COURT: SUPREME COURT OF TASMANIA

CITATION: *Lakaev v McConkey* [2024] TASSC 35

PARTIES: LAKAEV, Natasha
v
McCONKEY, Carli

FILE NO: 771/2024

DELIVERED ON: 12 July 2024

DELIVERED AT: Hobart

HEARING DATE: 28 May 2024

JUDGMENT OF: Blow CJ

CATCHWORDS:

Appeal and New Trial – Appeal – Practice and procedure – Tasmania – Powers of court – Other matters – Dismissal for want of prosecution – List of documents proposed to be included in appeal book not delivered – Proposed appeal grounds not formulated – Prospects of success not strong – Appellant seeking delay on medical grounds – Prejudice to respondent.

Aust Dig Appeal and New Trial [392]

Cases referred to:
Bajramovic v Calubaquib [2015] NSWCA 139, 71 MVR 15
Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching) [1978] 1WLR 382
Brunskill v Sovereign Marine & General Insurance Co Pty Ltd (1985) 62 ALR 53
Chambers v Jobling (1986) 7 NSWLR 1
Chouman v Margules (1993) 17 MVR 144
Cooper v Hopgood & Ganim [1998] QCA 114, [1999] 2 Qd R 113
Dearman v Dearman (1908) 7 CLR 549
De L v Director-General, NSW Department of Community Services (1996) 187 CLR 640
Department of Transport v Chris Smaller (Transport) Ltd [1989] AC 1197
Deputy Commissioner of Taxation (Cth) v Luckhardt [2006] QCA 53
Faris v Savage [2019] ACTSC 339
Faris v Savage (No 2) [2020] ACTSC 219
Fox v Percy [2003] HCA 22, 214 CLR 118
Jowett v Kelly [2008] NSWSC 1009
Lakaev v McConkey [2024] TASSC 8
Lenijamar Pty Ltd v AGC (Advances) Ltd (1990) 27 FCR 388
Masel v Transport Industries Insurance Co Ltd [1995] 2 VR 328
Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA 274
Morocz v Marshman [2016] NSWCA 202
Muto v Faul [1980] VR 26
Palermo Seafood Pty Ltd v Lunapas [2015] NSWCA 175
R v Birks (1990) 19 NSWLR 677
Seymour v Drill Engineering & Pastoral Co Pty Ltd [2023] QCA 159
State Rail Authority (NSW) v Earthline Constructions Pty Ltd [1999] HCA 3, 160 ALR 588
Stollznow v Calvert [1980] 2 NSWLR 749
Varmedja v Varmedja [2008] NSWCA 177
Voulis v Kozary (1975) 180 CLR 177
Witten v Lombard Australia Limited (1968) 88 WN (NSW) (Pt 1) 405

Legislation:
Defamation Act 2005 (Tas) s 25

REPRESENTATION:

***Counsel*:**

Plaintiff:	In Person
Defendant:	In Person

Judgment Number:	[2024] TASSC 35
Number of paragraphs:	79

Serial No 35/2024
File No 771/2024

NATASHA LAKAEV v CARLI McCONKEY

REASONS FOR JUDGMENT — BLOW CJ
12 July 2024

1 This is an application for an appeal to the Full Court to be dismissed for want of prosecution.

2 The appeal is from a judgment dismissing a defamation action. In 2017 the respondent, Carli McConkey, published a book that she had written entitled *The Cult Effect*. It contained a great deal of material about the appellant, Dr Natasha Lakaev. The respondent asserted that she had spent 13 years as a member of a cult that was said to have been conducted by and on behalf of the appellant. The book published by the respondent also contained two articles written by her that had been published in newspapers in 2010. She also published material about the appellant on-line. The appellant sued the respondent for damages for defamation in this Court in 2018. Her action was tried by Estcourt J without a jury over 37 hearing days commencing in September 2023, with closing addresses in February 2024. The appellant was represented by Mr Daniel Zeeman. The respondent was not legally represented. Between them the parties tendered 419 exhibits.

3 On 1 March 2024 Estcourt J dismissed the action: *Lakaev v McConkey* [2024] TASSC 8. His Honour found that the impugned book, articles and on-line publications contained 16 defamatory imputations. At [320] he concluded that each of those imputations was "substantially true (and true in substance and fact), such as to attract the defence of justification provided by s 25 of the Act [the *Defamation Act* 2005] (and the common law)".

4 Section 25 of the *Defamation Act* provides as follows:

> "**25 Defence of justification**
>
> It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true."

5 The 16 pleaded imputations were to the following effect:

(a) The appellant was a bully and had bullied the respondent.

(b) The appellant had unlawfully battered the respondent.

(c) The appellant had unlawfully battered other persons.

(d) The appellant had unlawfully incited other persons to batter persons.

(e) The appellant had unlawfully obtained a financial advantage.

(f) The appellant had used illicit drugs and had encouraged others to do so.

(g) The appellant wrongfully indoctrinated people.

(h) The appellant had breached Australian industrial legislation.

(i) The appellant was a criminal.

(j) The appellant was unfit to practise as a psychologist.

(k) The appellant committed acts of abuse against the respondent.

(l) The appellant physically abused the respondent.

(m) The appellant was likely to suffer from narcissistic personality disorder and borderline personality disorder.

(n) The appellant was a violent extremist.

(o) The appellant misused her position as a psychologist to threaten the respondent.

(p) The appellant was guilty of abuse and physical assault of the respondent and was guilty of such conduct as to warrant her deregistration as a psychologist.

6 Estcourt J made findings that 12 of these imputations were "absolutely true" and that the others – imputations (j), (m), (n) and (p) in the list above – were "substantially true".

The appeal proceedings

7 On 22 March 2024 the appellant's original solicitors, Messrs Butler McIntyre & Butler, commenced this appeal. They filed a notice of appeal containing four grounds of appeal. Each ground related to one of the four imputations that Estcourt J had found to be "substantially true". Each ground asserted that his Honour had erred in concluding that the particular imputation was "true and/or substantially true when no evidence, or no satisfactory evidence was admitted on the trial in support of that imputation". The findings that the other 12 imputations were absolutely true were not challenged. There were no other grounds of appeal. The grounds of appeal were apparently drawn by Mr Zeeman.

8 Rule 659 of the *Supreme Court Rules* 2000 requires an appeal from a final judgment to be instituted within 21 days after the date on which the judgment was pronounced. Rule 665 of those Rules provides as follows:

"**665 List of documents to be included in appeal book**

(1) This rule applies to an appeal other than an appeal by way of renewing before a Full Court an *ex parte* application which has been refused by a judge.

(2) Within 7 days after the expiration of the time prescribed by rule 659 , an appellant is to deliver to the Principal Registrar a list of the documents proposed to be included in the appeal book.

(3) The list of documents is to consist of any of the following as are required for the appeal:

(a) the notice of appeal;

(b) the formal judgment appealed from;

(c) the reasons for judgment, if given in writing;

(d) any pleading;

(e) any affidavit;

(f) any notice of cross-appeal;

(g) the transcript of the proceedings or, if there is no transcript, the judge's notes taken at the trial.

(4) If an appellant does not comply with subrule (2) , the Court or a judge, on the application of a respondent, may order that the appeal be dismissed for want of prosecution."

9 The time prescribed by r 659 for the filing of a notice of appeal expired on 22 March. The time prescribed by r 665(2) for the delivery of a list of the documents proposed to be included in the appeal book expired on 29 March. No such list has yet been delivered to the Registrar.

10 On 9 April the respondent made an application pursuant to r 665(4) for this appeal to be dismissed for want of prosecution. That is the application that is now before me. The respondent is not represented by a legal practitioner in these proceedings, and never has been. Rule 524(a) requires any application to the Court in a pending proceeding to be made by an interlocutory application. The respondent made her application by means of a letter to the Registrar. In the circumstances, I regard that irregularity as inconsequential.

11 On 22 April the appellant changed solicitors. A firm named Paula Sutherland & Associates commenced acting for her. A notice of change of practitioner was filed by that firm the following day.

12 This application was listed before me on 26 April. On that day Mr Gunson SC appeared for the appellant and the respondent represented herself. She had filed 19 pages of written submissions in support of her application. Mr Gunson informed me that the appellant proposed to engage specialist defamation solicitors in Sydney, that the original grounds of appeal would be revised, and that it was anticipated that a smaller appeal book would be needed as a result. He described the grounds of appeal drafted by Mr Zeeman as "not particularly attractive" and observed that they would face a number of "*Fox v Percy* type hurdles". That was a reference to the High Court's decision in *Fox v Percy* [2003] HCA 22, 214 CLR 118. I will discuss that case later in these reasons. The respondent opposed an adjournment but I granted one, to 28 May. I anticipated that during the adjournment the required list of documents would be delivered to the Registrar and proposed amended grounds of appeal would be formulated. Neither of those things happened.

13 On 3 May Paula Sutherland & Associates filed a notice of intention to cease to act.

14 On 23 May the respondent filed 63 pages of written submissions, together with some annexures. The submissions contained many lengthy extracts from the trial transcript.

15 On 27 May the appellant filed 18 pages of written submissions headed "Application for Adjournment of Appeal" together with a letter from a psychiatrist and several other documents.

16 On 28 May the parties made oral submissions to me on the hearing of this application. The respondent went first. At 4pm the appellant had not concluded her oral submissions. I directed that the appellant was to make any further submissions that she wished to make in writing, to be emailed to the Court by 12 June, and that the respondent could email written submissions in reply by 26 June. On 13 June the appellant submitted 120 pages of written submissions, with 79 pages of annexures. The submissions comprised the entirety of the respondent's submissions of 23 May, printed in black, interspersed with submissions made by the respondent, printed in red.

17 I have been provided with information as to why the appellant changed solicitors and later proceeded without legal representation. On 24 April her new solicitor, Paula Sutherland, swore an affidavit for the purpose of these proceedings. It appears from that affidavit that the appellant owed Butler McIntyre & Butler over $100,000 in relation to the trial, that that firm was unwilling to act in relation to the appeal (except apparently for the purpose of filing a notice of appeal), and that that firm was retaining its file pursuant to a solicitor's lien. On 28 May the appellant told me that the Sydney solicitors estimated the costs for the appeal would amount to $500,000, and that she therefore decided to proceed as an unrepresented litigant.

18 It is clear that two important steps need to be taken at this stage in these proceedings. First, the appellant needs to apply for leave to amend the notice of appeal to set out all the grounds of appeal that she wishes to rely upon. Also, she needs to formulate and provide a list of the documents that she proposes to include in the appeal book. It is now more than three months since this appeal was instituted, but neither of those steps has been taken, and there is no reason to expect that either of those steps is about to be taken.

The discretion to dismiss for want of prosecution

19 As part of its inherent jurisdiction, this Court has a discretionary common law power to dismiss any civil proceeding for want of prosecution. The principal authorities as to the exercise of that discretion all relate to proceedings at first instance. However it is clear from the decision of the Full Court of the Supreme Court of Victoria in *Muto v Faul* [1980] VR 26 at 31 that the same power exists to dismiss an appeal for want of prosecution.

20 The English courts have taken quite a rigid view of the principles to be applied in exercising the discretion. The established criteria were summarised by Lord Griffiths in *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197 at 1203 as follows:

> "The principles upon which the jurisdiction to strike out for want of prosecution is exercised were settled by the Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, and approved by the decision of this House is (sic) *Birkett v. James.*[1] The power should be exercised where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiffs, or between each other, or between them and a third party."

21 However, a number of Australian appellate courts have taken the view that, since the discretion to dismiss for want of prosecution is an unfettered one, it ought not to be restricted by rigid rules, and that each case must be decided according to its own circumstances: *Witten v Lombard Australia Limited* (1968) 88 WN (NSW) (Pt 1) 405; *Stollznow v Calvert* [1980] 2 NSWLR 749; *Masel v Transport Industries Insurance Co Ltd* [1995] 2 VR 328; *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388; *Cooper v Hopgood & Ganim* [1998] QCA 114, [1999] 2 Qd R 113; *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274.

22 In the circumstances of this case, it is appropriate to take into account the following factors:

- The appellant's delay in formulating additional grounds of appeal.
- The appellant's delay in relation to the preparation of appeal books.
- The appellant's prospects of success.
- The appellant's desire to delay the proceedings on medical grounds.
- Any prejudice to the respondent.

Delay in formulating the grounds of appeal

---

[1] [1987] AC 297.

23 The notice of appeal was filed by Mr Zeeman's firm at 3.45pm on the 21st day after Estcourt J gave judgment. The appellant told me that the grounds of appeal were drafted by Mr Zeeman without reference to her. She told me that she wanted to expand the grounds of appeal so as to challenge all of the sixteen imputations that Estcourt J found to be true, rather than just the four imputations referred to in the grounds drawn by Mr Zeeman.

24 In her written and oral submissions she made it clear that she wishes to contend that Mr Zeeman represented her so badly that the appeal should be allowed. She referred to some authorities relating to the incompetence of counsel.

25 She revealed that she wishes to contend that Mr Zeeman failed or refused to call particular witnesses whom she wanted called. I anticipate that she will wish to pursue grounds of appeal relating to new evidence or fresh evidence.

26 Towards the end of the trial the respondent was proposing to call a witness named Kylie Bennett, but decided not to. Mr Zeeman submitted that an inference should be drawn that Ms Bennett's evidence would not have assisted the respondent. In his reasons at [278] Estcourt J declined to draw that inference. It appears from the appellant's submissions to me that she is aggrieved by that finding. She may well wish to pursue a ground of appeal relating to it.

27 In her submissions of 13 June, the appellant foreshadowed that she proposed to contend that Estcourt J had denied her procedural fairness, giving six examples of proposed grounds relating to procedural fairness.

28 In those submissions the appellant also foreshadowed that she wished to pursue a ground of appeal to the effect that there had been a miscarriage of justice because the respondent and her witnesses had given false testimony.

29 The appellant has not applied for leave to amend the notice of appeal by adding new grounds of appeal. Any such application is likely to be opposed by the respondent. If such an application is made and opposed it will be necessary for the prospects of success of the various grounds to be evaluated by the judge who hears the application.

Delay in the preparation of appeal books

30 Rule 665(3) lists seven documents or categories of documents required to be included in an appellant's list of the documents proposed to be included in an appeal book. That subrule, when applied to this case, requires the list to include the notice of the appeal, the formal judgment appealed from, the reasons of Estcourt J, the pleadings, and the transcript. That would not be a difficult list to prepare. It would not be inappropriate to include the parties' written closing submissions and all the documentary exhibits, or a selection of them. There are hundreds of documentary exhibits, but they are numbered, and lists of them are available.

31 In her written submissions of 27 May, at [31], the appellant wrote this:

> "31 A list of the files that are being prepared to be collated into the Appeal Book/s format is listed below:
>
> APPEAL BOOK/S SUMMARY OF DOCUMENTS (AS YET NOT COMPLETED)
>
> 1 Statement of Claim
>
> 2 Statement of Claim evidence presented in court
>
> 3 Statement of Claim evidence not presented in court

4 List of Imputations

5 List of Imputations evidence presented in court

6 List of Imputations evidence not presented in court

7 Transcript of each Hearing prior to Defamation Trial

8 Transcript of s23 Pre-trial Hearing

9 Transcript of Defamation Trial (blank)

10 Transcript of Defamation Trial Evidence Inserted

11 Transcript of Defamation Trial with Procedural Issues

12 Transcript of Defamation Trial highlighting where Objections absent

13 Transcript of Defamation Trial highlighting Hearsay

14 Transcript of Defamation Trial highlighting Leading Questions

15 Transcript of Defamation Trial highlighting Reading of Evidence Verbatim

16 Transcript of Defamation Trial highlighting Indiscernible Sections with Relevance

17 G1 Evidence

18 G2 Evidence

19 Plaintiff Evidence

20 Defendant Evidence

21 Relevant Communications Between Plaintiff & Counsel

22 Plaintiff Final Summation

23 Defendant Final Summation

24 Presiding Judge's Final Findings (Judgement)

25 Final Findings Response

26 Plaintiff Court Book Detailing Case

27 There is more to add to this list…to be continued" (Original emphasis.**)**

32 There are some things in that list that I do not understand. However I am able to make the following observations relating to it:

- The list is incomplete. It is impossible to predict how long the appellant would eventually like it to be, or how long she might take to complete it.

- The transcript of the trial, excluding the closing speeches, is 2768 pages long. It appears that the appellant proposes to create seven annotated editions of the transcript (items 10 – 16 on her list) in addition to providing an unannotated copy of the transcript (item 9).

- Item 21 indicates that the appellant wishes to adduce evidence on the hearing of the appeal in relation to communications between herself and Mr Zeeman. I infer that she wishes to adduce

that evidence to support a ground of appeal asserting that Mr Zeeman did not competently conduct the trial.

- The appellant has had the ability to obtain legal advice as to what documents belong in an appeal book. She appears either not to have obtained such advice or not to have heeded it.

The appellant's prospects of success

Findings of substantial truth

33 As I have said, the notice of appeal drafted by Mr Zeeman contains four grounds of appeal challenging findings of fact that four of the pleaded imputations were substantially true, and the appellant wishes to pursue grounds of appeal challenging the findings of fact that the other 12 pleaded imputations were substantially true. As Mr Gunson SC said, such grounds of appeal would face "*Fox v Percy* type hurdles". An appeal to the Full Court, like the type of appeal discussed in *Fox v Percy* (above), is an appeal by way of "rehearing" that does not involve a completely fresh hearing of evidence, but involves the appellate court proceeding on the basis of the record and, in exceptional cases, fresh evidence. The findings of fact made by Estcourt J were based on his assessment of the credibility of the parties and their witnesses. An appellant who challenges a finding of fact based on a trial judge's assessment of credibility faces a difficulty because the trial judge has had the advantage of having seen and heard the witnesses give their evidence. Appeal judges are required always to bear in mind that they have neither seen nor heard the witnesses, and to make due allowance in that respect: *Dearman v Dearman* (1908) 7 CLR 549 at 565; *Fox v Percy* at [25] (Gleeson CJ, Gummow and Kirby JJ).

34 There are situations in which findings based on witness credibility will be reversed on appeal. The following possibilities were referred to by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*:

- At [28], cases where "incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, when they appear to be, or are stated to be, based on credibility findings": *Voulis v Kozary* (1975) 180 CLR 177; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* [1999] HCA 3, 160 ALR 588.

- At [29], the situation where the appellate court concludes that the decision at trial was "glaringly improbable": *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 62 ALR 53 at 57.

- Also at [29], the situation where the appellate court concludes that the decision at trial was "contrary to compelling inferences" in the case: *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

35 Estcourt J conducted a detailed examination of the evidence of each witness and the evidence relating to the truth or otherwise of each pleaded defamatory imputation. His conclusions were essentially based on his assessment of the independence of the respondent's witnesses and the partiality of the appellant's witnesses.

36 Without spending days reading the transcript and cross-referencing it to the reasons for judgment, I cannot rule out the possibility that one or more grounds challenging a finding of fact based on credibility might succeed. However nothing in the appellant's written or oral submissions suggests to me that a challenge to any particular one of the 16 findings would have any obvious merit. In my view the four existing grounds of appeal and the 12 similar proposed grounds of appeal are most unlikely to succeed because of the principles discussed in *Fox v Percy*.

Incompetence of counsel

37 As I have said, the appellant wishes to pursue grounds of appeal contending that she has suffered a miscarriage of justice because Mr Zeeman did not competently conduct her case, and because he failed to follow her instructions as to the conduct of the case. Grounds of appeal asserting the incompetence of counsel are common in criminal appeals but very rare in civil appeals. Section 402(1) of the *Criminal Code* and its equivalents in other jurisdictions require a criminal appeal to be allowed if the appellate court is satisfied "that on any ground whatsoever there was a miscarriage of justice". In the criminal jurisdiction, establishing a miscarriage of justice that warrants appellate intervention usually requires an appellant to demonstrate something greater than errors of judgment or negligence. Flagrant incompetence, or a combination of events including the incompetence of counsel, need to be demonstrated: *R v Birks* (1990) 19 NSWLR 677. Criminal appeals alleging the incompetence of counsel are rarely successful.

38 The right to appeal to the Full Court in a civil matter is conferred by s 40(1) of the *Supreme Court Civil Procedure Act* 1932. That Act does not contain a general "miscarriage of justice" provision like s 402(1) of the *Criminal Code.* Under s 47(1) of the *Supreme Court Civil Procedure Act*, the Full Court has the power "to give any judgment or make any order or determination which ought to have been given or made, and to grant a new trial in any cause or matter in which there has been a trial … and to make such further or other order as the case may require".

39 My research has not revealed any civil case in Australia in which an appeal has succeeded on the ground of the incompetence of counsel. There have been cases in which it has been suggested that an appeal could succeed on such a ground: *Chouman v Margules* (1993) 17 MVR 144; *Jowett v Kelly* [2008] NSWSC 1009; *Varmedja v Varmedja* [2008] NSWCA 177; *Bajramovic v Calubaquib* [2015] NSWCA 139, 71 MVR 15; *Morocz v Marshman* [2016] NSWCA 202 at [184]; *Faris v Savage* [2019] ACTSC 339; *Faris v Savage (No 2)* [2020] ACTSC 219; *Seymour v Drill Engineering & Pastoral Co Pty Ltd* [2023] QCA 159 per Henry J at [152]-[162]. Some of those cases contain comments to the effect that the criteria to be applied in relation to such a ground of appeal in the civil jurisdiction must be even more stringent that those in the criminal jurisdiction: *Chouman v Margules* (above) at 149; *Jowett v Kelly* (above) at [11]; *Bajramovic v Calubaquib* (above) at [38].

40 An incompetence ground was argued in *Deputy Commissioner of Taxation (Cth) v Luckhardt* [2006] QCA 53. Keane J, with whom McMurdo P and Williams JA agreed, said at [38]:

> "… the appellant seeks to import into a civil case the stringent rules to prevent miscarriages of justice in criminal cases. There are powerful reasons, associated with values of individual autonomy and the finality of litigation, for resisting attempts to import into civil litigation those qualifications upon the adversarial system which have been accepted as necessary to protect the liberty of the subject in the law of criminal procedure." (Footnote omitted.)

41 Those words were cited with approval in *Seymour v Drill Engineering & Pastoral Co Pty Ltd* (above) by Dalton JA, with whom Mullins P agreed, at [32].

42 I am not able to absolutely rule out the possibility that this appeal could be the first civil appeal in Australia to succeed on an incompetence ground. I could not do that without reading and analysing a great deal of material. Many of the appellant's grievances about the conduct of the trial by Mr Zeeman appear to be criticisms of tactical decisions made with the benefit of hindsight. I think it is fair to say that the chances of success on an incompetence ground are very remote.

Fresh Evidence

43 It seems likely that the appellant may wish to pursue grounds of appeal asserting that there has been a miscarriage of a justice as a result of Mr Zeeman not adducing evidence that would have

supported her case. Any such grounds of appeal might encounter difficulty as a result of s 48(3) of the *Supreme Court Civil Procedure Act.* That sub-section reads as follows:

> "(3) Upon any appeal from a judgment, order, or other determination given or made after the trial of any cause or matter on the merits, such further evidence (except as to matters which have occurred after the date of judgment, order, or determination) shall be admitted only by special leave of the Full Court, which shall only be granted in cases in which –
>
> (a) the evidence was not in the possession of the party seeking to have it admitted, and could not by proper diligence have been obtained by him, before the termination of the trial; or
>
> (b) there is some other special circumstance which, in the opinion of the Full Court, justifies the admission of it."

44 It seems likely that the appellant would have to rely upon the incompetence of counsel, or something like that, as constituting a special circumstance warranting a grant of special leave pursuant to s 48(3)(b). In view of the provisions of s 48(3), it seems extremely unlikely that an appeal could succeed on the basis that a miscarriage of justice had resulted from particular evidence not being adduced at the trial.

Procedural fairness

45 In her submissions of 13 June, the appellant foreshadowed a ground of appeal asserting that Estcourt J denied her procedural fairness. She outlined some examples of alleged procedural unfairness in that document, at 17:

> "Below are examples of grounds for the appeal under procedural fairness:
>
> a Presiding Judge determined the finding solely based on character, which is subjective and coloured by his own personal bias.
>
> b The presiding judge allowed extraneous or irrelevant matters and material to guide or affect him, such as McConkey's compound, unclear, and accusatory questioning style, which the judge allowed through the entire trial.
>
> c Presiding Judge mistook the facts as a result of the later [sic] point.
>
> d Presiding Judge's improper handling of the Respondent's 'expert' witness and what an expert witness is, especially as the expert witness went against the Respondent.
>
> e Presiding Judge took the book 'The Cult Effect' as evidence-in-chief, which is an incorrect procedure, and the Apellant [sic] had no right of reply to this. An important point here is that Counsel had in his possession this book answered line by line and showed it was not based on truth and Counsel could have countered this action at the time and did not. This will be presented at this appeal.
>
> f The above points would have affected outcome of this trial."

46 I do not see any chance of the Full Court making a finding of error on the basis of the assertion in item (a). Estcourt J made findings of credibility. I am unaware of any basis upon which an allegation of bias could succeed.

47 As to items (b) and (c), the central contention appears to relate to the respondent's questioning style. She was an unrepresented litigant in a long and difficult case. She questioned the appellant for many days about events that took place over many years. It is appropriate for a trial judge in such circumstances to afford some latitude to an inexperienced cross-examiner.

48 Item (d) appears to relate to a psychologist named Christine Kipps whom the respondent called as a witness on 8 December 2023. Mr Zeeman objected to her giving expert evidence because he had no notice of what she was going to say. Rule 516 of the *Supreme Court Rules* requires a party who intends to present the evidence of an expert at a trial to serve on each other party a report containing the evidence and a statement signed by the expert containing an acknowledgement relating to the Court's Expert Witness Code of Conduct. Apparently the respondent had not complied with that rule. A judge has a discretion to receive expert opinion evidence when that rule has not been complied with under rule 515(1)(b). Estcourt J decided to receive the evidence of Ms Kipps *de bene esse*, meaning provisionally. In his reasons for judgment, he did not refer to any of the evidence of Ms Kipps. At [321] he said the following:

> "I note that in reaching the findings of fact and the findings as to credit that I have, it has not been necessary for me to have recourse to any of the evidence that I admitted on the trial de bene esse."

49 If, as asserted by the appellant, his Honour erred in some way in his "handling" of Ms Kipps, any such error was inconsequential.

50 As to item (e), it is clear that the appellant is referring to a question that Estcourt J asked the respondent at the start of her evidence-in-chief. His Honour began by asking her a series of basic questions. After asking her to state her full name, her State of residence, her date of birth, the dates of birth of her three children, whether she was the author of *The Cult Effect*, whether it was self-published, and when it was published, he asked, "Now are the contents of that book true and correct to the best of your knowledge and belief?" The respondent said that they were, subject to one "concession". That qualification related to a description of a place as "a completely barren piece of land". The respondent said that she meant "barren of other buildings and built structures, not that it was barren of vegetation." The book, of course, had been tendered as part of the appellant's case as Exhibit P1. The book is 387 pages long. By the time the respondent commenced her evidence-in-chief it was no doubt clear to all that her case was based on the proposition that what she had written was true. The appellant's counsel was afforded an opportunity to challenge any or all of the factual assertions made in the book and the other publications that were the subject of the action. During the presentation of the appellant's case, he had the opportunity to lead evidence as to any or all of the factual assertions made in the publications, but it was appropriate to be selective and not ask questions about every sentence. In the circumstances, I do not think there is any realistic chance that the Full Court would consider that the trial judge denied the appellant procedural fairness by asking the respondent whether the contents of her book were true.

51 I cannot see any basis on which a ground of appeal ruling a denial of procedural fairness could possibly succeed.

False Evidence

52 In her submissions of 13 June, at 20-21, the appellant foreshadowed a ground of appeal expressed in the words "miscarriage of justice falls under false testimony from a witness".

53 At the trial there were many conflicts between the evidence of the appellant and her witnesses, and the evidence of the respondent and her witnesses. It is likely that false evidence was given. The role of the trial judge was to decide, amongst other things, whom to believe, if he could. It is true that the Full Court may reverse findings based on assessments of credibility, subject to the limitations discussed in *Fox v Percy*.

54 When artificial intelligence is used to generate submissions for use in court proceedings, there is a risk that the submissions that are produced will be affected by a phenomenon known as "hallucination".

55 In her submissions, the appellant referred to the High Court's decision in *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640. Her commentary on that case included the following:

> "In this case, the High Court of Australia dealt with an appeal where the appellant challenged the veracity of evidence provided by a witness … The High Court held that the false testimony had a significant influence on the original decision, which warranted overturning the lower court's decision."

56 Those submissions are surprising. The case in question concerned the law about international child abduction. The High Court set aside a decision of the Full Court of the Family Court of Australia and remitted the matter to a single judge of that court for rehearing. The case had nothing to do with false evidence.

57 In her next paragraph the appellant referred to "*Hewitt v Omari* [2015] NSWCA 175". There does not appear to be any such case, although there is an irrelevant case with that citation. In *Palermo Seafood Pty Ltd v Lunapas* [2015] NSWCA 175, JC Campbell AJA, sitting as a single acting judge of the New South Wales Court of Appeal, refused to dismiss an appeal as incompetent, but stood over a notice of motion seeking to have it dismissed as incompetent for further hearing with the appeal. The proceedings concerned a dispute as to the validity of the termination of a lease. The appellant's submissions describe a medical negligence case. I have been unable to find any New South Wales case involving a person named Hewitt or any similar name that the appellant could have been referring to.

58 I assume that any contentions that the appellant might wish to raise concerning false evidence would be directed towards her contentions that Estcourt J ought to have found that the 16 defamatory imputations were not substantially true. I do not see any basis on which arguments relating to false evidence could be formulated, let alone succeed, on any other basis.

Kylie Bennett

59 As I have said, after the respondent decided not to call Kylie Bennett as a witness, Estcourt J declined to draw an inference that Ms Bennett's evidence would not have assisted the respondent. It is not clear whether the appellant wishes to pursue a ground of appeal relating to that decision. If she does, I do not think any such ground would have any prospects of success. As Estcourt J pointed out at [78] there were reasons for him to infer that the respondent withdrew Ms Bennett in order to avoid prolonging the trial. It would appear that his decision not to draw an adverse inference was reasonably open to him, and of little consequence.

The appellant's desire to delay the appeal on medical grounds

60 As I have said, on 27 May the appellant filed a document entitled "Application for Adjournment of Appeal". It is clear that what she wanted was not, strictly speaking, an adjournment, but a stay of proceedings for six months. The document contains 18 pages of submissions. Most of those submissions outline the appellant's grievances as to the manner in which Mr Zeeman conducted her case, and as to the conduct of the trial by Estcourt J. On page 14 of the document, having outlined most of those grievances, the appellant wrote this:

> "Most aggrievedly this has caused the Plaintiff to relapse into Severe Chronic Complex PTSD causing a relapse in thyroid storms and lupus symptoms. The Plaintiff asks the court to consider a six-month adjournment."

On page 16 she said that more time was required for her to be able to prepare "the expanded appeal". She went on to write this:

> "When considering the second opinion given by Mr Gunston (sic) that an expansion of the appeal grounds is needed as Mr Zeeman's version is unlikely to bear fruit, it is respectfully requested that an adjournment be granted to enable this to be achieved."

61 In support of her request the appellant submitted a letter from a Brisbane psychiatrist, Dr Tucker. In the second paragraph of his letter, Dr Tucker wrote this:

> "On 21 May 2024 I consulted with Dr Natasha Lakaev for whom I have provided support for the past 12 years for management of her fluctuating severe chronic complex PTSD including marked anxiety and depression which has become more

> severe and persistent over the past 5 – 6 years with aggravating terrifying, horrifying stressors. This condition is the direct result of being stalked (since 1996), then harassed, and extensively defamed by Ms Carli McConkey and the mainstream media, etc. since 2010."

62 Dr Tucker's report is dated 9 May 2024. He refers to a consultation on 21 May 2024. After the paragraph I have quoted, Dr Tucker wrote several pages about Mr Zeeman's conduct of the appellant's case and the effect that his conduct of the case had on his patient. On page 4 of the report he wrote this:

> "My patient reported herself becoming more and more numbed, blunted, fearful, anxious and closed off emotionally and intellectually (as proceedings progressed) and described numerous physiological symptoms associated with this, for example nightmares, inability to sleep, lupus symptoms escalating and a deep malaise.
>
> …
>
> …. Dr Lakaev needs time to recover enough so, she can aid in her own defence during the appeal process. The events described here have been damaging to her overall health especially mental health. My patient needs time to settle into her medication regime for the relapse of lupus symptoms and Complex Chronic PTSD so she can focus properly to ensure she can defend herself successfully in the court room."

63 On page 5 of his letter, Dr Tucker said that an adjournment of six months would give the appellant "the time to both recover and become well". His letter concluded with the following:

> "In Summary: Dr Lakaev cannot participate in any form of court preparation at this time; Dr Lakaev is not fit to appear in the court room at this time; and Dr Lakaev is not fit to communicate within the court room if any form at this time, and while attempting to attend to the appeal requirements, Natasha has had a significant emotional and cognitive collapse. The illnesses described above take a long time (months) to stabilise once a patient is in relapse.
>
> For the many reasons outlined above, a six-month adjournment is medically recommended and advised by me, and in my professional opinion it is urgently needed to ensure Natasha can competently advocate for herself within the court room."

64 The appellant also provided me with a letter from Dr Tucker to Mr Zeeman, dated 2 May 2023, in which he said that she was suffering from "severe chronic stress/adjustment disorder with ongoing stressors, and PTSD (Post Traumatic Stress Disorder) which meet DSM IV/V criteria". He attributed his patient's disorders to "destructive claims … generated and propagated by a Ms McConkey".

65 Dr Tucker provided another document about the appellant's mental health, dated 25 June 2024. In that document he attributed his patient's difficulties to the respondent, not Mr Zeeman. He said that his patient urgently required "adjournment of this Court hearing for six months in order to regain her health to a reasonable level".

66 I have no reason to doubt Dr Tucker's expertise. Having read what he has written about the respondent and Mr Zeeman, I have every reason to doubt his objectivity. I accept that the appellant has stress-related mental health problems, and that her symptoms are likely to improve if there is a stay of proceedings in relation to this appeal for six months. However, if I make an order staying the proceedings for six months, I consider that there will be serious risks that (a) the preparation of the appellant's case will be no further advanced in six months' time, and (b) the appellant might continue to experience the symptoms that she is now experiencing and seek to delay the appeal proceedings further on medical grounds.

67 The extent to which the appellant has participated in the appeal proceedings tends to indicate that she is not as incapacitated as Dr Tucker's documents tend to suggest. In summary, she has taken the following steps in the proceedings:

- On 27 May she submitted 18 pages of submissions and eight annexures.
- On 28 May she spent a full day in Court and made lengthy oral submissions.
- On 13 June she provided 120 pages of written submissions and 79 pages of annexures.
- On 27 June, in response to applications by the respondent as to costs, the appellant submitted two sets of submissions. In relation to an application by the respondent seeking to enforce an order made by Estcourt J as to the costs of the proceedings at first instance, she filed seven pages of submissions, with eight annexures. In response to an interlocutory application by the respondent seeking security for costs, she provided 14 pages of submissions, with the same annexures.
- On 2 July she forwarded to my associate several documents that she had meant to send on 12 June but failed to send.

68 Having regard to the amount of work that the appellant has put into the appeal proceedings to date, I doubt that she is so incapacitated that she could not take the steps necessary to prosecute this appeal in a timely manner.

Prejudice to the respondent

69 If this appeal is not dismissed, then, assuming that it is not stayed pending the provision of security for costs, it is clear that some case management would be warranted. It would be appropriate for a time limit to be fixed for the appellant to (a) make any application she may wish to make for the grounds of appeal to be varied or added to; and (b) provide her list of the documents proposed to be contained in the appeal book. An application to amend the notice of appeal by adding more grounds of appeal would probably be made and opposed. If so, there would have to be a hearing before a single judge at which he or she would consider the prospects of success of each additional ground and any assertions of prejudice made by the respondent. The respondent would be likely to have to bear the burden of opposing an application to add new grounds of appeal, as well as the burden of making written and oral submissions to the Full Court in relation to the determination of the appeal.

70 Since applications for proceedings to be dismissed for want of prosecution usually relate to proceedings of first instance where no steps have been taken for years, the authorities relating to prejudice are generally concerned with the prejudice suffered by a defendant in obtaining a fair trial after memories have dimmed, documents have been lost, or witnesses have died or disappeared. However, other forms of prejudice can be relevant. In *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1WLR 382 the English Court of Appeal held that anxiety suffered by nurses whose professional competence was in question was a type of prejudice that warranted striking out an action for want of prosecution. That case was cited with approval by Lord Griffiths, with whom the other members of the House of Lords agreed, in *Department of Transport v Chris Smaller (Transport) Ltd* (above) at 1209. His Lordship also referred to a number of cases in which the prejudice caused to a small business with a huge claim hanging over it had been held to warrant an order striking out proceedings.

71 In this case the respondent has already conducted a very long trial and substantial pre-trial proceedings in a State where she does not live without the benefit of legal representation. She has three children. Opposing an amendment application and resisting the appeal are likely to result in an emotional burden, interference with family life, and interference with her ability to earn an income. Of course the burden of conducting her case at the final hearing of the appeal would depend on the scope of the grounds that the appellant is allowed to pursue. However, even if she is only allowed to pursue Mr Zeeman's four original grounds, the burden of conducting a case in the Full Court would be considerable.

72 At trial the respondent relied on a number of defences, not just the defence of justification available under s 25 of the *Defamation Act*. The other pleaded defences were contextual truth, pursuant to s 26 of the Act, qualified privilege, pursuant to s 30 of the Act, honest opinion, pursuant to s 31 of the Act, and qualified privilege at common law. She also pleaded that the appellant's "personal and professional reputation was such that she was already likely to be shunned, avoided, ridiculed or despised". It was not necessary for Estcourt J to make findings as to any of those defences in his reasons. If the appeal proceeds to a hearing, it is likely that there will have to be argument as to each of those defences.

73 The quantum of the appellant's claim for damages is another factor relevant to the assessment of the prejudice likely to be suffered by the respondent. The appellant contends that the respondent's publications have damaged her reputation over many years, to the extent of making it impossible for her to practise as a psychologist. If her claim were to succeed, she would have a substantial claim for aggravated damages after many days of cross-examination. The respondent has had a very substantial claim for damages hanging over her, at least since the appellant instituted her action in 2018, and that claim will continue to hang over her if the appeal is not dismissed at this stage.

To dismiss or not to dismiss?

74 Cases in which proceedings are dismissed or struck out for want of prosecution are usually cases in which no steps have been taken to prosecute a claim for years and years. This is a very different situation. The appeal was instituted less than four months ago and there has been a lot of activity on the part of the appellant. However, it has been activity without progress. Thought has been given to the grounds of appeal that the appellant may wish to pursue, but the appellant has not finished thinking about them, and her real grounds of appeal, as distinct from those drafted by Mr Zeeman, have not been finalised. The creation of a list of the documents that the appellant proposes to include in the appeal book, a very simple task, has not been finalised. Steps taken by the respondent in relation to the delay have resulted in a lot of words but no progress. The appellant does not want a hearing. She wants a six-month pause.

75 I accept that the appellant is at a disadvantage because she cannot afford legal representation of her choice, and has decided to proceed without legal representation. I accept that in some respects and to some extent allowances should be made in her favour because of her lack of legal representation and because of the length and complexity of the trial. But there are limits.

76 The appellant is an intelligent person. She has a doctorate in psychology from a reputable university. She has had an opportunity to obtain legal advice before deciding to proceed without legal representation. Yet she still did not manage to complete the simple task of drafting a list of documents to be included in the appeal book.

77 If the appeal is not dismissed, the respondent will suffer significant prejudice in bearing the burden of defending the proceedings. There is absolutely no indication that any of the appellant's original or foreshadowed grounds of appeal have any significant prospects of success.

78 Having regard to all the circumstances, I consider that it is in the interests of justice for this appeal to be dismissed for want of prosecution.

79 The appeal is dismissed.