APPLICANT'S SUMMARY OF ARGUMENT

COURT DETAILS	
Court	**Supreme Court of New South Wales Court of Appeal**
Registry	**SYDNEY**
Case number	2025/
TITLE OF PROCEEDINGS	
Applicant	**John Hooper**
First Respondent	**Julia Phipps**
Second Respondent	**Willoughby City Council**

A. NATURE OF APPLICANT'S CASE

1. The applicant (hereafter, **plaintiff**) is the plaintiff in a defamation case which, following a valid jury requisition by the plaintiff, was heard with a judge (Gibson DCJ) and jury, relevantly from 21 July 2025. On the fifth day of that trial, following the respondents' (hereafter, **defendants**) closing address to the jury, but prior to the start of that for the plaintiff, the plaintiff fell ill and was taken to hospital. The jury was subsequently discharged.

2. The defendants applied for the trial to continue before Gibson DCJ without a jury, which involved an application for an order under s 21 of the *Defamation Act* 2005 (NSW) (**the Act**). The plaintiff opposed the order. The parties filed evidence and made written and oral submissions, and on 19 September 2025, the primary judge granted the defendants' application (**Order**), delivering detailed reasons (**Reasons**).

3. The plaintiff seeks to appeal from the Order, and therefore seeks a new trial with judge and jury.

4. There is a question in those circumstances if leave to appeal is required. On one view of s 127A of the *District Court Act 1973* (NSW), there is an appeal as of right. However, the plaintiff seeks leave to appeal out of caution, noting that leave to appeal was sought (and granted) in *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* [2011] NSWCA 246; (2011) 81 NSWLR 315 (at 315).

B. QUESTIONS INVOLVED SHOULD LEAVE BE GRANTED

5. The questions involved in the appeal, should leave be granted, are:

   (a) did the primary judge err in making an order under s 21(1A) of the Act to revoke the plaintiff's jury election?

   (b) should a new trial be ordered?

   (c) if a new trial is ordered, should it be with a jury?

C. BRIEF STATEMENT OF APPLICANT'S ARGUMENT

6. Section 21 of the Act in its present form contains two powers to dispense with a jury in defamation proceedings:

   (a) a general discretionary power under s 21(1) of the Act; and

   (b) an additional discretionary power under s 21(1A) of the Act.

The primary judge exercised the wrong power

7. The primary judge appears to have considered that s 21(3) contained a further dispensing power: Reasons at [19]. With respect to her Honour, that may not be correct. Section 21(3) seems better viewed as imposing limits on the exercise of the other dispensing powers conferred by s 21 (that is, those under s 21(1) and s 21(1A)), in particular where an electing party seeks to resile from a jury election. However, that issue need not be resolved in the present matter.

8. The primary judge expressly exercised the power under s 21(1A), and apparently did so on the basis that "the issue of the plaintiff's health" fell within s 21(1A)(b), so that it could be said that "the trial involves any technical, scientific or *other* issue that cannot be conveniently considered or resolved by a jury": Reasons [20]-[21]. This was perhaps surprising as the defendants' application was made under s 21(1), not s 21(1A): Defendants' Outline of Submissions dated 27 August 2025 (**DOS**), at [1], [15], [54].

9. With respect to the primary judge, this was an incorrect reading of s 21(1A). The reference to "*other issue*" means "issue for decision", not a matter in relation to the proceedings (eg their length, venue or – as in this case – the health of the plaintiff).

10. If that is right, then the only way that s 21(1A) could have been engaged was on the basis that "other issue" meant all the issues in the case (or alternatively, all those that fell to the jury), but such a reading would not add to the general power conferred by s 21(1) and would not sit with a usual *ejusdem generis* reading of such a provision.

The power under s 21(1) of the Act: general matters

11. The Court would not allow an appeal if the Court were satisfied that the power under s 21(1) ought to have been exercised in the circumstances, even if the power under s 21(1A) were unavailable. Apart from any other consideration, the order that the plaintiff seeks is an order for a new trial (see below), and under UCPR 51.53 such an order would not be made unless it appeared to the Court that some substantial wrong or miscarriage had been occasioned by the primary judge's decision.

12. Given that her Honour did not exercise that power, it is appropriate to focus on the nature of the power, and to consider whether the exercise of such a power was warranted in the circumstances.

13. The dispensing power in question has been interpreted as of a general discretionary nature: *Channel Seven Sydney Pty Ltd v Fierravanti-Wells*, at [42]-[43] per McColl JA, with whose reasons Giles JA agreed at [1] and Handley AJA at [137]; *Wagner v Harbour Radio Pty Ltd* [2017] QSC 222 at [7], although not as exercisable of a court's own motion: *Fierravanti-Wells* at [97].

14. Although power of the Court to "order otherwise" under s 21(1) of the Act is not subject to express limits, limits may flow from the subject matter and scope and purpose of the provision: *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; *Fierravanti-Wells*, at [43] per McColl JA. That includes regard to the fact that once an election has been made for trial by jury, the electing party has a vested right accordingly: *Fierravanti-Wells* at [50].

15. On that basis, various considerations have been held to be extraneous to a jury dispensation power, especially following the decision of this Court in *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387. Notwithstanding the reservation of opinion in relation to *Pambula* by a majority in the High Court in *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; (2002) 209 CLR 478, at [14], the approach taken in

Pambula has generally been followed by Australian courts in relation to jury dispensation, including *Fierravanti-Wells* and *Wagner*.

16. Thus, the fact that trial by jury may generally involve greater expense or a longer trial than trial by judge alone has not been regarded as warranting dispensation, or even an involving a permissible consideration: *Pambula* at 402 D-403 B ; *Wagner* at [12]. Where there is a sufficient basis to dispense with the jury, the fact that such dispensation leads to a saving of time and money is incidental: *Wagner* at [14]. It has been said that there must be some compelling reason to warrant the discretion being exercised: *Wagner* at [14].

17. These considerations are especially relevant in a defamation context because of the historical position of juries in that context: *Fierravanti-Wells* at [69]-[79], [95]; *Wagner* at [8]-[9]. It is established that the onus is on the party seeking the dispensation: *Wagner* at [10] and the cases there cited.

The power under s 21(1) of the Act: application based on plaintiff's health

18. The sole matter which moved her Honour to dispense with the jury was the issue of the plaintiff's health.

19. That was *not* a basis on which the defendants sought the dispensing order – indeed the defendants expressly disclaimed relying on the possibility of another medical episode occurring at any subsequent fourth trial: DOS [31]-[32]. That disclaimer was, with respect, appropriately made; after all, the prospect of such an event (even given the history of the matter) would have been highly conjectural. To the extent that her Honour attributed such reliance to the defendants (Reasons [30], last sentence), this seems to have been in error.

20. Although it is true that the plaintiff did not put on medical evidence on the defendants' application, he bore no onus to do so, and in circumstances where the defendants had expressly disclaimed reliance on the medical issue, there was no occasion for him to do so. No *Jones v Dunkel* inference arose; in any event, it was adequately displaced by an affidavit filed by the plaintiff on 15 September 2025 which stated that he had been told by his doctors that as a result of changes to his medication there should not be a

recurrence of the medical episodes which caused him to be admitted to hospital on 28 July 2025.

21. There was no proper basis for her Honour (or now for this Court) to conclude that the plaintiff was likely to experience a further medical episode at any further trial. The *possibility* of such an episode could not be ruled out, but that would scarcely be a sufficient reason to exercise the power. It was not the case that the plaintiff exhibited some ongoing disability which made his participation in a future trial inconvenient or impractical.

22. The matter may be contrasted with the observations of Kirby P in *Pambula* at 403B where his Honour considered that if a litigant were seriously ill or dying, the difficulties of a jury trial would be a relevant consideration. (See, also Samuels JA at 413E, who considered that if the delays of obtaining a jury trial "would likely exceed a plaintiff's life expectancy", that could warrant dispensation with a jury.) These observations show how continuous disability, or at least health events that were likely to occur, could amount to the sort of compelling reason which would warrant dispensation, but that was not the circumstances in the present case, notwithstanding the history of the matter.

23. For these reasons, the power under s 21(1) of the Act should not have been exercised on the basis of the plaintiff's health.

The power under s 21(1): costs as a consideration

24. The primary judge also placed emphasis on the special position of costs in defamation matters: Reasons at [22], [47]. That position of course is that (unlike most claims) a defamation claim abates on the death of a party, together with entitlement to costs. In circumstances where Parliament has made specific provision for the role of a jury to hear defamation claims, this was not a proper consideration to take into account. If it were otherwise, old defamation plaintiffs might be liable to have their jury elections revoked by reference to actuarial tables.

25. By way of analogy, legal principle has long been against ordering security for costs against impecunious plaintiffs (and in such cases, the irrecoverability of legal costs by defendants may be close to a certainty, and not merely a possibility). It is also worth

observing that the abatement rule runs both ways; a plaintiff's estate does not succeed to a plaintiff's claim including his or her claim for costs.

The power under s 21(1): application based on plaintiff's conduct

26. One of the bases on which the defendants applied under s 21(1) was the plaintiff's conduct: see DOS [32]-[39]. (Her Honour expressly disclaimed reliance on that basis: Reasons [49].)

27. On one view, this issue would arise only if leave were granted and a notice of contention filed. However, it should be addressed briefly in case it be relevant to the issue of leave.

28. The background to this issue (at least in summary) appears at Reasons [9]-[11]. In short, after the plaintiff suffered a medical episode, he did not agree to a proposal that the matter continue with the jury, in circumstances where he would be absent from the court room for his counsel's address (and likely then the summing up).

29. That was not a proper basis on which a dispensing order ought to have been made, especially when the circumstances in which the instructions were being sought from the plaintiff, including that he was in hospital having suffered a serious medical episode, and he was given only a short time to consider his position, having been told that the trial would proceed in his absence (T 424.44-425.10, 425.40-.48; 426.41-427.17).

30. It was not unreasonable for the plaintiff (especially in his position) to be concerned that the jury might form an adverse view of him, if he were absent as his counsel made closing address, and even more so if (as seemed likely to occur) he were also to be absent during the judge's summing up. That was especially so where his absence had occurred immediately following closing address for the defendants in which a strong attack had been made on him. Having chosen to have a jury trial, it was not unreasonable for him to be concerned that it might miscarry if the jury wrongly drew some adverse inference against him from these circumstances. Nor was it unreasonable for him to be concerned that telling the jury his absence was because he was unwell would not remove the potential prejudice.

31. Regardless of how the Court viewed his instructions in the circumstances, that did not disentitle him from having a jury hear his case. To the extent that the defendants' submissions suggested that the plaintiff was seeking to gain a collateral advantage from

the circumstances of his medical episode (the DOS at [37] referred to him "orchestrating a fresh jury trial"), and in circumstances where it was not disputed that the plaintiff had experienced a serious medical episode and remained in hospital under care, a finding to that effect should not be made or taken into account.

The power under s 21(1): application based on other grounds

32. The defendants relied on two other grounds, namely case management considerations and the impact of the proceedings on trial participants.

33. Briefly, as to the first, so far as CPA s 56 is concerned, it did not apply to the exercise of powers under the Act, but under the CPA or the UCPR: see CPA s 56(1) and (2). More generally, it has been recognised that general case management considerations have to be understood in the context that parties have the right to make choices as to how their claims are framed and include the right to elect for trial by jury: *Fierravanti-Wells* at [107]. Reference to considerations in CPA ss 59 and 60 should also be understood in that context. Jury trials do tend to give rise to extra cost and delay, but Parliament has identified some cases as being available to be heard by juries, notwithstanding.

34. Briefly, as to the second, the burden placed on trial participants (parties, witnesses and lawyers) is not a sufficient basis to make a dispensing order in the circumstances. It may be that there are directions that could be given that might ameliorate that burden but the burden does not provide a basis to dispense with the jury.

Consequences of mode of trial: why the dispensing order matters

35. There are two important reasons why the dispensing order matters.

36. First, judges and juries operate differently as fact finders. A range of forensic decisions are made before and at trial based on those differences. Some are made on detailed reflection; others in the course of the conduct of trial. Examples include which witnesses to call, what documents to tender, which witnesses to cross-examine, what line of cross-examination to pursue or leave alone, what case theory to pursue, what arguments to advance in opening or closing address.

37. In the present case, the dispensation order was made after the evidence had closed. Other than having the opportunity to recast closing address to adjust to the fact that it was to be judge alone, all of the other forensic decisions had been made in the context of a jury hearing. There is no way to undo those decisions (even if they could be identified and recalled).

38. Second, less importantly, but still significantly, her Honour heard the evidence in circumstances where she did not expect to decide matters of fact. While she no doubt attended to the evidence, the difference of perspective is a real disadvantage to later consideration, especially in circumstances where there was a strong challenge to the character and credit of the plaintiff: see, generally, *Messade v Baires Contracting Pty Ltd (Rulings Nos 2, 3 and 4)* [2011] VSC 75 per J Forrest J at [43].

D. REASONS WHY LEAVE SHOULD BE GRANTED

39. There are no exhaustive or rigid rules of practice or criteria governing the grant of leave to appeal: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170. However, it has been consistently stated that leave should be granted where there are substantial reasons that call for appellate review: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; 104 FCR 564, including injustice which is reasonably clear in the sense of going beyond what is merely arguable: see for example *Be Financial Pty Ltd (as trustee for Be Financial Operations Trust) v Das* [2012] NSWCA 164; *Clarke v New South Wales* [2015] NSWCA 27. Only in very unusual circumstances will this Court decline to intervene when appealable error has been established: *State of New South Wales v Torronen* [2023] NSWCA 319 at 85.

40. In the present case, the primary judge appears to have exercised a power that was not sought to be invoked by the defendants. In any event, the primary judge relied exclusively on a ground that was not sought to be relied on. The ground relied on by the primary judge was not a sufficient to basis to order a jury dispensation. Nor were the other grounds relied by the defendants sufficient to warrant the making of a dispensing order.

41. The result has the potential to work a real injustice on the plaintiff for the reasons previously set out.

42. It is not open to the plaintiff to have the issue of dispensation await a final appeal – he must act now if he is to challenge that decision: *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; (2002) 209 CLR 478.

43. The plaintiff primarily seeks an order for a new trial with a jury. The unfortunate history of this matter does not provide a sufficient basis to make such an order inappropriate. If the Court is disinclined to make such an order, the plaintiff seeks in the alternative an order for a new trial without a jury, as that will undue the prejudice referred to above caused by a late shift in the mode of trial, although not the loss of his right to his preferred mode of trial.

E. NO REASON FOR SPECIAL COSTS

44. In the event the application for leave is refused, there is no reason against an order for costs in favour of the defendants.

F. PLAINTIFF DOES NOT CONSENT TO MATTER BEING DEALT WITH ON THE PAPERS

45. The plaintiff does not consent to the application for leave being dealt with in the absence of the public and without the attendance of any person.

G. SUITABLE FOR CONJOINT HEARING?

46. The plaintiff suggests that the matter would be suitable for a conjoint hearing of the application with the argument on the appeal. The whole appeal could likely be dealt with in half a day.

H. RELEVANT AUTHORITIES

47. *Defamation Act* (NSW) 2005 (current reprint)

48. *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387

49. *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* [2011] NSWCA 246; (2011) 81 NSWLR 315

50. *Wagner v Harbour Radio Pty Ltd* [2017] QSC 222

9 October 2025

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CERTIFICATION

I **Steven Lewis**, solicitor for the Applicant, certify pursuant to paragraph 27 of Practice Note SC CA 01 - Court of Appeal that the Applicant's Summary of Argument is suitable for publication.

SIGNATURE OF LEGAL REPRESENTATIVE

Signature of legal representative: 

Date of signature 27 November 2025