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## Transfer of proceedings in New South Wales – principles and issues

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### Introduction

In New South Wales, applications to transfer proceedings from a lower court to a higher court are typically underpinned by concerns that a successful judgment will exceed the jurisdictional limit of the lower court. However, the court's discretion to permit transfer is far broader than that. While in the recent case of *State of New South Wales v Plum* [2015] NSWSC 1566 the application to transfer was unsuccessful, it provides a useful refresher of the legal principles relevant to the exercise of the court's discretion, particularly where the reasons for transfer are based around issues of complexity and public importance.

### Factual background

In August 2011, the plaintiff's son, Jason Plum was arrested by officers of the New South Wales Police Force and subsequently detained in the custody compartment of a police vehicle. Mr Plum was taken in the police vehicle to the Wagga Wagga Police Station.

Upon arrival, but while still inside the custody compartment of the police vehicle, Mr Plum fatally shot himself. It was later discovered that Mr Plum had been in possession of a small pistol that had not been detected at the time of his arrest.

### The proceedings

In 2014, the plaintiff filed a statement of claim against the State of NSW (**State**) in the District Court of New South Wales seeking damages for nervous shock within the meaning of s 31 of the *Civil Liability Act 2002* (NSW). The plaintiff alleged that the State:

1. Owed Mr Plum a duty of care to take reasonable precautions against him suffering injury; and
2. Owed the plaintiff a duty of care to take reasonable care not to cause her mental harm.

The State denied that it owed Mr Plum or the plaintiff a duty of care or that it breached any duty of care. It also pleaded *novus actus interveniens* and contributory negligence defences.

The State subsequently filed an application (which was opposed by the plaintiff) seeking to have the proceedings transferred from the District Court to the Supreme Court. The State's primary argument concerned the purported complexity of what it said was the core issue in the case, namely whether the police officers owed the plaintiff a duty of care in the circumstances in which they arrested and detained Mr Plum. Alternatively the State argued that the circumstances of the case were matters of public importance.

## Transfer of proceedings – legal framework

The court noted that s 140 of the *Civil Procedure Act 2005* (NSW) (CPA) sets out the relevant power of the court to transfer proceedings. Section 140 of the CPA relevantly provides that:

### *'140 Transfer of proceedings to higher court*

*(1) The Supreme Court may, of its own motion or on application by a party to proceedings before the District Court or the Local Court, order that the proceedings, including any cross-claim in the proceedings, be transferred to the Supreme Court.*

...

*(3) Proceedings in the District Court on a claim for damages arising from personal injury or death are not to be transferred to the Supreme Court under this section unless the Supreme Court is satisfied:*

...

#### *b) in any other case:*

- i. that the amount to be awarded to the plaintiff, if successful, is likely to exceed the jurisdictional limit of the District Court, or*
- ii. that there is other sufficient reason for hearing the proceedings in the Supreme Court'.<sup>1</sup>*

The power under s 140 of the CPA is a discretionary one, to be exercised having regard to the circumstances of the case and so that justice is best served between the parties.<sup>2</sup> The onus rests on the party seeking the order.<sup>3</sup>

In considering the legal framework, the court referred to the comments of Brereton J in *Rinbac v Owners Strata Plan No 64972*,<sup>4</sup> as setting out the

circumstances where a transfer of proceedings will be permitted:

*'The purpose of Civil Procedure Act, s 140, is to permit the removal from a lower court to a higher court of proceedings in the lower court where there is good reason to do so. Typically, that has been where there has been a risk that a jurisdictional limit affecting the lower court would be exceeded, where there are complex and important issues, and where the proceedings involve allegations of significant notoriety or public importance'.*

The court also noted that s 56 of the CPA (which provides that the overriding purpose of the CPA is to facilitate just, quick and cheap resolution of proceedings) also bears upon the exercise of the discretion.<sup>5</sup>

## The parties' positions

It was common ground that the District Court had jurisdiction to deal with the proceedings and that the amount to be awarded would not exceed the jurisdictional limit.

In support of the transfer application, the State argued that the issue of whether a duty exists in the circumstances, and the scope and content of the duty, is one of considerable complexity. As such, the case required careful analysis in the setting of a court that regularly considers such complex issues. The State argued that it would benefit both parties and be in accordance with s 56 of the CPA. Alternatively, it was submitted that the circumstances of the case were matters of public importance.

The plaintiff submitted that the reasons offered by the State for the transfer were not 'sufficient' as required by s 140(3)(b)(ii) of the CPA.

Specifically the plaintiff asserted that since similar issues surrounding the duty of care owed by police officers have been litigated in the NSW Supreme Court, the NSW Court of Appeal and in the High Court, which considered particular circumstances which may or may not give rise to a duty of care, there was no issue of significant complexity to be determined.

Furthermore, the District Court was bound to apply the legal principles enunciated in the decisions of appellate courts and operates under the doctrine of *stare decisis*. The plaintiff therefore asserted that:

*'the District Court is called on day in and day out to determine issues the same as those which will arise in determining these proceedings, namely, the existence of a duty of care and the scope and content of that duty'.*



## Decision

The court spent some time considering the extent of a police officer's immunity in claims of negligence, noting several leading cases including *Hill v Chief Constable of West Yorkshire*,<sup>6</sup> *Cran v New South Wales*,<sup>7</sup> and more recently *Stuart v Kirkland-Veenstra*.<sup>8</sup> Those cases essentially confirm that save for exceptional circumstances (for example, where there is a specific assumption of responsibility), police officers generally do not owe a duty of care to persons in custody to take care when carrying out their duties.

Having regard to those legal authorities, the court concluded that the law in relation to whether the police officers owed Mr Plum a duty of care is not complex. Further, as the law on the actions and liability of police officers for actions in the course of their duty was well settled, the court rejected that the case involved matters of public importance. Those conclusions effectively meant that the requirements in s 140(3)(b)(ii) of the CPA were not satisfied.

While that was essentially the end of the argument, the court also noted that an important consideration in its decision was that a hearing date in the District Court had already been allocated with an estimate of 10 days. There was going to be a significant number of witnesses, the plaintiff had served expert evidence and was therefore ready to go to trial. If the proceedings were transferred, the court was of the view that:

*'there will be a significant delay before a hearing date is allocated. [The plaintiff] will also incur more legal costs in attending directions hearings in this court in order for a hearing date to be allocated.'*

The court ultimately concluded that:

*'Justice is best served between the parties if these proceedings remain in the District Court, where [the plaintiff] will not lose her hearing date. It is my view that in these circumstances, the [State] has not shown sufficient reason to transfer these proceedings from the District Court to this court'.*

## Implications

The case is a useful reminder that jurisdictional limits are not the only factors which a court may consider in determining whether to exercise its discretion to transfer proceedings. It emphasises that delay to the proceedings will be a significant factor against making a transfer order. It is also of interest that when the legal principles are well settled with respect to a particular cause of action – as was the case with claims of negligence against police officers – successfully transferring proceedings on the grounds of complexity / public importance will be difficult.

As the court considered delay to the proceedings (particularly after a trial date had been allocated) was an important factor in its decision, where there are reasonable grounds to support transfer of proceedings to a higher court, parties should make their application as early as possible.

<sup>1</sup> It should be noted that section 140 of the CPA also provides the District Court with the power to order transfer of proceedings from the Local Court.

<sup>2</sup> See *Ryner Pty Ltd v Roller* [2007] NSWSC 372, Price J at [7] cited in *Tabbaa v TCN Channel Nine Pty Ltd* [2015] NSWSC 920 by McCallum J at [6].

<sup>3</sup> *Parry v WGE Engineering Pty Ltd* [2003] NSWSC 337, Malpass M at [3].

<sup>4</sup> (2010) 77 NSWLR 601; [2010] NSWSC 656 at [11].

<sup>5</sup> *Younes v QIC Ltd trading as Westpoint Blacktown* [2012] NSWSC 451, Bellew J at [44].

<sup>6</sup> [1989] AC 53; [1988] 2 All ER 238.

<sup>7</sup> [2004] NSWCA 92; (2004) 62 NSWLR 95.

<sup>8</sup> (2009) 237 CLR 215; [2009] HCA 15.

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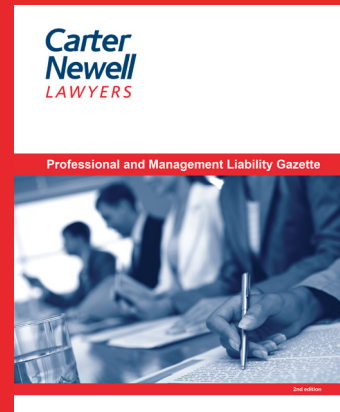
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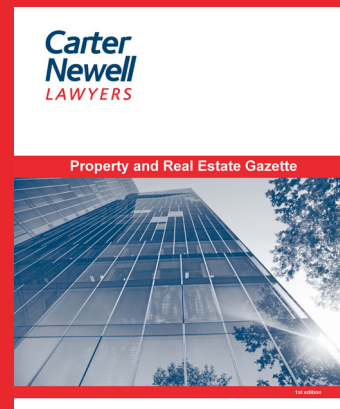
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