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CIVIL LITIGATION AFTERNOON

WEDNESDAY 11 MARCH 2026

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Navigating Leave Applications in Personal Injury Litigation

PRESENTED BY JOHN HENRY AND WAYNE SHARWOOD

WEDNESDAY 11 MARCH 2026



Applications for leave under section 79 of the Civil Law (Wrongs) Act 2002

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Section 79 of the Wrongs Act

- Provides that the court on application by a claimant may give leave to a claimant to begin a personal injuries proceeding despite noncompliance with Chapter 5 if satisfied that there is an urgent need to begin the proceeding.
- If leave is given the proceeding is stayed until the claimant complies with Chapter 5 or the proceeding is discontinued or otherwise ends.

Chapter 5 of the Wrongs Act

- Includes Part 5.2, sections 51 to 62, which sets out claims procedures and imposes an obligations
 - on claimants to give respondents a notice of claim before bringing a proceeding against someone else (s 51) and
 - on respondents to attempt to resolve claims within 6 months of receiving a notice of claim including by admitting or denying liability and offering to settle the claim (s 61).
- Also includes Part 5.3 which says that the purpose of the part is to put the parties in a position where they have enough information to assess liability and quantum and imposes obligations on claimants (s 64) and respondents (s 68) to give documents and, where requested, information.
- Part 5.4, sections 72 to 80, which deals with
 - legal privilege (s 72),
 - the consequences of failure to give a document (s 75),
 - the court's power to enforce compliance with Parts 5.2 and 5.3(s 78) and
 - the need for leave to commence proceedings where there has been noncompliance with Chapter 5 (section79)

Issues for determination

- Whether the only precondition to commencement of proceedings is the provision of a notice of claim to a respondent?
- How should leave be sought?
- Whether it is necessary for a claimant to seek leave under section 79 where the noncompliance is that of a respondent?
- What is the status of a proceeding brought without leave where there has been noncompliance with Chapter 5?

Maletic v Calvary Healthcare ACT Limited [2022]

ACTSC 231 (McCallum CJ)

- Plaintiff alleged negligence in relation to diagnosis of epilepsy in 2019.
- Diagnosis resulted in plaintiff taking medication which caused ongoing problems.
- On 9 March 2022 plaintiff was told by another doctor that epilepsy diagnosis was not correct and some ongoing problems were caused by the medication.
- On 1 July 2022, just prior to expiration of limitation period, plaintiff commenced proceedings.
- Plaintiff had not taken any of the steps required by Chapter 5 and had not sought leave under section 79.

Maletic

- Defendant sought stay for 6 months to enable plaintiff to comply with Chapter 5.
- Chief Justice stayed the proceedings for 6 months to allow the parties to comply with Chapter 5.
- She outlined the expectation of the court that if proceedings are commenced without compliance with Chapter 5 the plaintiff should include in the prayers for relief an application for leave to commence the proceedings.
- Chief Justice also accepted remarks from an earlier decision that the intent of the legislation was that personal injuries claim should be resolved quickly and noted that this was consistent with the obligation of the Court to determine proceedings promptly.

Rees-Wlodek v Calvary Healthcare ACT Limited [2025]

ACTSC 162 (McCallum CJ)

- Claims by mother and father of twins born at Calvary on 19 April 2022, one of whom died 3 weeks later allegedly as a result of injuries sustained during birth.
- Mother provided a notice of claim which was conclusively presumed to be compliant because of the failure of the respondent to respond within the time allowed under the Act.
- Father did not provide a notice of claim until 15 July 2024 with an explanation ('reasonable excuse') that he was suffering from depression as a result of the death of his child and the alleged negligence of the hospital.

Rees-Wlodek

- Plaintiffs served a liability report and psychiatric reports in response to a request for information from the respondent prior to commencing proceedings on 31 October 2024.
- Defendants filed a conditional notice of intention to respond alleging noncompliance with Chapter 5 and filed an application for a stay on 16 December 2024.
- Plaintiffs filed an application for leave which was determined by Chief Justice McCallum on 1 March 2024.

Rees-Wlodek

- Chief Justice noted the tension between section 51, which suggested that the only precondition to commencing proceedings was the provision of a notice of claim and section 79 which suggests that a claimant cannot commence proceedings until they have complied with obligations under Chapter 5.
- The plaintiffs' application for leave was neither consented to nor opposed and the Court found that there was an urgent need to commence proceedings because of the mental state of the plaintiffs.
- Accordingly, her Honour did not need to resolve the tension between sections 51 and 79 but provided some observations by way of obiter dicta.

Rees-Wlodek – observations of Chief Justice

- The clear purpose of Chapter 5 is to encourage and facilitate the resolution of claims without the need for litigation and in a manner that is timely and that minimises legal costs.
- The provisions in Chapter 5 are sufficiently flexible to accommodate many different types of claims including those that cannot be resolved within the time limits contemplated under the Act and allows proceedings to be commenced prior to the completion of the pre-court procedures.
- Proceedings commenced without compliance with Chapter 5 are not a nullity but section 79 imposes a requirement to obtain leave and if leave is granted the proceedings are stayed until the claimant complies.

Rees-Wlodek

- While proceedings may be commenced with leave before the completion of Chapter 5 steps the two processes (procedural steps under Chapter 5 and interlocutory processes under the court rules) should not ordinarily run side by side.
- A claimant can seek authorisation from the court under section 59 to proceed with a claim which is noncompliant if the respondent is not willing to waive noncompliance.
- A claimant may seek an order under section 78 from the court compelling a respondent to comply with a duty imposed under part 5.2 or 5.3 if they fail to do so.
- While acknowledging the confusion created by section 51, her Honour stated that *'the better view would appear to be that leave is required to commence proceedings before the Chapter 5 processes are complete but that the claimant can enforce compliance by bringing an application under section 78 to compel a defendant to comply with its obligations.'*

Ruspandini v Summernats(No 2) [2025] ACTSC 171 (McCallum CJ)

- Plaintiff filed an application under section 79 in proceedings seeking damages for two assaults allegedly committed by security guards at Summernats.
- Plaintiffs brought proceedings against Summernats organisation itself but, more relevantly, against two companies alleged to be the employer of the guards.
- Application heard by Chief Justice who made incidental comments (at [6]) about the urgent need requirement in section 79 noting that it has been satisfied where
 - (i) limitation periods were about to expire,
 - (ii) grief resulting from consequences of negligence (death of an infant) and subsequent delay in completing Chapter 5 procedures had contributed to claimants becoming suicidal,
 - and that other other obvious examples would be where (iii) the claimant had a shortened life expectancy or (iv) a respondent was evading responsibility for a claim

Ruspanini

- Plaintiff served a notice of claim on Reddawn on 17 September 2024.
- Reddawn's solicitor informed plaintiff that the security guards were employees of another company, Canberra Security, which provided personnel to Reddawn as an independent contractor.
- Plaintiff then served notice of claim on Canberra Security and told Reddawn that they would not be pursuing a claim against Reddawn.
- Director of Canberra Security spoke to the plaintiff's solicitor advising that the company had any employees at Summernats.

Ruspanini

- Plaintiff commenced proceedings against both Reddawn and Canberra Security (as well as Summernats).
- The Chief Justice was satisfied that at the time of commencement of proceedings there was nothing more the plaintiffs were required to do in order to comply with Chapter 5.
- She rejected a submission from Reddawn that the plaintiff was required to go back to Reddawn having received the denial from Canberra Security that their employees were at Summernats, to enable Reddawn to complete its investigations.
- She noted that Chapter 5 is highly prescriptive as to what a claimant is required to do and there was no warrant in the language of the statute for superimposing additional requirements.

Ruspandini

- The mistake as to employment was Reddawn's and plaintiff was entitled to proceed on the basis of information provided by Reddawn's solicitor.
- This meant that there was nothing further for the plaintiff to do and no need for leave to be obtained.
- However, as Reddawn had not had the opportunity to investigate and resolve the claim (albeit because of its own error) the Court was willing to consider granting a stay to enable that to occur.

Ruspanдини

- Counsel for the plaintiff that the only requirement for a claimant before commencing proceedings was to give written notice of the claim under section 51 and invited the Chief Justice to reconsider her decision in *Maletic*.
- Despite finding that leave under section 79 was not required in the present case, she reiterated her previous view that a claimant who wishes to commence proceedings despite noncompliance with Chapter 5 requires leave under section 79 (i.e. the claimant needed to comply with Chapter 5).

Ruspandini

- In reaching that conclusion her Honour stated that:

Reading chapter 5 as a whole it is clear that Parliament intended to create a regime that would serve to resolve claims for damages for personal injury in a manner that would avoid the cost and delays that attend the adversarial system of justice. The obligations of disclosure, cooperation and attempted resolution imposed by Chapter 5 are plainly calculated to be less expensive and more efficient than proceedings in court

Cook-Bateman v Adham [2025] ACTSC 173 (Baker J)

- On 17 August 2015 the plaintiff suffered an injury during surgery undertaken by the defendant.
- In August 2021 the plaintiff became aware as result of watching a report on the ABC program 7.30 that other medical negligence claims had been made against the defendant.
- On 23 August 2021 the plaintiff served a notice of claim on the defendant.
- On 9 August 2024 the plaintiff brought proceedings against the defendant.
- The plaintiff sought leave to commence proceedings relying on sections 59 (authorisation to proceed with a claim despite not giving a complying notice of claim where the respondent did not waive noncompliance) and 79.

Cook-Bateman

- The parties informed the Court that there was a dispute as to whether the Statement of Claim was filed outside the period provided by section 16B of the Limitation Act 1985.
- Justice Baker noted that that issue was not before her and raises a novel question about the proper construction of the section.
- The defendant submitted that the granting of leave would be futile because the claim was statute barred.
- Her Honour granted the authorisation to proceed and leave to commence the proceeding because
 - there was an urgent need to commence the proceeding in view of the limitation issue,
 - while not determining the limitation issue she was not satisfied that granting the application would be futile,
 - the plaintiff would suffer real and irreparable prejudice if the application was not granted and
 - the defendant would not suffer irreparable prejudice as a result of the delay.

Cook-Bateman

- Her Honour noted that the automatic stay under subsection 79 (3) only operates until the claimant complies with Chapter 5 even though the stay is consequent upon non-compliance with Chapter 5 by either party [29], that many of the obligations on a claimant only arise upon a request by the respondent meaning that there may be uncertainty as to precisely when the stay will end.
- Accordingly, she ordered that the proceedings be stayed for 6 months but encouraged the parties to comply with their Chapter 5 obligations as expeditiously as possible.

Moy v ACT [2025] ACTSC 505 (Muller AJ)

- Plaintiff had commenced proceedings in relation to injuries sustained on 1 June 2022 when he tripped and fell on a protruding hydrant cover while jogging on a footpath.
- Territory (First Defendant) sought stay of proceedings against it and Icon (Second Defendant) pending the granting of leave to the Plaintiff to proceed under section 79.
- The Territory filed an unconditional notice of intention to respond.
- Plaintiff had provided a notice of claim against the Territory on 27 July 2022 and at a later date against Icon.
- The Territory informed the Plaintiff that the protruding cover was the responsibility of Icon and that the Territory was thus not a proper respondent to the claim.

Moy

- Section 52 of the Wrongs Act sets out what is to occur where a respondent denies that it is a proper respondent to a claim.
- The proper respondent issue, and whether the Plaintiff had done what was required under section 52, was the subject of considerable correspondence with the Territory ultimately accepting that it had become a proper respondent after receiving further correspondence from the Plaintiff the day before proceedings were commenced.
- As is noted in the judgment, that made it unsurprising that the parties did not have the opportunity to attend to Chapter 5 obligations prior to the commencement of proceedings.

Moy

- The Territory invited the Plaintiff to make an application under section 79 but the Plaintiff declined to do so.
- The Territory sought a stay pending the determination of any application for leave by the Plaintiff under section 79.
- Acting Justice Muller reviewed the authorities including those referred to earlier and concluded that their effect was that:
 - The commencement of proceedings invokes the court's jurisdiction and enlivens its obligations under section 5A of the Court Procedures Act;
 - Section 51 requires a claimant to give written notice of a claim to the respondent before commencing proceedings;
 - Section 59 prevents a claimant from proceeding further with the claim if a complying notice has not been given except where the respondent indicates that they are satisfied that the notice is compliance, that any noncompliance has been rectified or waives any noncompliance or a court finds the noncompliance has been rectified or allows the claimant to proceed.

- The court's power under section 59 can be exercised before or after the commencement of proceedings.
- Section 79 imposes a requirement to seek leave to commence proceedings in urgent circumstances where there is noncompliance with any part of Chapter 5.
- The court must be satisfied (in order to grant leave under section 79) that there is an urgent need to commence proceedings .
- Proceedings commenced without leave are not a nullity.
- Where leave is given under section 79 the proceedings are generally stayed pursuant to section 79 (3) until the claimant complies or the proceedings are otherwise ended.
- A party may apply for orders under section 78 compelling another party to comply with a duty under Part 5.2 or 5.3 of Chapter 5.

Moy

- Sections 51 and 79 suggest different answers to the question of whether proceedings may be commenced simply by serving a complying notice of claim or whether compliance with the entirety of Chapter 5 is required in order to begin proceedings.
- The position of a claimant who has commenced proceedings with the requirements of Chapter 5 still outstanding who is therefore unable to avail themselves of leave under section 79 is unclear but the better view is that those proceedings may continue in the usual way unless and until the defendant invokes its right to contest the plaintiff's noncompliance.
- In Moy the plaintiff had provided a complying notice of claim, the Territory had accepted that it was properly a respondent (albeit only just before proceedings had been commenced) and his Honour noted that there was no suggestion of the plaintiff having other material that he was required to disclose under section 64.

Moy

- His Honour noted that the noncompliance with Chapter 5 was largely that of the Territory (having earlier commented that that noncompliance was not surprising in view of the history of the matter) and that the plaintiff had complied with his obligations and accordingly it was not appropriate for the stay to be imposed.
- There is no clear statement in Moy that the requirement to obtain leave under section 79 only arises where the noncompliance with Chapter 5 is that of the claimant.
- However, that is the inference that arises from the decision.

- Returning to the issues for determination:
 - Whether the only precondition to commencement of proceedings is the provision of a notice of claim to a respondent?
 - **Answer:** yet to be conclusively determined by a court decision. Obiter comments of Chief Justice in Rees-Wlodek and Ruspandini suggest that the answer is no.
 - How should leave be sought?
 - **Answer:** by including in the prayers for relief an application for leave to commence the proceedings notwithstanding noncompliance with Chapter 5.
 - Whether it is necessary for a claimant to seek leave under section 79 where the noncompliance is that of a respondent?
 - **Answer:** yet to be conclusively determined. Moy suggests that the answer is no but Baker J in Cook-Bateman seemed to accept that the need for leave arose where there had been noncompliance by either party even though the statutory stay remained in place until the claimant complied. In Moy and Ruspandini the Court concluded that the claimants had complied with their obligations and dismissed the application for a stay (Moy) and concluded that the plaintiff did not require leave under section 79 (Ruspandini).
 - What is the status of a proceeding brought without leave where there has been noncompliance with Chapter 5?
 - **Answer:** it is not a nullity and Acting Justice Muller's comments in Moy suggest it is a matter for a respondent to raise any issue of noncompliance. While not clear, his Honour may have been implying that if the respondent did so the proceeding may be stayed to enable the parties to comply with Chapter 5.
- It seems fairly clear that the intent of the legislature in enacting Chapter 5 was to facilitate and encourage the early resolution of personal injuries claims and to avoid litigation where possible. Section 79 was presumably intended to assist in achieving those aims. In principle the procedures in Chapter 5 are reasonable and sensible and if followed may in some cases lead to early resolution and in others at least result in there being clarity as to the issues in dispute. In practice, the timeframes are unrealistic and, in medical negligence cases or where quantum is significant, few cases are able to be resolved at the pre-court stage.

Protected Confidences

Div 4.4.3 of the *Evidence (Miscellaneous Provisions) Act 1991*

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What are protected confidences?

Some definitions – the *Evidence (Miscellaneous Provisions) Act 1991*

- s79A(1) For this division, a **protected confidence** is a counselling communication made by, to or about a person against whom a sexual offence or family violence offence was, or is alleged to have been, committed (the **counselled person**)
- **counselling communication** – (see s79A(3))
 - made in circumstances that give rise to a reasonable expectation of confidentiality or
 - a duty of confidentiality
 - broadly, involving a **counsellor** – defined (training, study, experience)
- **sexual offence** – s79A(5) – (see parts 3, 4, and 5 of the *Crimes Act 1900*)
- **family violence offence** – s79A(5) – (see also *Family Violence Act 2016*)

What are protected confidences?

- s79D
 - (1) applies to a **proceeding**
 - (2) a protected confidence must not be disclosed in, or for the purposes of, the proceeding unless the court dealing with the proceeding gives leave for the disclosure (**NB.** proposed amendment where leave will not be required: the disclosure can be made in accordance with new section 79J i.e., with the consent of the counselled person)
 - (3) without limiting (2):
 - a person cannot be required to produce a document recording a protected confidence without leave
 - protected confidence evidence is not admissible without leave

What are protected confidences?

- Division 4.4.3 applies whether or not a person who has made a protected confidence consents or does not object to the disclosure of the protected confidence (s79J)
- The division does not apply in relation to
 - information obtained by a doctor because of a physical examination of a person against whom a sexual offence or family violence offence was, or is alleged to have been, committed; or
 - any communication made in the course, or because, of the examination (s79K)

The balancing of competing interests

- *Stanley v Commonwealth* [2023] ACTSC 157 per McCallum CJ at [11]:
 - “The provisions of div 4.4.3 implicitly recognise that therapeutic counselling is important in the management of trauma and that trust and confidentiality are critical to its success. At the same time, it is recognised that there will be cases in which an accused person or, as here, a party to civil proceedings has a legitimate purpose for obtaining access to a complainant’s counselling notes. A balance is struck between those competing interests by creating a qualified immunity in respect of counselling communications concerning a complainant in sexual assault or family violence proceedings. The immunity is qualified to the extent necessary to protect the interests of other parties in legal proceedings. The mechanism by which those competing interests are balanced is to require a person seeking disclosure of a protected confidence first to obtain leave.”

Applications for leave

Formalities

- An application for leave must:
 - be in writing (79E(1)(a))
 - set out the leave sought (79E(1)(b))
 - set out the arguments in support including:
 - identify a legitimate forensic purpose for seeking leave
 - satisfy the court of an arguable case that the evidence would materially assist the applicant's case(see 79E(1)(c) and 79F(2))
 - set out the nature of the protected confidence evidence (if known) (79E(2))
 - set out or be accompanied by a copy of any relevant documents (79E(2))

Applications for leave

Notice to the counselled person

- Subject to 79E(6) (e.g., cannot be found, consents to not being notified, previously notified), mandatory notice of the application is to be given to the counselled person (79E(3)) stating:
 - the known protected confidence evidence (79E(4))
 - that they may appear under s79IA (79E(4))
 - the date of the application (79E(4))
- NB. the court must not determine the application for 14 days after notice is given to the counselled person (79F(3)) unless satisfied it is in the interests of justice (79F(4))

When to seek leave

- Despite some interpretation issues, “the question of leave to disclose a protected confidence will fall to be considered at several different stages of the litigation and in respect of several different kinds of disclosure”: (see *Stanley* at [17]-[18])
 - (1) leave to compel production of protected confidences to the court;
 - (2) leave to inspect and make use of protected confidences; and
 - (3) leave to adduce the evidence in the proceedings

When to seek leave

(1) leave to compel production of protected confidences to the court

- (1) leave to compel production of protected confidences to the court
 - to be determined on the basis of an “arguable case” – a reasonable possibility in the light of known facts (*Stanley* at [20], *R v Chute* [2019] ACTSC 197 [9] to [19])
 - sufficient if the disclosure “assists”, even if it will not advance a party’s case (*Stanley* at [21] to [22] citing *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145)
 - if no legitimate forensic purpose, leave must be refused (s79F(1))
 - the decision whether or not to refuse leave must be made before a preliminary examination of the protected confidence evidence under s79G

When to seek leave

(2) leave to inspect and make use of protected confidences

- (2) leave to inspect and make use of protected confidences
 - once the documents are available – the preliminary examination (see more below)
 - a more stringent test – s79H
- (3) leave to adduce the evidence in the proceedings
 - a matter for the trial judge

The preliminary examination

- If satisfied that there is a legitimate forensic purpose, the court conducts a preliminary examination of the protected confidence evidence under section 79G
 - the examination must be:
 - in the absence of the public
 - in the absence of the parties and their lawyers, unless otherwise decided by the court (79G(6)), and
 - prima facie, the evidence is not to be disclosed (see 79G(7) and (8))

The preliminary examination

- The court may require:
 - the custodian/controller of a document to produce the document (s79G(2)(a)),
 - the counsellor to give written answers to questions or attend for oral examination (if necessary) (s79G(2) and (4))
- The court may permit the counselled person to make a written statement about the harm they might suffer if leave is given (s79G(3)) – this is not to be disclosed (s79G(7)(a))
- A record of the preliminary examination must be made, but must not be made available for public access (s79G(8))

After the preliminary examination

Giving leave to disclose

- The court may give leave for disclosure only if satisfied the public interest in ensuring the proceeding is conducted fairly outweighs the public interest in preserving the confidentiality of the protected confidence (79H(1)(a))
- In making that decision, the court must have regard to (s79H(3)):
 - the public interest in ensuring that victims of sexual offences receive effective counselling or other treatment; and
 - the extent to which disclosure of protected confidences may dissuade victims of sexual offences from seeking counselling or other treatment or diminish the value of counselling or other treatment; and
 - whether the evidence will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available about the matters to which the evidence relates; and

After the preliminary examination

Giving leave to disclose (continued)

- the court must also have regard to:
 - the likelihood that disclosure of the protected confidence will affect the outcome of the case; and
 - whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
 - whether the person to or by whom the protected confidence was made objects to the disclosure of the protected confidence; and
 - the nature and extent of the reasonable expectation of confidentiality for the protected confidence and the potential prejudice to the privacy of anyone, including to the extent to which any interest in confidentiality or privacy has been lessened by the passage of time or the happening of any event since the protected confidence was made.

After the preliminary examination

Giving leave to disclose

- Leave may be given subject to conditions (79H(5))
- The court may make any order it considers appropriate to limit possible harm, or the extent of possible harm, to a person who made a protected confidence by the disclosure of protected confidence evidence (79I(1)) (e.g. closing the court while the evidence is presented)

Some issues

- How will a practitioner know that there might be a protected confidence?
- Law reform - *Family, Personal and Sexual Violence Legislation Amendment Bill 2025* (presented 3 December 2025)

Questions?





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