

Plaintiff is suing multiple defendants but is only successful against one defendant

The cost implications for succeeding against only some parties

EXAMPLE: Car A is parked at the lights, Car B hits car A, Car B says Car C hit me – P sues both Car B and Car A; is successful against Car B but unsuccessful against Car C

1. Litigants may sue anyone in the alternative that they believe is liable to them – often happens when P is unsure who to sue
2. Since an award of costs ordinarily follows the event A will recover its costs from B but will have to pay the costs against C

WHICH ONE WILL BE AWARDED:

The court has a discretion which must be exercised on judicial grounds connected with the case but extend to any matter relating to the litigation and the parties conduct in the litigation this includes:

- Parties conduct in proceedings
- Possible hardship to one party
- The information that was available to P

DETERMINING WHICH COSTS ORDER WILL BE AWARDED	
1) Should the Court depart from the general rule (costs follow the event)	
a) P must prove that they were in a REASONABLE STATE OF UNCERTAINTY AS TO WHO WAS LIABLE <ul style="list-style-type: none">○ If P believes they have a definite cause of action against one D the general costs rule will apply	
b) Plaintiff must establish that, in the circumstances of the Case it would be REASONABLE, JUST and PROPER to join two or more defendants	
c) The CLAIMS against each of Defendant's MUST TRULY BE ALTERNATIVE – cannot have different claims against each of them	
IF YES	IF NO
	Costs will follow the event
2) Should it be a BULLOCK or SANDERSON order?	
The court will make this determination by looking at all RELEVANT FACTORS <i>Vucadinovic v Lombardi & Meyers</i> these include: <ul style="list-style-type: none">• Parties conduct in proceedings• Possible hardship to one party• The information that was available to P	

SHOULD THE COURT DEPART FROM THE USUAL COSTS ORDER?

Altamura v Victorian Rail Authority & Ors

- P sued DA Constructions, Barrow and Victorian Railways for injuries suffered
- DA Constructions and Victorian Railways were unsuccessful defendants – Barrow successful Defendant
- There was no issue of solvency in this matter

HELD

- *Question 1:* P was in a reasonable state of uncertainty as to who was liable – this was because each D blamed each other for the injuries, “until all the evidence was heard it was not possible to judge which D would be found liable for injury to the P”
- *Question 2:* Irrelevant because each D was insured

Vucadinovic v Lombardi & Meyers 1967 VSC

- V was a passenger in a taxi – taxi was driven by L – L crashed into M
- Case went to trial and L was found liable for the accident
- She was awarded \$7,500 dollars – L only had insurance to the sum of \$4K

HELD

- *Question 1:* V was in a reasonable state of uncertainty
- *Question 2:* L was unemployed and it was highly unlikely he would not be able to meet the requirement of \$7K
- Court held that a Bullock order was relevant for the following reasons
 - P and her lawyers must have known of L's limited means and that they could not recover any more than that sum

- P/her lawyers must have known that by negotiating the claim they had a reasonable chance of settling the matter
- The court could not see any reasons to be unfair to the successful defendant – Meyers did not seek to be a party to the matter

Overarching obligations

S16 – S27 of the *Civil Procedure Act* outlines obligations

These apply to:

- a party
- a lawyer or representative
- a law practice
- any person who provides financial assistance

CIVIL PROCEDURE ACT 2010 - SECT 10

Application of overarching obligations—participants

1. The overarching obligations apply to—
 - a. any person who is a party;
 - b. any legal practitioner or other representative acting for or on behalf of a party;
 - c. any law practice acting for or on behalf of a party;
 - d. any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—
 - i. an insurer;
 - ii. a provider of funding or financial support, including any litigation funder.
2. Subject to subsection (3), the overarching obligations do not apply to any witness in a civil proceeding.
3. The overarching obligations (other than the overarching obligations specified in sections 18, 19, 22 and 26) apply to any expert witness in a civil proceeding.
4. Subsection (3) is in addition to, and not in derogation of, any existing duties applying to expert witnesses.

WHO DO THE OBLIGATIONS APPLY TO	<div>Parties</div> <div>Lawyers or representatives</div> <div>A law practice</div> <div>Any person who provides financial assistance to a party</div>	CIVIL PROCEDURE ACT 2010 - SECT 10 Application of overarching obligations—participants (1) The <u>overarching obligations</u> apply to— (a) any <u>person</u> who is a <u>party</u> ; (b) any <u>legal practitioner</u> or other representative acting for or on behalf of a <u>party</u> ; (c) any <u>law practice</u> acting for or on behalf of a <u>party</u> ; (d) any <u>person</u> who provides financial assistance or other assistance to any <u>party</u> in so far as that <u>person</u> exercises any direct control, indirect control or any influence over the conduct of the <u>civil proceeding</u> or of a <u>party</u> in respect of that <u>civil proceeding</u> , including, but not limited to— (i) an insurer; (ii) a provider of funding or financial support, including any litigation funder.
WHAT ARE THE OBLIGATIONS?		
PARAMOUNT DUTY TO THE COURT	CIVIL PROCEDURE ACT 2010 - SECT 16 Paramount duty Each <u>person</u> to whom the <u>overarching obligations</u> apply has a <u>paramount duty</u> to the <u>court</u> to further the administration of justice in relation to any <u>civil proceeding</u> in which that <u>person</u> is involved, including, but not limited to— (a) any interlocutory application or interlocutory proceeding; (b) any appeal from an order or a judgment in a <u>civil proceeding</u> ; (c) any <u>appropriate dispute resolution</u> undertaken in relation to a <u>civil proceeding</u> .	
OBLIGATION TO ACT HONESTLY	CIVIL PROCEDURE ACT 2010 - SECT 17 Overarching obligation to act honestly A <u>person</u> to whom the <u>overarching obligations</u> apply must act honestly at all times in relation to a <u>civil proceeding</u> .	

REQUIREMENT OF PROPER BASIS	CIVIL PROCEDURE ACT 2010 - SECT 18 Overarching obligation—requirement of proper basis A <u>person</u> to whom the <u>overarching obligations</u> apply must not make any claim or make a response to any claim in a <u>civil proceeding</u> that— <ul style="list-style-type: none"> (a) is frivolous; or (b) is vexatious; or (c) is an abuse of process; or (d) does not, on the factual and legal material available to the <u>person</u> at the time of making the claim or responding to the claim, as the case requires, have a proper basis.
OBLIGATION TO ONLY TAKE STEPS TO RESOLVE OR DETERMINE DISPUTE	CIVIL PROCEDURE ACT 2010 - SECT 19 Overarching obligation to only take steps to resolve or determine dispute For the purpose of avoiding undue delay and expense, a <u>person</u> to whom the <u>overarching obligations</u> apply must not take any step in connection with any claim or response to any claim in a <u>civil proceeding</u> unless the <u>person</u> reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.
OBLIGATION TO COOPERATE IN PROCEEDING	CIVIL PROCEDURE ACT 2010 - SECT 20 Overarching obligation to cooperate in the conduct of civil proceeding A <u>person</u> to whom the <u>overarching obligations</u> apply must cooperate with the parties to a <u>civil proceeding</u> and the <u>court</u> in connection with the conduct of that proceeding.
OBLIGATION NOT TO MISLEAD OR DECEIVE	CIVIL PROCEDURE ACT 2010 - SECT 21 Overarching obligation not to mislead or deceive A <u>person</u> to whom the <u>overarching obligations</u> apply must not, in respect of a <u>civil proceeding</u> , engage in conduct which is— <ul style="list-style-type: none"> (a) misleading or deceptive; or (b) likely to mislead or deceive. <p>This extends to –</p> <ul style="list-style-type: none"> • failing to bring relevant authorities to the court or judge • misleading the court or another party to the true facts • Concealing facts
OBLIGATION TO USE REASONABLE ENDEAVOURS TO RESOLVE DISPUTES	CIVIL PROCEDURE ACT 2010 - SECT 22 Overarching obligation to use reasonable endeavours to resolve dispute A <u>person</u> to whom the <u>overarching obligations</u> apply must use reasonable endeavours to resolve a dispute by agreement between the <u>persons</u> in dispute, including, if appropriate, by <u>appropriate dispute resolution</u> , unless— <ul style="list-style-type: none"> (a) it is not in the interests of justice to do so; or (b) the dispute is of such a nature that only judicial determination is appropriate. <p>Example</p> <p>A proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.</p>
OBLIGATION TO NARROW ISSUES IN DISPUTE	CIVIL PROCEDURE ACT 2010 - SECT 23 Overarching obligation to narrow the issues in dispute If a <u>person</u> to whom the <u>overarching obligations</u> apply cannot resolve a dispute wholly by agreement, the <u>person</u> must use reasonable endeavours to— <ul style="list-style-type: none"> (a) resolve by agreement any issues in dispute which can be resolved in that way; and (b) narrow the scope of the remaining issues in dispute— unless— <ul style="list-style-type: none"> (c) it is not in the interests of justice to do so; or (d) the dispute is of such a nature that only judicial determination is appropriate.
OBLIGATION TO ENSURE COSTS ARE REASONABLE	CIVIL PROCEDURE ACT 2010 - SECT 24 Overarching obligation to ensure costs are reasonable and proportionate A <u>person</u> to whom the <u>overarching obligations</u> apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the <u>civil proceeding</u> are reasonable and proportionate to— <ul style="list-style-type: none"> (a) the complexity or importance of the issues in dispute; and (b) the amount in dispute.

OBLIGATION TO MINIMISE DELAY	CIVIL PROCEDURE ACT 2010 - SECT 25 Overarching obligation to minimise delay For the purpose of ensuring the prompt conduct of a <u>civil proceeding</u> , a <u>person</u> to whom the <u>overarching obligations</u> apply must use reasonable endeavours in connection with the <u>civil proceeding</u> to— (a) act promptly; and (b) minimise delay.
OBLIGATION TO DISCLOSE EXISTING DOCUMENTS	CIVIL PROCEDURE ACT 2010 - SECT 26 Overarching obligation to disclose existence of documents (1) Subject to subsection (3), a <u>person</u> to whom the <u>overarching obligations</u> apply must disclose to each <u>party</u> the existence of all documents that are, or have been, in that <u>person's</u> possession, custody or control— (a) of which the <u>person</u> is aware; and (b) which the <u>person</u> considers, or ought reasonably consider, are critical to the resolution of the dispute. (2) Disclosure under subsection (1) must occur at— (a) the earliest reasonable time after the <u>person</u> becomes aware of the existence of the document; or (b) such other time as a <u>court</u> may direct. (3) Subsection (1) does not apply to any document which is protected from disclosure— (a) on the grounds of privilege which has not been expressly or impliedly waived; or (b) under any Act (including any Commonwealth Act) or other law. (4) The overarching obligation imposed by this section— (a) is an ongoing obligation for the duration of the <u>civil proceeding</u> ; and (b) does not limit or affect a <u>party's</u> obligations in relation to discovery.