

## **Recent Judgments in Personal Injury and Litigation♦**

- 1 I had the privilege as a junior barrister of being led by the late Honourable Theo Simos QC, and as a junior judge of sitting frequently when the Honourable Simon Sheller was the presiding judge. Theo, of course, was the son of the Greek proprietors of the Paragon Café in Katoomba St, Katoomba – a veritable institution in this region’s tourism trade.
- 2 Simon’s parents did not own a café in Katoomba or anywhere else so far as I know. He does have a home in Bowral so it would appear that both liked chilly climes. And both were legal colleagues at the bar on the 11<sup>th</sup> Floor Selbourne Chambers and judicial colleagues in the Supreme Court.
- 3 That, however, is not the point I wish to make. The point is that both had extremely fine and refined legal minds. I learned a most valuable lesson from each: the importance of approaching a case from basic legal principle. It was what I saw in Theo in his preparation and presentation of a case. It was what I observed in Simon in his approach to the preparation of a case prior to hearing, during the hearing and in his judgment writing.
- 4 I wish to make that the focus of my presentation today: the importance of approaching matters from first principles. In saying that I do not mean that the Court necessarily needs to hear the “nuts and bolts” of the basic principles underlying the case being advanced. However, it is always apparent from the argument when the advocate does not understand those principles. That failure makes the task of the judge particularly difficult.
- 5 In the last 30 years, personal injury law had moved on from the era of jury trials, with the different skills and techniques of both advocate and judge that such a trial called for. Victoria continues to bathe in that luxury. I make that comment uncritically. Recently, a Victorian judge said to me that, whilst the task of explaining principles of tort law to a jury was exacting, he commiserated with the task of New South Wales judges in having to write

lengthy judgments explicating their reasoning process. He referred, by way of example, to the task of the judges on the Dust Diseases Tribunal.

- 6 The end of the era of jury trials revealed, on the High Court's assessment, a gap in the proper articulation, and perhaps in the understanding, of fundamental principles of tort law. This led to a period during which the High Court sought, in a series of judgments, to articulate what was involved in determining the existence of a duty of care.<sup>1</sup> This remains a problematic area, for reasons to which I will shortly return.
- 7 The seismic change with which common lawyers have had to grapple is the statutory wrapping in which the law of personal injuries now resides. I will also expand upon that.
- 8 Lawyers have responded to these changes with artful attempts to bend, stretch and manipulate the statutory construct which binds personal injury litigation. Again, a matter for amplification later in this paper.
- 9 Before I commence an examination of the issues thus flagged, I will make an immediate disclaimer. This paper is directed to its billing – that is, a key note address with an allocated 30 minute time (or perhaps more accurately, concentration) span. Accordingly, I will be brisk in the matters that I raise, seeking to remain with the thematic basis I have identified. Being part of, grappling with and watching these developments over the last decade has, for me, reinforced the importance of understanding fundamental legal principle to achieve the best available outcome for the client on both sides of the record.
- 10 My approach will be to examine that theme by reference to the following matters:

---

\* I express my thanks to my researcher, Kathleen Heath, for her extensive research and valuable assistance in the preparation of this paper.

<sup>1</sup> *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council* [2001] HCA 29; 206 CLR 512; *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422; *Mulligan v Coffs Harbour City Council* [2005] HCA 63; 223 CLR 486.

- (1) The determination of the existence of duty of care, including its relationship of ss 5B and 5C of the *Civil Liability Act*;
- (2) The legal implications of the principle that the law of torts protects the citizen taking reasonable care for that person's own safety (this will meld with contributory negligence under the *Civil Liability Act*);
- (3) Damages for gratuitous care; and
- (4) The government agency as litigant.

### **The determination of a duty of care**

*How is the existence and scope of a duty of care determined?*

11 There is no single approach to the identification of the scope of the duty save that, even in the case of a well-settled duty, such as that owed by a motorist to another road-user, the scope of the duty is likely to be fact sensitive. The approach that has received consistent endorsement by the High Court is its statement in *Sullivan v Moody*<sup>2</sup> that “*different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care.*” Factors that are relevant are:

- (a) The harm suffered;
- (b) The cause of the harm (eg where the direct cause of the harm was criminal conduct – being the matter in issue in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*<sup>3</sup>);
- (c) The fact that the defendant has a statutory power or discretion;
- (d) The need for coherence (explained in *Sullivan v Moody*);

---

<sup>2</sup> [2009] HCA 48; 239 CLR 420 at [13].

<sup>3</sup> [2000] HCA 61; 205 CLR 254 at [103] (Hayne J).

(e) The existence of a statutory scheme governing entitlements.

12 Some of these areas have been reasonably well worked out.<sup>4</sup> However, the identification of and relevant articulation of the “the harm” suffered may not always be so easy.<sup>5</sup> An example is where claims are made for economic loss suffered as a result of advice given in respect of, and the delivery of, biotechnological services.<sup>6</sup> The basic principle requires the identification of an interest that the law will protect.<sup>7</sup> This in turn may need to take into account legal and social changes.

13 In *Montgomery v Lanarkshire Health Board*,<sup>8</sup> the Supreme Court was concerned with the duty of a doctor towards a patient in relation to advice about treatment. The patient sought damages on behalf of her son who was born with severe disabilities following a difficult birth. The alleged negligence was the failure to give advice about a particular risk, shoulder dystocia, that would be involved in a vaginal birth and of the alternative possibility of elective caesarean section. The court stated:

“The social and legal developments which we have mentioned point away from a model of the relationship between the doctor and the patient based upon medical paternalism. They also point away from a model based upon a view of the patient as being entirely dependent on information provided by the doctor. What they point towards is an approach to the law which, instead of treating patients as placing themselves in the hands of their doctors (and then being prone to sue their doctors in the event of a disappointing outcome), treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.”<sup>9</sup>

---

<sup>4</sup> See eg *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424; *Modbury Triangle Shopping Centre Pty Ltd v Anzil*; *Sullivan v Moody*.

<sup>5</sup> In *Sutherland Shire Council v Heyman*, Brennan J, at 487, placed primary emphasis on the harm suffered being in a novel area of claimed economic loss. See also Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* at [103].

<sup>6</sup> *Waller v James* [2013] NSWSC 497, currently reserved on appeal; *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1.

<sup>7</sup> In the context of actions for economic loss, see *Hawkins v Clayton* [1988] HCA 15; 164 CLR 539; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* [2013] HCA 10; 247 CLR 613 at [25].

<sup>8</sup> [2015] UKSC 11; [2015] 2 WLR 768.

<sup>9</sup> At [81].

14 The intuitive skill of the common lawyer will be to “suss out” (if I may use a colloquialism) how far those shifting sands will result in the recognition of a relevant interest. The history of the failed sterilisation cases in the United Kingdom has shown how social or medical advancements can result in an evolution of legal principles.<sup>10</sup> In New South Wales, the recognition of a right to claim damages for the costs of raising a child<sup>11</sup> was reversed by legislation.<sup>12</sup> The United Kingdom has taken a different approach.<sup>13</sup> In *Rees v Darlington Memorial Hospital NHS Trust*, the Court awarded:

“a modest conventional sum by way of general damages, not for the birth of the child, but for the denial of an important aspect of [the parents’] personal autonomy, viz the right to limit the size of the family.”<sup>14</sup>

15 The markers of those shifting sands will not come exclusively from the legislature or the courts. Industries and professions have an important role to play.<sup>15</sup> Nonetheless, as the UK Supreme Court affirmed in *Montgomery* by moving away from the *Bolam* test<sup>16</sup> in cases relating to a doctor’s duty to advise patients of the material risks of a treatment, responsibility for

---

<sup>10</sup> In *McFarlane v Tayside Health Board* [2000] 2 AC 59, the House of Lords refused to award damages for the cost of bringing up the child born after a negligently performed sterilisation. However, two years later in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, the Court of Appeal allowed damages to be recovered where the child was born with severe disabilities. In *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, the House of Lords awarded a “conventional award” of £15,000 to recognise the parents’ loss of autonomy resulting from a failed sterilisation procedure.

<sup>11</sup> *Cattanach v Melchior*.

<sup>12</sup> *Civil Liability Act*, ss 71 and 72.

<sup>13</sup> Caution must be exercised when seeking to rely on English reasoning in negligence cases in Australian courts. The UK Courts continue to apply the three-step test formulated in *Caparo Industries plc v Dickman* [1990] UKHL 2, 2 AC 605. The third limb of that test is to ask whether it would be fair, just and reasonable to impose liability. Australia has expressly rejected this enquiry, considering that it is “capable of being misunderstood as an invitation to formulate policy rather than to search for principle”: *Sullivan v Moody* (2001) 207 CLR 562 at 579.

<sup>14</sup> At [123] (Lord Millett). An interesting question is whether ss 71 and 72 of the *Civil Liability Act* will apply to damages of this nature, given that Lord Millett the conventional award to be by way of general damages rather than damages for economic loss.

<sup>15</sup> See the use of published medical guidelines in *Airedale NHS Trust v Bland* [1993] AC 780 and *Montgomery v Lanarkshire Health Board*.

<sup>16</sup> The *Bolam* test provided that a doctor was not guilty of negligence if she had acted in accordance with a practice accepted as proper by a responsible body of medical practitioners skilled in that particular art: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

determining the nature and extent of a person's rights rests with the courts, not with the medical professions.<sup>17</sup>

*What is the relationship between the determination of a common law duty of care and ss 5B and 5C of the Civil Liability Act?*

16 Notwithstanding the focus in recent years on the separate identification of duty, breach, causation, remoteness of damage (although an infrequent issue) and damages, the basic principle is that there is fundamental cohesion amongst these various integers of a tortious cause of action. The point is well made in *John Pfeiffer Pty Ltd v Canny*,<sup>18</sup> where Brennan J observed:

“His duty of care is a thing written on the wind unless damage is caused by breach of that duty; there is no actionable negligence unless duty, breach and consequential damage coincide ... for the purposes of determining liability in a given case, **each element can only be defined in terms of the others.**”<sup>19</sup>

17 That statement raises an interesting question as to the interaction of the determination of a common law duty of care, not subject of prescription in the *Civil Liability Act*,<sup>20</sup> and ss 5B and 5C of the Act. Indeed, this line of authority caused Basten JA in *Hoffman v Boland*<sup>21</sup> to observe that High Court's proposition in *Adeels Palace* that these sections were concerned only with breach<sup>22</sup> was:

“[O]nly partly true, for the reason that factors relevant to duty and breach, at least in their practical application, do not fit easily within watertight compartments.”<sup>23</sup>

18 I have referred above to the artful bending of the statutory construct in which the law of negligence now operates. This surfaced in *Grills v Leighton*

---

<sup>17</sup> *Montgomery v Lanarkshire Health Board* at [83]. This decision moved the UK position closer to the Australian position in *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>18</sup> (1981) 148 CLR 218.

<sup>19</sup> *Id* at 241-242; see also *Tame v New South Wales* (2002) 211 CLR 317 at [90].

<sup>20</sup> *Adeels Palace Pty Ltd v Moubarek* [2009] HCA 48; 239 CLR 420 at [13], where the Court stated that the heading to ss 5B and 5 C was “apt to mislead [because] [b]oth provisions are evidently directed to questions of breach of duty.”

made clear that despite their legislative heading, ss 5 B and 5C deal with breach, not duty.

<sup>21</sup> [2013] NSWCA 158.

<sup>22</sup> Above n 18.

<sup>23</sup> *Hoffman v Boland* at [2].

*Contractors Pty Ltd*<sup>24</sup> where Leighton, on the question of duty, submitted at trial that s 5B was not only concerned with breach but with “*the mere existence of the duty itself*”.<sup>25</sup>

- 19 The submission did not survive appellate scrutiny, as it misunderstood the observation of Basten JA in *Hoffman v Boland*.<sup>26</sup> The point is that the statement in *John Pfeiffer Pty Ltd v Canny* has continued relevance in the sense that the questions of foreseeability and harm are common integers of all the elements of the tort of negligence.
- 20 The question whether Leighton Contractors owed a duty of care was determined by reference to the usual factors pointing to or away from the existence of a duty of care,<sup>27</sup> viz: foreseeability, nature of the harm alleged, degree and nature of control able to be exercised by the defendant; degree of vulnerability of the plaintiff to harm from the defendant’s conduct; the assumption of responsibility by the defendant; the nature of the activity undertaken by the defendant; and the nature of the hazard or danger liable to be caused by the defendant’s conduct.<sup>28</sup>

### **The plaintiff taking reasonable care for her/his own safety: the competition between breach and contributory negligence**

- 21 The duty of a road authority is to exercise reasonable care so that the road is safe “*for users exercising reasonable care for their own safety*.”<sup>29</sup> A statement of duty in these terms has thrown up an interesting challenge to the profession and the Court of Appeal.

---

<sup>24</sup> [2015] NSWCA 72.

<sup>25</sup> *Id* at [92].

<sup>26</sup> *Grills v Leighton Contractors Pty Ltd* at [95].

<sup>27</sup> *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [84]; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 at 34-35; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [85], [92].

<sup>28</sup> See the summary of principles in *Caltex Refineries (Qld) Pty Ltd v Stavara* [2009] NSWCA 258; 75 NSWLR 649.

<sup>29</sup> *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at 581 [163]; see also *RTA v Dederer* at [44].

- 22 *Council of the City of Sydney v Hunter*,<sup>30</sup> was a simple enough footpath/tree root tripping case. The eruption of tree roots through the pavement was not only obvious but there was ample room to navigate around it. The plaintiff simply chose to walk over it. The Council was held not to be liable because the plaintiff was not taking care for his own safety. What does that mean as a matter of practical application?
- 23 The best explanation is found in *Ghantous*.<sup>31</sup> there was no failure to maintain or improve the footpath “*because the footpath was not unsafe for a person taking ordinary care*”.<sup>32</sup> Likewise, in *RTA v Dederer*,<sup>33</sup> the High Court held that the duty of care was owed to all road users whether or not they took ordinary care for their own safety, but the *extent* of the obligation owed by the RTA was to see that the road was safe for users exercising care for their own safety. There is no different duty to the careless road user. As the High Court has stated more than once, there is no obligation to prevent harm.<sup>34</sup> (Questions of duty and breach in relation to a road authority must now be considered in the context of the *Civil Liability Act*, s 42).
- 24 Subsequent to *Hunter*, arguments have been run seeking to give a forensic twist to the application of these basic principles: the argument has been to the effect that in determining the question of breach, the court first looks at whether the plaintiff was taking care for his or her own safety. If not, it has been submitted, the plaintiff fails at the outset before the question of breach of duty is addressed.
- 25 That cannot be correct. The articulation of the duty by reference to a user exercising care for his or her own safety indicates the *standard* of care required of a road authority. To treat whether the plaintiff was taking care for his or her own safety as a preliminary question subverts the logical sequence of the negligence enquiry. It would have the effect of making any form of

---

<sup>30</sup> [2014] NSWCA 449.

<sup>31</sup> *Ghantous v Hawkesbury City Council* [2001] HCA 29; 206 CLR 512.

<sup>32</sup> *Id* at [166].

<sup>33</sup> [2007] HCA 42; 234 CLR 330 at [47].

<sup>34</sup> See *Sullivan v Moody* (2001) 207 CLR 562 at [42].



contributory negligence a complete defence – or perhaps in this modern world of statutory override, a finding of 100 per cent contributory negligence. That approach indicates a poor understanding of the basic principles of the law of negligence.

26 Sections 5R and 5S have a particular structure. First, they presuppose that someone has been contributorily negligent.<sup>35</sup> Secondly, although a claim in damages is defeated by a finding of 100 per cent contributory negligence, it does not amount to a reinstatement of the historical position whereby contributory negligence was a complete defence.<sup>36</sup>

27 There is an intuitive logical difficulty in providing for a 100 per cent reduction in damages concurrent with a finding of liability. However, the reconciliation of these propositions was explained in the Ipp Report:<sup>37</sup>

“... there may be cases in which the plaintiff’s relative responsibility for the injuries suffered is so great that it seems fair to deny the plaintiff any damages at all. It is important to remember that apportionment of damages is concerned with the issue of appropriate remedy, not with liability. It does not follow from a decision that the plaintiff should be denied any damages at all that the defendant was not at fault.”<sup>38</sup>

28 Central, therefore, to the operation of ss 5R and 5S under the Act is a finding as to the liability of a defendant in a case. The effect of s 5R is to require the court, in determining whether a person is contributorily negligent, to apply ss 5B and 5C, being the statutory provisions applicable to determining breach.

29 It might be thought that 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. It is concerned with the conduct of the perpetrator of the alleged wrong. Contributory negligence requires a

---

<sup>35</sup> *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361 at [180] (Gleeson JA).

<sup>36</sup> *Adams by her next friend O’Grady v State of New South Wales* [2008] NSWSC 1257 at [132].

<sup>37</sup> Commonwealth of Australia, *Review of the Law of Negligence* (Canberra, September 2002).

<sup>38</sup> *Id* at [8.24].

determination whether a person has taken reasonable care for the person's own safety.

- 30 However, the difficulty is resolved by the application of basic principles of statutory construction. As the Court of Appeal pointed out in *Grills Leighton Contractor Ltd*,<sup>39</sup> once the difference in the fact finding task is recognised, it is apparent that s 5R(1) requires consideration is required to be given to the statutory prescriptions in s 5B. 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 plaintiff knew or ought to have known.

### **Damages for gratuitous attendant care services**

- 31 The head of damages for gratuitous attendant care services has its origins in the common law. The basic principle is, as stated in *Griffiths v Kerkemeyer*,<sup>40</sup> is that such damages do not compensate the loss incurred by the provider of the services. The relevant loss is the plaintiff's incapacity to look after herself or himself.<sup>41</sup> The underlying policy consideration is not allowing a wrongdoer to benefit, through reduced damages, from the benevolence of friends or relations.<sup>42</sup>
- 32 Although now governed by statute,<sup>43</sup> the basic principle remains and the underlying policy is the same. This is well illustrated by the Court of Appeal's decision in *Perisher Blue Pty Ltd v Nair-Smith*.<sup>44</sup> That decision concerned the calculation of damages for domestic assistance obtained below market rates, rather than gratuitously. The claim made was for an award for domestic care at the market rate of \$30 per hour, notwithstanding that the injured party had retained a person at the rate of \$14.58 per hour.

---

<sup>39</sup> At [162].

<sup>40</sup> (1977) 139 CLR 161.

<sup>41</sup> *Id* at 192.

<sup>42</sup> *Id* at 168, where Gibbs J quotes Lord Reid in *Parry v Cleaver* [1970] AC 14. See also at Mason J at 192.

<sup>43</sup> *Motor Accidents Compensation Act 1999*, s 141B; *Civil Liability Act 2002*, s 15.

<sup>44</sup> [2015] NSWCA 90.

- 33 The award would have been upheld on appeal.<sup>45</sup> The relevant loss was not the legal liability to pay for the service, but the loss of capacity which occasions the need for the service. The Court indicated that in accordance with the principles stated *Griffiths v Kerkemeyer*<sup>46</sup> such damages are, in general, calculated in accordance with the standard or market cost of the services.
- 34 An interesting attempt to put a kink in the statutory scheme is to be found in *Sampco Pty Ltd v Wurth*,<sup>47</sup> where there was a question whether the 6 hour/ 6 month threshold<sup>48</sup> could be met by averaging the hours spent per week over the 6 month period. Her actual need for domestic assistance had been 21 hours per week of assistance until she went back to work part time, and then 14 hours per week for a further period when she recommenced fulltime work. However, that only covered a period of up to five months.
- 35 The primary judge found that the respondent had receive gratuitous domestic assistance “*at an average of 8 hours a week*” across a three and a half year period. That approach was held to be impermissible.<sup>49</sup> It conflicted with the basic tenet of statutory construction that words must be given their ordinary and natural meaning. The language of the provision clearly indicated that the assessment was to be made on a weekly basis for a period of 6 months, not as an average.<sup>50</sup>

---

<sup>45</sup> The Court of Appeal in *Perisher* found that the liability of the tortfeasor was not established. However, the grounds of appeal relating to the calculation of damages were considered in the hypothetical.

<sup>46</sup> At 192-193 (Mason J).

<sup>47</sup> [2015] NSWCA 117.

<sup>48</sup> Section 15(3) of the *Civil Liability Act* provides:

“(3) Further, no damages may be awarded to a claimant for gratuitous attendant care services unless the services are provided (or to be provided):  
(a) for at least 6 hours per week, and  
(b) for a period of at least 6 consecutive months.”

<sup>49</sup> *Sampco v Wurth* at [91].

<sup>50</sup> The court in *Sampco v Wurth* also questioned the relevance of medical evidence that stated an opinion as to the amount domestic assistance required as opposed to the extent of the plaintiff’s physical or mental disability.

- 36 Claims for domestic assistance also require a clear understanding of the nature of the claim made. The legislation has differentiated between claims for assistance in respect of a plaintiff's own needs<sup>51</sup> and claims for interference with the capacity to perform attendant care services for others.<sup>52</sup> Importantly, a 6 hour/ 6 month threshold applies to each claim. The statutory requirements are not met by a global approach or an accumulation of the claims, viewed in combination.<sup>53</sup>
- 37 A problem may arise in the case of a "hybrid claim" (sometimes referred to as commingling of services) where the service claimed by the plaintiff personally is co-extensive with the service the plaintiff is incapacitated from providing for the family. Where the elements of the claim for services are severable, commingling is an impermissible approach.<sup>54</sup> That principle will always beg the question of what services are or are not severable. I have been known to have different views on this from some of my colleagues,<sup>55</sup> to say nothing of counsel who appear before me.

### **The appropriate standard of conduct of lawyers in the conduct of litigation**

- 38 I wish to conclude this talk on the need to approach matters from first principles with a discussion of the role to be played by the executive arm of government as a party. I will do so by reference to two cases, but there are many more.
- 39 The executive government must act fairly and in a way which assists the Court to arrive at the proper and just result, and must endeavour to avoid litigation where possible or at least attempt to keep the costs of litigation to a minimum.<sup>56</sup> In brief, it has an obligation to conduct itself as a model litigant.<sup>57</sup>

---

<sup>51</sup> *Civil Liability Act*, s 15; *Motor Accidents Compensation Act*, s 141B.

<sup>52</sup> *Civil Liability Act*, s 15B; See *Allianz Australia Insurance Ltd v Ward* [2010] NSWSC 720; (2010) 79 NSWLR 657; *White v Benjamin* [2015] NSWCA 75.

<sup>53</sup> *Allianz Australia Insurance Ltd v Ward* at [17] (Hidden J)

<sup>54</sup> *White v Benjamin* at [14] and [75]. See also *Frost v Hodges* (1984) 53 ALR 373.

<sup>55</sup> *Ibid.*

<sup>56</sup> See, for example, the NSW Government's *Model Litigant Policy for Civil Litigation* (8 July 2008), available at <http://www.justice.nsw.gov.au/legal-services-coordination/Documents/cabinetapp-mlp.pdf>.

The model litigant policy is a basic and fundamental tenet that has been formulated by the government itself and applies to all government departments, entities and agencies. There may be cost consequences of a failure comply with this tenet.<sup>58</sup>

40 I have raised this as an issue because, occasionally, the flavour of litigation conducted for government agencies by private lawyers is of proceedings conducted as if by a hard-nosed defendant who had not caught up with the obligations imposed by s 56 of the *Civil Procedure Act*, let alone the obligation to act as a model litigant. Sometimes, a government agency itself takes a stance that is untenable.

41 With the concurrence of Barrett and Gleeson JJA, I commented upon the former in *Grills v Leighton Contractors Pty Limited*. The State of NSW, represented by non-government lawyers, made what I described in the judgment as an “*extravagant*” submission that there should be a finding of 75 per cent contributory negligence. A hard-nosed defence of a client’s position is not, of itself, wrong or inappropriate. Indeed, the position is often to the contrary. The concern I had was that a claim of 75% contributory negligence was contrary to the evidence of the State’s own witnesses. I could see no basis, therefore, for such a submission to be made. That offends the first principle of appropriate, let alone good, advocacy.

42 In *Reznitsky v Director of Public Prosecutions (NSW)*,<sup>59</sup> Mr Reznitsky brought judicial review proceedings against a decision of a District Court judge dismissing an application he brought under s 22 of the *Crimes (Appeal and Review) Act 2001*. The Court of Appeal held that the applicant had been “*contumeliously denied procedural fairness*”<sup>60</sup> having been told to “*just sit down*” when he attempted to make some further submission.<sup>61</sup> This directive

---

<sup>57</sup> *Mahenthirarasa v State Rail Authority of NSW (No 2)* [2008] NSWCA 201 at [16]-[20] (Basten JA, Giles and Bell JJA agreeing).

<sup>58</sup> *Ibid.*

<sup>59</sup> [2014] NSWCA 79.

<sup>60</sup> *Id* at [32] (Tobias AJA, Meagher and Emmett JJA agreeing).

<sup>61</sup> *Id* at [30].

had been preceded by the judge describing a letter filed in court by the applicant as the “*raving of some kind of lunatic.*”<sup>62</sup> Despite clear evidence of a denial of natural justice, the DPP made no concession until effectively being shamed into it by the Court.

- 43 The standards of the model litigant have much to recommend themselves to private parties. Those standards do not deprive a party from fighting litigation to the fullest extent available on the evidence and the law. They perhaps take away the tactical advantage sought to be achieved by keeping the other party against the ropes for as long as possible. But there has to be a limit to the cost effectiveness of doing so.

### **Conclusion**

- 44 I commenced by reference to two great legal figures of my experience, Theo Simos and Simon Sheller. They were not only exemplars of clear legal thinking. Each practiced the law as a profession in the true sense of that word. The criticism to which I have just drawn attention would not have been within their respective stratospheres. They are perfect example of the way in which law ought to be practiced.

- 45 I thank you for your attention so late in the afternoon.

---

<sup>62</sup> Id at [25], [29].