

Supreme Court of Victoria

Court of Appeal Practice Statement No. 2 of 1995

With the concurrence of the Chief Justice, the President has authorized the issue of the following Practice Statement, which is to apply to all civil appeals heard on and after the first day of First Term 1996

1. Practice Statement C.A. 1 of 1995 replaced, in relation to civil appeals, the directions contained in a number of earlier Practice Notes but did not replace the directions in the Practice Note published at [1991] 1 V.R. 635 about statements of facts. This Practice Statement now replaces those directions about statements of facts.
2. Not later than 7 days before the day fixed for the hearing of the appeal the appellant (unless unrepresented) shall file with the Registrar and serve on all other parties to the appeal a Summary for the Court of Appeal. (If the appellant is unrepresented, the respondent shall file and serve that summary not later than 7 days before the day fixed for the hearing of the appeal.)

Contents of the Summary for the Court of Appeal

3. The Summary for the Court of Appeal is to contain, first, a Summary of the Proceedings and Issues and, second, a Summary of Facts

The Summary of Proceedings and Issues

4. The Summary of Proceedings and Issues should describe shortly the nature of the proceeding (as e.g. an action by the plaintiff Smith for damages for personal injuries allegedly suffered in the course of employment by and as a result of the negligence of the defendant Brown);
 - identify each party to the proceeding below (by name and by description in the proceeding below as plaintiff, defendant or as the case may require);
 - state, in chronological order, such of the steps taken in the proceeding below as it is necessary to mention for the purposes of the appeal
(as e.g. The action was commenced by writ issued onFebruary 1994 and came on for trial at the County Court at Geelong before Judge X on.....June 1995. After a trial lasting.....days, on.....July 1995 the jury returned a verdict for the plaintiff in the sum of \$.....On.....July 1995, judgment was entered for the plaintiff for the sum of \$.....together with damages by way of interest in the sum of \$.....and costs (including reserved costs) to be taxed on Scale.)
 - state, shortly, the major issues dealt with in the proceeding below, and their disposition below (as e.g. The plaintiff, Brown, alleged that the defendant, Smith had been negligent in failing to have the appropriate equipment (a 12 foot ladder) readily available for his use in doing the required work. The defendant alleged that Brown had been contributorily negligent in not waiting for the ladder to become available after it had been used by the electricians who were using it when Brown set out to undertake the work. The Judge found for the plaintiff, holding that no contributory negligence was established.
 - state, shortly, the issues that are to be raised on the hearing of the appeal
(as e.g. The defendant appellant now challenges the finding that there was no contributory negligence by the plaintiff.
 - in every case, refer to any interlocutory order made in the appeal

(as e.g. any order granting leave to appeal, or providing for a stay of execution or directing provision of security for costs of the appeal etc.)

5. Because the Summary of Proceedings and Issues is to refer to only those steps in the proceeding below that it is necessary to mention for the purposes of the appeal it may be expected that, generally, it will be necessary to refer to only the main steps in the proceeding (the institution of the proceeding and the making of the judgment or order which is the subject of the appeal). However, in some cases it will be necessary to refer to other steps in the proceeding, such as interlocutory applications, because those applications bear upon the issues raised on the appeal.

Summary of Facts

6. The Summary of Facts should describe, in narrative form, both the facts which form the background to the proceeding and the facts that bear directly upon the disposition of the appeal. Thus, the summary should be sufficient to inform the members of the Court of the general nature of the facts that give rise to the proceeding and should state all of the facts that are material to the issues for determination in the appeal, not just those facts which may later be said to support the case for one party. It should, generally, be organised in chronological order.
7. It is not intended that the summary of facts should be an argumentative document. Thus, it should state the facts in a neutral rather than a tendentious manner. Further, it should be prepared bearing in mind its two principal purposes
 - to assist members of the Court in their pre-reading of the appeal papers (which will usually include the summary of facts, the reasons for judgment below and the notice of appeal) so that they may understand the issues that are to be argued on the appeal; and
 - to form the basis of the introductory statement of facts contained in the Court's reasons for judgment.
8. There will be cases in which it is appropriate to include references in the summary to the fact that conflicting evidence was given below and to summarise that evidence

(as e.g. "The plaintiff's general practitioner, Dr Smith, gave evidence (AB123-5, 132-7) that in his opinion the plaintiff's injuries were such that he could not have been expected to return to work and that he was of the view that the plaintiff could not be expected to return to work in the foreseeable future. However, the defendant's consultant, Dr Brown, swore (AB 234-5, 256-9) that she was of the view that the plaintiff was physically able to have resumed light duties no later than 3 June 1994 - six weeks after the last operation on the plaintiff's arm.").

Although it will summarise the relevant parts of the evidence, the summary need not follow the order in which evidence was given at the trial.

9. Three examples of summaries of facts are appended -
 - a summary of facts in a personal injury case
 - a summary of facts in a contractual dispute; and
 - a summary of facts in an appeal on an interlocutory question

Preparation of the Summary for the Court of Appeal

10. The party that is obliged to file and serve the Summary should provide all other parties to the appeal with a draft of the Summary no later than 21 days before the day fixed for the hearing of the appeal and the practitioners for the parties should consult about its contents no later than 14 days before the day fixed for the hearing of the appeal.

11. The Summary for the Court of Appeal is an important document. Particular attention should be given by the parties to ensuring that the summary is accurate in all respects - not least in its identification of the issues that are to be raised on the appeal. It may therefore be thought desirable to involve counsel engaged to argue the appeal in the preparation of at least this part of the Summary.

Non-compliance

12. Substantial non-compliance with any of the paragraphs of this Practice Statement may result in the adjournment of the hearing and, in appropriate cases, an order for costs against the party in default or the practitioner.

Associate to the President
M.H. WINNEKE

Summary Of Facts In A Personal Injury Case

1. The appellant-plaintiff is a 38 year old married man who was employed by the respondent as an electrician between 1982 and 1994. On 4 June 1992, in the course of his employment, he suffered an injury to his back.
2. On the morning of the incident he was instructed to assist another electrician in the respondent's maintenance department (Jones) to remove and replace some exhaust motors in the loft areas of five buildings at the respondent's premises, install some thermal devices for the protection of those units and generally clean up the loft areas. (Appellant's evidence AB 110-111)
3. The buildings concerned are two storey buildings with a loft at the top of each stairwell containing two motors in each loft. The appellant's evidence (AB 112-114) that the two men used a nine-foot ladder to get into and out of each loft and then carried the motors down the ladder, along the corridors of the building and out onto the street where they placed them in a van was not disputed (See Jones AB 236-7).
4. In the loft the men had to isolate the motors from the electricity supply and unbolt a base plate which was fastened to the floor of the loft thereby releasing a unit which comprised the fan cover, the electric motor and base plate and a long covered electrical lead. Photographs of the unit and the route which the men followed in carrying the unit are at AB 756-764. The appellant said in evidence (AB 114) that the unit weighed about 12 kilograms and measured about 2 feet six inches from the outer edge of the cowling over the fan to the opposite outer edge of the base plate upon which the electric motor was fixed.
5. The plaintiff's description of the accident is at AB 112-115 and 175-92. He said (AB 113) that he cradled the whole of the unit in both arms and
 - carried it down two flights of stairs between the first and ground floors of the building (AB 113-4, 175-7; photographs 1, 3 and 4 AB 756-7)
 - along the covered footway (AB 114, 175-7; photograph 2 AB 756)
 - to the forecourt of the building (AB 114, 175-8; photograph 5 AB 757).

He described what then happened at AB 115 and again at 179, 183 and 184. At the top of the steps leading from the forecourt to the footpath, he shifted the load to his left so that he might see where he was going, the unit slipped in his grasp and he stumbled down the steps in the course of trying to control the load, thereby wrenching his back.

6. The defendant alleged that the plaintiff was contributorily negligent in not waiting until he had a suitable trolley to carry the unit and in not having taken suitable steps to wipe a slippery load.

7. Conflicting evidence was given about whether the plaintiff should have used a trolley for the job, about whether the plaintiff took any steps to procure a trolley and about what trolleys the respondent had available for use by those in the department in which the appellant was employed.

Should a trolley have been used?

8. Chan, a consulting engineer called by the plaintiff, swore (AB321-56) that in his opinion.....
Nguyen, the defendant's consulting engineer, swore (AB 521-55) that in her opinion.....

Was a trolley sought?

9. The plaintiff said in evidence (AB 120) that..... An answer made by the plaintiff to interrogatories which, so it was later to be argued, admitted that he had not sought any trolley was tendered (Ex 4 AB 695). The maintenance supervisor, Camilleri, said (AB 425-6).....

Was the load slippery?

10. All witnesses who described the unit said that it was slippery with oil and possum droppings. However, there was a dispute about whether wiping the unit with rags of the kind which the appellant had in his van, would have made any significant difference . So, Camilleri swore (AB 427-9)..... Nguyen said.....

The Appellant's injuries

11. The appellant said that as a result of the accident, he has been unable to resume his work,(AB 125) he can no longer play competitive squash (as he did at C Grade pennant level before the accident)(AB 126).....
12. The appellant suffered a partial cauda equina lesion. He underwent three operations;
 - the first on.....1993 when the appellant's orthopaedic surgeon (Maria Cutter) performed a procedure known as (described at AB417-25)
 - the second on.....
 - the third on.....

All of the medical evidence below accepted that as a result of the accident the appellant..... The significant areas of dispute were.....

Summary Of Facts In A Contractual Case

1. In 1988 the first appellant (the first defendant below) carried on business as a builder and real estate developer. It owned land in the Cheltenham area and proposed to build a series of small office and retail developments.
2. On.....June 1988, the principal of the first appellant (John Brown, the second defendant below and second appellant) spoke to the manager of the Cheltenham branch of the XY Bank (Smith) about procuring finance for the development. Both appellants were then, and for some years had been, customers of that bank at that branch and Brown had had a number of earlier dealings with Smith.
3. Smith referred the enquiry to the bank's associated finance company (the respondent XY Finance Co Ltd). The circumstances of the referral were a matter of controversy - Brown giving evidence (AB78-80, 110-112) that Smith had said..... and Smith denying that he had said anything to that effect (AB 212-4, 242-3).
4. By letter dated.....1988 (Ex A, AB 423) the appellant applied for finance for the proposed development.
5. The documentary material tendered in evidence below shows that thereafter -

- XY Finance considered the proposal (Ex 1, AB.....)
 - On.....1988 the Regional Manager of XY Finance recommended approval (Ex 1, AB..... line.....)
 - Between.....and.....1988 security documents were prepared and on.....1988 were sent to the appellant (Ex AB ; See also Jones, the mail clerk of XY Finance AB.....)
 - On.....1988 Blow, the Regional General Manager of XY Finance witnessed the affixing of the common seal of the company to the various security documents (Blow, AB.....)
6. In support of their defence to the claims by XY Finance (for repayment of the loan, possession of the security properties and payment under the guarantee given by Brown) the appellants gave evidence of several conversations which it was alleged were had with employees of XY Finance before the security documents were signed. There were three critical conversations (as well as some other conversations which were of less significance). The defendants alleged that employees of XY Finance represented that..... The XY Finance employees denied making such statements.

The first conversation

7. Brown swore (AB.....)that on.....1988 he had telephoned the head office of XY Finance and spoken to a woman named ..l.. He alleged that she had said to him words to the effect that “.....” She denied any such conversation had ever taken place (AB.....)

The second conversation

8. Brown’s son Bill (then employed as an office manager in the appellant’s business) swore (AB.....).....

The third conversation.....

9.

The provisions of the security documents

10. XY Finance submitted that even if (contrary to its contentions) conversations of the kind alleged had taken place, it was nevertheless entitled to enforce its security documents, and sue on the guarantee because of the provisions of clauses ... and ... of the loan agreement (AB.....and.....)

Summary Of Facts In An Interlocutory Appeal

1. The plaintiff’s proceeding seeks to set aside the decision taken by the defendant statutory corporation to award a contract to set up a roadside service centre, and cafe beside the Hume Highway at Wallan to its competitor Lemnos Ltd.
2. The appeal arises from a dispute about production of documents that have been discovered. The defendant corporation (and the intervener Lemnos Ltd) both seek to resist the plaintiff’s application that it be entitled to inspect documents numbered 33, 34 and 35 in the defendant’s affidavit of documents (AB.....) The defendant resists inspection claiming that the documents are the subject of public interest immunity. The intervener resists inspection on the basis that the documents are commercially sensitive and revealing their contents to a the plaintiff, a trade rival, would harm it.

The documents

3. The documents, each of which was created by Lemnos Ltd and sent to the corporation in the course of a competitive tender, are described in the evidence of Mitsitakis (the principal of Lemnos Ltd) as being “.....” (AB.....)

The claimed public interest immunity

4. The General Manager of the defendant corporation (Robertson) swore that unless the documents remained confidential..... (AB.....)

The Judge said in his reasons for judgment (AB.....) that he did not accept that the consequences alleged by Robertson would follow because.....

The claimed commercial sensitivity of the documents

5. Mitsitakis swore (AB.....) that..... The principal of the plaintiff (Brno) denied that that is so. He swore (AB)...... CASUMM - 281195