found that the primary judge had formed his own conclusion that the applicant was guilty of the charges of which he was committed – notwithstanding that his reasons related substantially to errors imputed to the magistrate – and, like Basten JA, would have dismissed the summons. In that circumstance, Sackville AJA did not find it necessary to express an opinion on the operation of s 18.

Evidence in s 11 appeals

97 The nature and scope of the appeal is of critical importance given that the terms of s 18(2) and s 19. Those sections provide:

> "**18 Appeals against conviction to be by way of rehearing on the evidence**
>
> (1) An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.
>
> **(2) Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.**

[71] [2006] NSWCCA 244; 164 A Crim R 39 at [23]-[24].
[72] *Crimes (Appeal and Review) Amendment Act 2009* (NSW).
[73] [2015] NSWCA 218 at [101].

> (3) The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.
>
> **19 Circumstances in which evidence to be given in person**
>
> (1) The District Court may direct a person to attend and give evidence in proceedings on an appeal against conviction if it is satisfied:
>
> > (a) in the case of an appeal that relates to an offence involving violence against that person, that there are special reasons why, in the interests of justice, the person should attend and give evidence, or
> >
> > (b) in any other case, that there are substantial reasons why, in the interests of justice, the person should attend and give evidence.
>
> (2) An application for such a direction may be made by a party to the proceedings in relation to a particular person only if notice of the party's intention to make such an application has been served on each other party to the proceedings within such period as the District Court may direct.
>
> (3) If an application for such a direction is refused, the District Court must give reasons for the refusal.
>
> (4) A direction may be withdrawn only on the application, or with the consent, of the appellant.
>
> (5) The regulations may make provision for or with respect to the determination of special or substantial reasons for the purposes of subsection (1).
>
> (6) Without limiting subsection (5), in determining whether special or substantial reasons exist, the District Court must have regard to whether or not the appellant was legally represented for the whole or any part of the original Local Court proceedings." (emphasis added)

98 Special leave to appeal to the High Court from the decision in *AG* was refused on 11 March on the basis that the case was not a suitable vehicle for determination of the issue.[74] The position of both parties in the High Court – the DPP and the appellant – was that s 18 did not require error to be demonstrated. There was, however, a substantial dispute between the parties as to the relevance of credibility findings made by the magistrate in circumstances in which the District Court judge is required to form her or his own assessment of the evidence.

[74] *AG v Director of Public Prosecutions & Anor* [2016] HCATrans 50.

99 Nothing said on a special leave application – nor the fact that special leave is refused – is to be taken as an authoritative statement of legal principle.[75] However, it is not irrelevant that there was some interest in the interaction between the nature of the appeal and the provisions relating to reception of evidence. French CJ observed, without demur, that the nature of the process (that is the nature and scope of an appeal under s 18) "*must inform the way in which it is to be done*", which was a reference to what evidence could be or was required to be called on the appeal.

The effect of orders made under s 20

100 A question has arisen in at least two cases as to the orders the District Court may make, including whether it has any implied power to remit a matter to the Local Court.

101 Section 20 permits the Court to make one of two orders: it can dismiss the appeal. That is uncontroversial. Or it can "*set aside the conviction*".

102 The effect of setting aside the conviction is to leave the charge extant. In an appeal to the Court of Criminal Appeal under the *Criminal Appeal Act 1912* (NSW), the Court has a number of powers, including acquitting the accused persons[76] or remitting the matter to the trial court for a new trial.[77] It also has power in special cases to decide that the person was properly convicted of some other offence and sentence in respect of that charge.[78]

103 The District Court has none of those powers. In *DPP v Burns*[79], I held that the effect of an order setting aside a conviction was that it was as though the person had never been charged.[80] The *Crimes (Appeal and Review) Act*, s

[75] As to the nature of special leave hearings, see *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* [1991] HCA 43; 173 CLR 194.
[76] *Criminal Appeal Act 1912* (NSW), s 6.
[77] *Criminal Appeal Act 1912* (NSW), s 8.
[78] *Criminal Appeal Act 1912* (NSW), s 7.
[79] [2010] NSWCA 265; 207 A Crim R 362 at [55] per Beazley JA (Campbell JA agreeing).
[80] See *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45; 53 CLR 220.

73 provides that the Registrar of the District Court is to send a memorandum to the Local Court that the conviction has been set aside. The consequence, as I see it is that, if the prosecuting authorities saw fit to run the case again the appellant could raise a plea in bar – in effect pleading double jeopardy.

104 In *AG* and previous cases,[81] Basten JA has raised the question whether there is a power in the District Court to remit a matter for rehearing. For the reasons I gave in *Burns*[82] I do not consider that there is.

Civil appeals limited to questions of law

105 One perennial difficulty we see in the Court of Appeal is the construction of the powers of the District Court on statutory appeals limited (in varying language) to questions of law.

106 The applicants in *O'Farrell v Allianz Australia Insurance Ltd*[83] brought proceedings for judicial review of a decision of the District Court on appeal from the Consumer, Trader and Tenancy Tribunal (as it then was). At issue was an insurance claim over a stolen car. Allianz contended that, by reason of a failure of the insured to comply with his duty of disclosure pursuant to the *Insurance Contracts Act 1984* (Cth), it was entitled to refuse the claim. The matters not disclosed were convictions arising from a brawl outside a pub.

107 The *Insurance Contracts Act* imposes, by ss 21 and 21A, a duty on the insured to disclose certain matters and a system by which the insurer was taken to have waived compliance with that duty in certain circumstances.

108 By s 22, the insurer is required to inform the insured in writing of the general nature and effect of s 21 and 21A. It provides relevantly as follows:

[81] [2015] NSWCA 218 at [16]ff; *Director of Public Prosecutions (NSW) v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 at [59]-[60].
[82] [2010] NSWCA 265; 207 A Crim R 362 at [54].
[83] [2015] NSWCA 48.

> "**22 Insurer to inform of duty of disclosure**
>
> (1) The insurer must, before a contract of insurance is entered into, clearly inform the insured in writing:
>
> (a) of the general nature and effect of the duty of disclosure; and
>
> (b) if section 21A or 21B applies to the contract—of the general nature and effect of that section; and
>
> …
>
> (d) that the duty of disclosure applies until the proposed contract is entered into.
>
> …
>
> (5) An insurer who has not complied with subsection (1) … may not exercise a right in respect of a failure to comply with the duty of disclosure, unless the failure was fraudulent.
>
> …."

It was accepted that the insurer bore the burden of proof with respect to compliance with s 22(1).

109 The CTTT had found that no satisfactory evidence had been led to establish that Allianz had properly advised the insured of the matters the subject of s 22 and that, accordingly, Allianz could not rely on non-disclosure of the convictions to deny payment of the claim. In making that finding, the CTTT explicitly preferred the evidence of the insured over Allianz's evidence as to what he was asked and what he had been told when entering into the contract.

110 An appeal under s 67 of the *CTTT Act* was allowed on the ground that there was "*no evidence on which the Tribunal could have made the decisions*" with respect to s 22. (A ground relating to the interpretation of the *Insurance Contracts Act* was also successful but is not relevant for present purposes).

111 Section 67(1) of the *CTTT Act*, as then in force, provided relevantly:

> **"67 Appeal against decision of Tribunal with respect to matter of law**

> (1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the District Court against the decision."

112 The District Court's jurisdiction was thereby limited to questions with respect to matters of law. In that circumstance, as Allianz accepted, it was bound to accept the Tribunal's finding of fact that it preferred the evidence of the insured over that of Allianz. However, the primary judge erred by, in effect, failing to consider the operation of the jurisdictional limit in circumstances in which the onus, for the purposes of s 22 of the *Insurance Contracts Act*, lay with Allianz. As Basten JA held, relying on *Azzopardi v Tasman UEB Industries Ltd*[84]:

> "Needless to say, Allianz could not complain of an adverse factual finding if there was 'no evidence' to support the finding which it sought; however, even if there was 'no evidence' pointing to a contrary conclusion, the Tribunal was entitled to reach the contrary conclusion because it did not accept Allianz' evidence."[85]

113 It followed that the Tribunal's reasoning, which was founded on a failure to be satisfied as to matters required to be established by Allianz, "*could not have given rise to errors of law based on a total lack of supportive evidence*."[86] Basten JA found that the primary judge's contrary conclusion thereby "*revealed a misapprehension as to the nature and scope of* [*the District Court's*] *jurisdiction under s 67 of the* [*CTTT Act*]."[87]

114 Having found (erroneously) that the CTTT had erred in law, the primary judge embarked on a reassessment of the factual material before the Tribunal. However, the Court's powers in that regard were relevantly constrained by the *CTTT Act*, s 67(3), which provided:

[84] (1985) 4 NSWLR 139.
[85] [2015] NSWCA 48 at [18].
[86] Ibid [30].
[87] Ibid [49].

> "(3) After deciding the question the subject of such an appeal, the District Court may, unless it affirms the decision of the Tribunal on the question:
>
> > (a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or
> > (b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal."

115 The powers of the court to decide a case on the basis of s 67(3) are limited. Basten JA noted that the most expansive view was that given, in an expressly obiter passage, by French CJ in *Kostas v HIA Insurance Services Ltd*[88]. There French CJ canvassed the possibility that the appellate court may be entitled to "*draw inferences from facts found by the Tribunal or to find facts on materials before the Tribunal which were not in dispute*." But that was a case involving an appeal to the Supreme Court, and the application of its reasoning to District Court appeals remains an open question. On any view, however, by reassessing the factual material before the CTTT the primary judge was clearly exceeding the jurisdiction conferred by s 67(3).[89]

116 One problem in *O'Farrell* was that the primary judge appeared to have been led into error by the parties. Basten JA noted that:

> "… the grounds of appeal raised by Allianz in the District Court did not, for the most part, identify with any degree of precision errors of law within the terms of s 67. Nor did Allianz' submissions accurately advise the judge as to the limits of the District Court's jurisdiction."[90]

117 That point is, of course, no answer at all to jurisdictional error. But the case emphasises the basic point that – regardless of the positions taken by the parties – the first task of the judge, particularly when operating under a limited statutory appeal, must be to consider the boundaries of her or his jurisdiction, and the powers she or he can exercise within that jurisdiction.

[88] [2010] HCA 32; 241 CLR 390 at [26]-[30].
[89] [2015] NSWCA 48 at [40].
[90] Ibid [7].

118 A similar point arises from the tortured costs litigation in *Wende v Horwath*.[91]

119 In that case, costs were awarded in the substantive proceedings between the parties in the Local Court, Supreme Court and Court of Appeal. A costs assessment was then made, purportedly pursuant to s 353 of the *Legal Profession Act 2004* (NSW) (that Act, of course, now having been replaced by the Uniform Law). The costs certificates had been issued on the basis of a global assessment of multiple costs orders.

120 An appeal to the District Court was unsuccessful. That decision was subject to judicial review by the Court of Appeal in 2014, there being no right of appeal from a decision of the District Court on appeal from a determination by the costs assessor. In the result, the Court of Appeal set aside the costs certificates and the orders of the District Court, on the basis that the Act did not permit a global assessment of multiple costs orders, and remitted the matter to the District Court.[92]

121 On remittal to the District Court, the global costs sums in the costs certificates were disaggregated by calculation of which items recorded in the reasons of the assessor related to which costs order. That process was done with the assistance of expert evidence. Orders were made in respect of each costs order, in respect of the costs of the costs assessment, and in respect of the costs in the District Court.

122 Those orders were subject to a second judicial review application and returned to the Court of Appeal in 2015. The case turned on the construction of the jurisdiction conferred on the District Court pursuant to s 384 of the *Legal Profession Act 2004*. That section provided:

> **"384 Appeal against decision of costs assessor as to matter of law**

[91] *Wende v Horwath (No 2)* [2015] NSWCA 416.
[92] *Wende v Horwath (NSW) Pty Limited* [2014] NSWCA 170.

> (1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.
>
> (2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:
>
> > (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
> >
> > (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
>
> (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given."

123 A number of issues were raised on review. The central jurisdictional question, however, was whether s 384(2)(a) permitted the District Court to make an order in a money sum, as it did, or whether alternatively it was required to issue costs certificates in respect of each sum, or could do neither and was required to remit the matter to the costs assessor.

124 The District Court had jurisdiction pursuant to – and limited by – s 384, both at first instance and on remittal. That jurisdiction was limited to "*a matter of law*". Pursuant to s 384(3) additional evidence could be determined on the "*re-determination of an application*" but, as it was held, that "*re-determination*" meant a redetermination by a costs assessor pursuant to s 384(2)(b), not a determination by the District Court under s 384(2)(a).[93] It should also be noted that the District Court had, by necessary implication, everything necessary for the exercise of its powers under s 384: *Grassby v The Queen*[94].

125 I held:

> "There is a long line of authority that where an appeal is limited to a question of law, the appellate body is limited to a determination of the question of law

[93] [2015] NSWCA 416 at [57].
[94] [1989] HCA 45; 168 CLR 1 at 16-17; see [2015] NSWCA 416 at [49]-[53].

> and is not permitted to engage in a fact finding process or to otherwise engage in a merits review of the decision of the lower court or tribunal."[95]

126 The primary judge, in undergoing a process of disaggregation, performed an evaluative task with the assistance of fresh expert evidence. I concluded that that approach, simple as it may have been, necessarily involved making findings of fact and was thereby beyond jurisdiction. Being inconsistent with the statutory grant of power, the relevant power could not be derived by necessary implication.[96]

127 Basten JA came to the same conclusion, noting three factors militated against any power to make findings of fact pursuant to s 384: first, the subject matter of the appeal being "*as to*" a matter of law; secondly, the separate provision, by s 385(2), of a pathway for appeal on the merits (which had not been engaged); and thirdly, the limitation on fresh or additional evidence to re-determination of the matter by a costs assessor pursuant to s 384(2)(b).[97] It followed that, despite the pragmatic benefits of the approach taken by the primary judge, it was simply not open. Basten JA also found that the power provided by s 384(2)(a) did not extend to the issuance by the court of a costs certificate, notwithstanding that that approach had been sought by the respondent.

128 It is worth noting at this point that the corresponding provision now in force, the *Legal Profession Uniform Law Application Act 2014* (NSW), s 89, is cast in considerably wider terms. No doubt jurisprudence on that provision is being developed as we speak. However, as cases in which the previous legislation is applicable are likely to continue to appear for some time, and s 384 is in

[95] [2015] NSWCA 416 at [58].
[96] Ibid [65].
[97] Ibid [108]-[111].

any case not dissimilar to a number of other provisions providing for limited statutory appeals,[98] *Wende (No 2)* remains of some relevance.

129 The parties in *Wende* hve sought special leave to appeal to the High Court. The lengthy and technical *Wende* litigation has long-since overshadowed, by a very significant amount, the sums involved in the primary litigation. The course taken is particularly remarkable as it involves no challenge to the substance of the assessment – only its form. It is clear that both parties are very poorly served by ongoing disputation. However, that is a matter over which the Court has limited control.

130 *Wende* again demonstrates that close attention is required to the court's jurisdictional limits and powers, particularly in procedurally complex cases. It appears that the parties in *Wende* may have been of limited assistance to the primary judge on the crucial jurisdictional questions. In that circumstance, it may be appropriate to expressly draw jurisdictional questions to the attention of the parties and invite submissions. In particular, there should be an early focus on identifying the error of law that a party asserts has been made. However, to simply rely on a shared assumption as to the availability of a power invites error.

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[98] Albeit most appeals framed by reference to questions of law are now heard in the Supreme Court. Appeals under the *NSW Civil and Administrative Tribunal Act 2013* (NSW), s 83, which may in some circumstances be heard in the District Court, are an exception.