

WEEK 4

Service

- 1) Personal service. Explain what service is and when personal service is required in NSW (Colbran 327- 333, be able to discuss cases and rules)?**

WHAT IS SERVICE?

Service is the procedure by which a plaintiff informs a defendant of the claim being made against them. The rationale of service was stated by Lord Cranworth LC in *Hope v Hope (1854) at 342*: “The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him.” An action based on the *in personam* jurisdiction of the court (which extends to almost all civil cases) could not proceed unless the person whom a relief or remedy is sought had been served with an originating process (a personal service).

Two types of service: Personal service and Ordinary service. Personal service is required for originating proceedings; it is the main standard of service. Ordinary service is mostly for interlocutory proceedings.

It is also important to note that special service rules have been developed for certain types of parties such as corporations or those under a disability. Special service rules have also been developed for certain types of actions such as motor vehicle personal injury actions.

PERSONAL SERVICE

Personal service is required for originating proceedings. In order to originate proceedings, a party against whom a remedy or relief is being sought must be served ‘personally’.

Personal service is usually required in respect of:

- Preliminary originating process
- Secondary originating process, for example, introducing a new party or an existing party in a different capacity
- Documents initiating contempt or attachment proceedings
- Injunctions; and
- Where required by statute, rules or court order.

As per reg 10.21 of the UCPR (NSW) and the ruling of the NSW court of appeal in the case of *Ainsworth v Redd (1990)*, personal service of a document on a person is effected by leaving a copy of the document with the person, or if the person does not accept it, by putting the copy of the document down in the person’s presence and telling the person the nature of the document.

Uniform Civil Procedure Rules 2005 (NSW)

10.21 How personal service effected generally

- (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

Ainsworth v Redd (1990)

Facts:

The appellant sued the respondent in defamation and injurious falsehood. The respondent resided in the USA and had visited NSW for the purpose of obtaining a poker machine licence. The process server held out the statement of claim at arm's length and said "these documents are for you." The nature of the documents were not identified. The respondent appeared to look at the documents but did not take them. The respondent's American attorney took the documents not intending to do so on behalf of the respondent. The issue was whether personal service of the documents was effected.

Held:

Kirby J held that it is sufficient to leave the document with the person to be served. It is not necessary to identify the nature and purpose of the document but this is required if the person to be served does not accept the copy.

Clarke J held that "if the proposed recipient does not accept the document then the server who wishes to effect personal service is obliged to put the document down in his (her) presence and describe its nature to him (her). If, however, the proposed recipient does not decline to accept the document then effective service is achieved by 'leaving the document' with him (her)."

The latter was the situation in this case.

Personal service may be carried out by the plaintiff or the plaintiff's agent. The document should be left as near to the possession or control of the person to be served as circumstance will allow; Thomson v Phoney (1832).

Service is valid where the document will be brought to the attention of the defendant even though all of the requirements of the service rules have not been met. For instance a divorce petition was held to be validly served where it was pushed under the door after the respondent refused to allow entry to the process server Graczyk v Graczyk.

Personal service is permitted where the defendant is within jurisdiction – even if the defendant is only temporarily within the court's jurisdiction e.g. where the defendant is on a visit Maharane of Baroda v Wildenstein.

EXCEPTIONS TO PERSONAL SERVICE

Some situations do not require personal service. One important example is regarding interlocutory proceedings where Ordinary service is sufficient. There are situations where personal service is not required even where the process to be served is to initiate proceedings. These situations include:

- ex parte interim applications
- where a solicitor accepts service (p 334)
- where an appearance is entered before service
- where substituted service is ordered (see Question 4 below)
- where service is by means of a mode specified in an agreement (p 333)
- where service outside the jurisdiction is in a manner that complies with the local foreign law requirements
- where there is an action for the recovery of land
- where there is an action *in rem* against a ship (ie the ship/cargo is the defendant)
- where the rules or statute expressly permit other means of service

ORDINARY SERVICE

Generally, Personal service is required for initiating proceedings such as: writs, originating summonses, orders to show cause, and third party notices. However there are more relaxed rules in respect of the service of **interlocutory processes**. Most documents, along with interlocutory processes, do not require personal service (even though they can still be personally served). Rather more convenient modes of service, such as delivery to the person to be served's address (**r 10.5 UCPR NSW**), are sufficient. This is Ordinary service. There are other modes of ordinary service outlined in the textbook such as:

- Service by filing (p 340)
- Service by the court (p 341)
- Informal service (p 341)
- Service by facsimile (p 341)
- Service by post (p 342)
- Service by document exchange (p 343)
- Service by electronic means (p 343)

2) What are the relevant rules and provisions relating to service of corporations, businesses and associations (Colbran 344- 348)?

SPECIAL RULES FOR CERTAIN PARTIES

As previously stated, there are special rules governing the service of certain parties. These parties include:

- Corporations
- Partnerships, business names and unincorporated associations
- Agents (see p 348)
- Spouses (see p 349)
- Infants
- Mentally ill persons

CORPORATIONS

UCPR sets out that personal service may be effected of a document on a corporation by personally serving the document on a principal officer of the corporation or by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation. (**r 10.22**)

Corporations Act 2001

s 109X A document may be served on a company by:

- a) leaving it at, or posting it to , the company's registered office; or
- b) delivering a copy of the document personally to a director of a company who resides in Australia or in an external territory or
- c) if a liquidator of a company is appointed – leaving it at, or posting it to the address of the liquidator's office or
- d) if an administrator has been appointed – leaving it at, or posting it to the address of the administrator

Foreign corporations may be registered or unregistered. If the foreign corporation is registered then s 601CX *Corporations Act 2001* (Cth) applies and service may be effected by leaving it at or by sending it by post to the registered agent of the foreign company.

PARTNERSHIPS/BUSINESS NAMES

Generally proceedings must be brought in/against the persons own names because a firm or a partnership is not a legal entity and cannot sue/be sued.

In NSW where the business name has been properly **registered** under the *Business Names Act 1962* (NSW), it is possible to ascertain the names of the parties who carried on the business at the relevant time and to bring proceedings against them in their names (see UCPR **r 10.10**).

R 10.10 (2) For the purposes of any such proceedings, any document may be served on the defendant, whether sued in his or her own name or under the registered business name:

- (a) by leaving it with a person who is apparently engaged in the business, and apparently of or above the age of 16 years, at any place at which business is carried on under that name, or
- (b) by sending it by post, addressed to the defendant:
 - (i) to any place at which business is carried on under that name, or
 - (ii) to the address for service of any person in whose name the business name is registered under the *Business Names Act 2002* , whether or not the place concerned is within New South Wales.

R 10.10 (3) (c) in the case of a document sent by post, the document is taken to have been served at the end of 7 days after the day on which it was sent.

Where the firm is **not registered** UCPR 10.9 provides that the proceedings may be commenced against the defendant operating under an unregistered business name by serving the defendant or the business. However the person sued in the business name must enter an appearance in his/her own name and there are obligations on the plaintiff to take steps to ascertain the person's name. Service can be effected by leaving a copy with a person apparently engaged in the business where the business is carried with a person apparently engaged in the business of or over 16 years of age, or by sending a copy by post to the business address.

R 10.9 (2) For the purposes of any such proceedings, any document may be served on the defendant, whether sued in his or her own name or under the unregistered business name:

- (a) by leaving it with a person who is apparently engaged in the business, and apparently of or above the age of 16 years, at any place at which business is carried on under that name, or
- (b) by sending it by post, addressed to the defendant, to any place at which business is carried on under that name,

R 10.9 (3) (c) in the case of a document sent by post, the document is taken to have been served at the end of 7 days after the day on which it was sent.

INFANTS

An infant is served by serving the infant's tutor or if there is no guardian by serving the parent or guardian or the person with whom the infant lives (r 10.12(5)).

MENTALLY ILL PERSONS

A person of unsound mind is served by serving the tutor (r 10.12)

10.12 Service of process on [person under legal incapacity](#)

- (1) This rule applies to any proceedings in which a document is required to be served personally on a [person under legal incapacity](#).
- (2) Personal service on a [person under legal incapacity](#) may not be effected otherwise than in accordance with this rule.
- (3) **If the [person under legal incapacity](#) has a tutor in the proceedings, the document may be served on the tutor.**
- (4) The document may be served on any person (including the [person under legal incapacity](#)) whom the court may, before or after service, approve.
- (5) **If the person to be served is a minor and has no tutor in the proceedings, the document may be served:**
 - (a) **on the person, but only if the person is aged 16 years or more, or**
 - (b) **on a parent or guardian of the person, or**
 - (c) **if the person has no parent or guardian, on a person with whom he or she resides or in whose care he or she is.**
- (6) If the person to be served is a protected person (within the meaning of the [NSW Trustee and Guardian Act 2009](#)) and has no tutor in the proceedings, the document may be served:
 - (a) if the person has a manager in respect of his or her estate, on the manager,or
 - (b) if the person does not have a manager, on a person with whom he or she resides or in whose care he or she is.
- (7) Subject to subrule (8), a document served pursuant to this rule must be served in the manner required by these rules in relation to documents of the same kind.
- (8) In addition to any other service required by these rules:
 - (a) a judgment or order requiring a [person under legal incapacity](#) to do, or refrain from doing, any act, and
 - (b) a notice of motion for the committal of a [person under legal incapacity](#),and
 - (c) a subpoena addressed to a [person under legal incapacity](#), must be served personally on the person.
- (9) Subrule (8) does not apply to an order for interrogatories or for discovery or inspection of documents.

- 3) **Problem question. On 12 July, 2007 A issues a Statement of Claim out of the Supreme Court Sydney naming B as the defendant. B does not reside in Australia, but was in Sydney on 13 July 2007 in transit to Singapore from Auckland. Does the Court possess jurisdiction based on B's presence in NSW assuming he is served on 13 July 2007? See *Laurie v. Carrol* (1958) 98 CLR 310 (Colbran p 157 et seq). (ALTERNATE SCENARIO: What is the case where B is induced by A to stopover in Sydney on the basis that B has won the lottery?)**

ISSUE

Does the Court possess jurisdiction based on B's presence in NSW assuming he is served on 13 July 2007?

LAW

Laurie v. Carrol (1958)

Held:

[At 324]: Presence within the jurisdiction at the time of service is essential.

[At 331]: It is enough that the defendant is present (in the jurisdiction) at the time of service. It does not matter why, so long as he has not been enticed there fraudulently for the purpose. It does not matter whether he is a foreigner or a subject of the crown. It does not matter how temporary may be his presence, how fleeting may be his visit.

Also: Personal service is permitted where the defendant is within jurisdiction – even if the defendant is only temporarily within the court's jurisdiction e.g. where the defendant is on a visit *Maharanee of Baroda v Wildenstein*.

APPLICATION

B, being in Sydney at the time of service is within the jurisdiction of the Supreme Court. Even though B is only in Sydney in transit from Singapore to Auckland, it matters not "how temporary the presence" or "how fleeting the visit".

CONCLUSION

As B is within the jurisdiction of the Supreme Court of NSW at the time of service, the service is valid.

ALTERNATE SCENARIO

Had A induced B to stopover in Sydney for the purpose of service by claiming B won the lottery, this would amount to being "enticed there fraudulently". The service would not be valid.

- 4) **Substituted service. (Colbran 353-360) What is substituted service and on what grounds in NSW could you obtain an order for substituted service? Consider the cases excerpted in Colbran and explain the significance of each. What does impracticability mean? What evidence should be led in support of such an application? UCPR 10.14**

SUBSTITUTED SERVICE

Substituted service is permitted by NSW courts as an alternative to personal service if certain pre-conditions are met. There are two requirements that must be met in order to obtain an order for substituted service. These are that:

1. Personal service must be too difficult or impracticable; and
2. The substituted method proposed must be likely to bring the proceedings to the defendant's attention. (r 10.14 UCPR NSW)

An elaboration by common law of both of the above requirements; The THREE MAIN REQUIREMENTS before an order for substituted service should be made are:

- a) That there exists a practical impossibility of actual service: *Re Conan Doyle's Will Trusts Harwood v Fides Union Fiduciaire [1971]*; *Paragon Group Ltd v Burnell [1991]*; *Kendell v Sweeney [2002]*
- b) That the method of substituted service asked for is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ to the defendant: *Porter v Freudenberg [1915]*; *Miscamble v Phillips (No 2) [1936]*
- c) That without the practical difficulties, personal service would have been legally permissible: *Myerson v Martin [1979]*

In NSW it is necessary, although not provided in the UCPR (NSW), that an order for substituted service be supported by affidavit. The affidavit should typically set out the circumstances justifying the application, the attempts made at service and the alternative methods of service which are likely to bring the matter to the defendant's attention.

PRACTICAL IMPOSSIBILITY REQUIREMENT

The issue is whether at the date of the application for substituted service, the plaintiff, despite reasonable efforts, was unable to serve the document in accordance with the rules: *Foxe v Brown (1984)*; *Zinc Corp Ltd v Hirsch [1916]*; *Syndicate Mortgage Solutions Pty Ltd v Khaled El-Sayed [2009]*. An example of such an inability to serve and of practical impossibility is the following case:

Amos Removals & Storage Pty Ltd v Small [1981]

Facts:

The plaintiffs sought an order against 19 defendants who were committee members of a union. The plaintiffs pointed to a number of factors which they said rendered actual service impractical. The cost of service upon 19 defendants was one factor. The

geographical spread of the defendants' personal addresses was another factor. Thirdly, there was a short period in which service had to be effected due to the urgency of the matter.

Held:

The factors of cost and geographical spread were not sufficient enough to render service impractical on their own. However the fact that the service had to be effected quickly; that coupled with the geographical spread and cost of serving 19 defendants was deemed to be impractical. The order for substituted service was allowed. NOTE: Remember that cost and geographical spread are not sufficient factors on their own. The plaintiff must also show that extensive efforts were made to effect personal service as per *Munkarra v Fischer (1980)*.

Munkarra v Fischer (1980)

Facts:

The plaintiff suffered personal injuries when struck by the defendant's motorcycle. The motorcycle was registered in Western Australia. The defendant was a German national and was driving on an international licence and a Northern Territory licence. The defendant could not be found. The plaintiff applied for substituted service. The lengths the plaintiff went to in order to find the defendant were by: making inquiries in electoral rolls, motor registries, newspapers and courts in NT and WA.

Held:

As no inquiries were made in other states and territories, nor whether the defendant held drivers licence in those parts, nor inquiries being made to the German Embassy or any German clubs; the order was refused because the plaintiff did not show extensive efforts.

METHOD OF SERVICE REQUIREMENT

There are various methods that can be prescribed by the court for substituted service. The various methods include:

- By post: *Brad vica v Radulovic [1975]*
- Advertising (newspaper, registry): *Hilaire v Harvie (1950)*
- Serving someone closely connected with the defendant on the basis that they will bring the process to the notice of the defendant for example:
 - a) Spouse
 - b) Solicitor (acting or formerly acting for the defendant)
 - c) Agent (acting or formerly acting for the defendant)
 - d) Attorneys under power of attorney: *Rosenbaum v Rosenbaum [1926]*
 - e) Compulsory insurer: *Hunt v Molk (1976)*. This is not permissible where there is no likelihood of the process coming to the defendant's attention: *Chappell v Coyle (1985)*

Miscamble v Phillips (No 2) [1936]

Facts:

The Plaintiff sought to serve a notice of appeal, to the High Court, to the defendant by substituted service. The defendant's whereabouts had been unknown for 45 years.

Held:

The High Court held that the order for substituted service should be denied. The reasoning was that the **purpose** of a substituted service is to, in all reasonable probability or certainty, be effective to bring knowledge of the writ to the defendant.

Chappell v Coyle

Facts:

The plaintiff was injured by a motor vehicle driven by the defendant. The defendant was insured under a particular insurance agency. The defendant could not be located so the plaintiff applied for substituted service to the insurance agency. The insurance agency appealed arguing that it was unlikely that any order for substituted service would bring the statement of claim to the notice of the defendant.

Held:

The service was set aside. While methods of substituted service may include providing the service to a defendant's compulsory insurer, there must still be a likelihood that the process would come to the attention of the defendant.

PERSONAL SERVICE PERMISSIBLE REQUIREMENT

When applying for substituted service, an important requirement is that personal service is legally permissible in the situation. This most concerns 'Jurisdictional Limitations'; where the person to be served is outside jurisdiction such as in the case of Myerson v Martin [1979].

In a case where the defendant is abroad at the time of service such as Myerson v Martin [1979], personal service of the defendant would not be permissible and therefore neither would substituted service. Substituted service may only be permissible where personal service would have been permissible but for the practical impossibilities.

- 5) **Service out of jurisdiction within Australia. (Colbran 360- 362) Explain the operation of the *Service and Execution of Process Act 1992 (Cth)* and its major provisions. What are the benefits of the scheme created by this legislation?**

SERVICE OUT OF JURISDICTION WITHIN AUSTRALIA

This revolves around issuing service across different Australian jurisdictions (States and Territories). Prior to the Service and Execution of Process Act 1992 (Cth), each Australian jurisdiction was regarded as foreign territory with respect to service; now, it is much easier for service of processes across state borders.

Uniform Civil Procedure Rules 2005 (NSW)

10.3 Service of originating process in Australia

- (1) This rule applies to proceedings in the Supreme Court.
- (2) Subject to this Part, [originating process](#) may be served anywhere in Australia, whether in New South Wales or elsewhere.
- (3) **An [originating process](#) for service in Australia, but outside New South Wales, must bear a statement either that the plaintiff intends to proceed under the [Service and Execution of Process Act 1992](#) of the Commonwealth or that the plaintiff intends to proceed under the *Uniform Civil Procedure Rules 2005* .**
- (4) The plaintiff may proceed otherwise than in accordance with the intention stated under subrule (3), but only with the leave of the court.

SERVICE AND EXECUTION ACT 1992 (CTH)

The Act enables service of process in civil proceedings in any state or territory anywhere in Australia without leave. In effect, it gives state and territory courts Australia-wide *in personam* jurisdiction. The Act mostly applies to the exclusion of state law.

For more detailed information on the Service and Execution Act, see pages 361-362 of the textbook.

- 6) **Service outside Australia. (Colbran 363-376) Explain and summarise the process for service outside of Australia including relevant rules for NSW. What are the nexus requirements and the Rules of Court and what are the tests to be satisfied? Discuss the cases excerpted.**

SERVICE OUTSIDE AUSTRALIA

International service is relevant to federal, state and territory courts and may be permitted under the Rules of Court (the categories of nexus), including diplomatic channels, and under the Hague Convention. Those are the three avenues of service outside Australia, again they are: the categories of nexus, diplomatic channels and under the Hague Convention. In NSW the plaintiff may serve without leave but if the defendant fails to make an appearance the plaintiff must apply to the court before entering a judgment in default of appearance.

THE CATEGORIES OF NEXUS

The Rules of Court require a nexus to be established between the action and the jurisdiction. In other words, the cause of action must fall within a head specified by the rules as justifying service outside jurisdiction. Basically, the UCPR (NSW) outlines what type of circumstances justify service outside Australia; these circumstances are the categories of nexus.

Uniform Civil Procedure Rules 2005 (NSW)

11.2 Cases for service of originating process

- (1) Originating process may be served outside Australia in the circumstances referred to in Schedule 6.

SCHEDULE 6 – Proceedings in respect of which originating process may be served outside Australia

- (a) if the proceedings are founded on a cause of action arising in New South Wales,
- (b) if the proceedings are founded on a breach in New South Wales of a contract (wherever made), whether or not the breach is preceded or accompanied by a breach (wherever occurring) that renders impossible the performance of any part of the contract which ought to be performed in New South Wales,
- (c) if the subject-matter of the proceedings is a contract and the contract:
- (i) is made in New South Wales, or
 - (ii) is made on behalf of the person to be served by or through an agent carrying on business or residing in New South Wales, or
 - (iii) is governed by the law of New South Wales, or
 - (iv) is one a breach of which was committed in New South Wales,
- (d) if the proceedings are founded on a tort committed in New South Wales,

- (e) if the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in New South Wales caused by a tortious act or omission wherever occurring,
- (f) if the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the court,
- (g) if the person to be served is domiciled or ordinarily resident in New South Wales,
- (h) if the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the court,
- (i) if the proceedings are properly commenced against a person served or to be served in New South Wales and the person to be served outside New South Wales is properly joined as a party to the proceedings,
- (j) if the subject-matter of the proceedings, so far as concerns the person to be served, is property in New South Wales,
- (k) if the proceedings are for the perpetuation of testimony relating to property in New South Wales,
- (l) if the proceedings concern the construction, effect or enforcement of an Imperial Act or Commonwealth Act, or a regulation or other instrument having or purporting to have effect under such an Act, affecting property in New South Wales,
- (m) if the proceedings are for the construction, rectification, setting aside or enforcement of a deed, [will](#) or other instrument or of a contract, obligation or liability, affecting property in New South Wales,
- (n) if the proceedings are for an injunction as to anything to be done in New South Wales or against the doing of any act in New South Wales, whether damages are also sought or not,
- (o) if the proceedings are for the administration of the estate of a person who dies domiciled in New South Wales, or are for relief which might be granted in proceedings for administration of such an estate,
- (p) if the proceedings are for the execution of trusts which are governed by the law of New South Wales, or are for relief which might be granted in proceedings for the execution of such trusts,
- (q) if the proceedings affect the person to be served in respect of his or her membership of a corporation incorporated in New South Wales, or of an association formed or carrying on any part of its affairs in New South Wales,
- (r) if the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act,

(s) if the proceedings concern the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act,

(t) if the proceedings:

(i) relate to an arbitration held in, or governed by the law of, New South Wales, or

(ii) are commenced to enforce in New South Wales an arbitral award wherever made, or

(iii) are for orders necessary or convenient for carrying into effect in New South Wales the whole or any part of an arbitral award wherever made,

(u) if the proceedings are commenced to enforce in New South Wales a judgment wherever given,

(v) if the proceedings are for relief relating to the custody, guardianship, protection or welfare of a minor, whether or not the minor is in New South Wales, which relief the court has, apart from service, jurisdiction to grant,

(w) if the proceedings, so far as concerns the person to be served, fall partly within one or more of the foregoing paragraphs and, as to the residue, within one or more of the others of the foregoing paragraphs.