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A key problem in contemporary Australian family law arises when lawyers neglect the responsibilities recognised in r 1.08 Family Law Rules 2004 as necessary to "ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case", and the relevant court then fails to hold them to account.

The key issue is a critical lack of epistemic awareness and responsibility, resulting in epistemic neglect or even evasion, with regard to the law on the one hand, or to their client's marriage history and circumstances on the other. Commentary on Part 1.2 of the Rules and s 43 of the Act is sparse, suggesting they are largely ignored in practice and their implications seldom explored. Uninformed advice can lead a well-intentioned and trusting client to act negligently in joint business or property responsibilities, for instance, or to abuse their former spouse, and subsequently to unwittingly make a perverse family law application designed to conceal the misguided action and to protect the lawyer. In such circumstances the family courts must require the lawyer to pay for the parties' associated loss for there to be any just resolution of their case.

In Thompson & Berg [2014] FamCAFC 73 the Full Court (May, Ainslie-Wallace & Ryan JJ) ruled in effect that r 1.08 responsibilities did not apply in family law cases conducted in the Federal Circuit Court of Australia. This judgment is incontrovertibly wrong for a number of reasons. Firstly, it does not consider the distinction between responsibilities created by the making of a rule (like the arbitrary r 1.05 pre-action procedures specific to the Family Court of Australia that were not part of the husband's argument but were presented in the judgment as involved) and responsibilities that are recognised in the writing of a rule as essential to the administration of the Act. The structure of Part 1.2 establishes the r 1.08 responsibilities as of the latter sort, and some of them imply epistemic, dialogic and collaborative requirements for the pre-application phase of a matter. Secondly, it would follow from the Full Court's reasoning that in the FCCA there is no responsibility to comply with the duty of disclosure, which is the content of r 1.08(1)(b). Thirdly, the judgment nowhere ponders the nature of the actual responsibilities cited and whether they were dispensable. In fact r 1.08(1)(i) is mentioned but not even quoted: "being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact". Fourthly, there is no recognition in the judgment of the linkage between failure to discharge the responsibilities cited and the creation of a miscarriage of justice as in s 79A(1)(a) of the Act.

In Thompson & Berg special leave to appeal to the High Court was refused (HCASL 190 (15 October 2014) Hayne & Crennan JJ) without respondent input or the requested oral hearing of the matter.

There would be immense utility for the administration of justice if there was a mechanism that allowed a judgment to be reconsidered by the same judge(s) on a claim of incontrovertible error made within 28 days. If the claim were accepted and the judgment changed, an appeal may be avoided. If the claim was rejected but found on appeal to be correct, then this would put the primary judge's competence in question in a way that does not arise when the matter is arguable. Incorrect claims of incontrovertible error would need to have consequences on the errant counsel or litigant if unrepresented.