HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S530/2005

ANDREW BATISTATOS BY HIS TUTOR
WILLIAM GEORGE ROSEBOTTOM APPELLANT

AND

ROADS AND TRAFFIC AUTHORITY OF
NEW SOUTH WALES RESPONDENT

Matter No S531/2005

ANDREW BATISTATOS BY HIS TUTOR
WILLIAM GEORGE ROSEBOTTOM APPELLANT

AND

NEWCASTLE CITY COUNCIL RESPONDENT

Batistatos v Roads and Traffic Authority of New South Wales
Batistatos v Newcastle City Council
[2006] HCA 27
14 June 2006
S530/2005 & S531/2005

ORDER

In each matter, the appeal is dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

Matter No S530/2005

B M Toomey QC with S J Maybury for the appellant (instructed by T D Kelly & Co)

I D Temby QC with C F Hodgson for the respondent (instructed by Crown Solicitor for New South Wales)

Matter No S531/2005

B M Toomey QC with S J Maybury for the appellant (instructed by T D Kelly & Co)

M J Joseph SC with S P W Glascott for the respondent (instructed by Phillips Fox Lawyers)

CATCHWORDS

Batistatos v Roads and Traffic Authority of New South Wales
Batistatos v Newcastle City Council

Abuse of Process – Delay – Proceedings commenced in 1994 in respect of causes of action which accrued in 1965 – Appellant suffered quadriplegia and other injuries in motor accident allegedly caused by the negligence of, and nuisance created by, the respondents – Appellant born mentally retarded and later orphaned – Applications brought by respondents for summary dismissal or permanent stay for abuse of process – Whether, due to the effluxion of time since the causes of action accrued, a fair trial was not possible for the respondents.

Abuse of Process – Delay – Factors to be considered in determining whether delay precludes the conduct of a fair trial – Whether actions commenced by appellant untenable or futile – Whether actions commenced by appellant present real question to be determined – Sufficiency of evidence – Relevance of fundamental right to bring legal proceedings – Relevance of summarily denying right to a trial – Relevance of appellant's severely disabled condition – Relevance of the extent of the investigations made by the parties – Relevance of the disparity in the economic resources of the parties – Relevance of fact that the 30 year ultimate limitation bar had not yet descended.

Limitation of Actions – Appellant born mentally disabled and suffered quadriplegia in the accident out of which these proceedings arose – Appellant's causes of action not subject to 6 year limitation period which would otherwise have been imposed by the *Limitation Act* 1969 (NSW) by reason of the appellant's disabilities – Actions commenced within 30 year ultimate limitation period – Whether *Limitation Act* 1969 (NSW) precludes court from summarily dismissing or permanently staying proceedings for abuse of process when actions commenced before expiry of limitation period – Whether exercise of power to dismiss or stay in such circumstances is exceptional and requires proof of oppressive or contumelious conduct on the part of the plaintiff.

Courts – Powers of courts – Whether supplementary power of Supreme Court of New South Wales properly described as inherent or implied – Distinction between inherent powers and implied powers – Basis from which the State Supreme Court derives its jurisdiction to summarily dismiss or permanently stay proceedings.

Courts – Powers of courts – Jurisdiction – Rules of Court – Whether Rules of Court are exhaustive of the circumstances in which the Supreme Court can

dismiss or stay proceedings for abuse of process – Weight to be given to the relevant legislative context in exercising discretion to dismiss or stay proceedings – Where both Rules of Court and supplementary jurisdiction empower Supreme Court to stay or dismiss proceedings for abuse of process – Relationship between supplementary jurisdiction and Rules of Court.

Words and phrases – "abuse of process", "delay", "inherent jurisdiction", "implied jurisdiction".

Limitation Act 1623 (Imp) (21 Jac I c 16), ss 3, 7.
Limitation Act 1969 (NSW), ss 5, 11(3), 51(1), 52.
Supreme Court Act 1970 (NSW).
Supreme Court Rules (NSW), Pt 13 r 5.

1 GLEESON CJ, GUMMOW, HAYNE AND CRENNAN JJ. These appeals from the New South Wales Court of Appeal[1] were heard together. The issues which arise illustrate the point made by Griffith CJ in *Varawa v Howard Smith Co Ltd*[2] that the term "abuse of the process of the Court" has been (as it still is) used in many senses. Reference to some of these senses of the term should first be made.

The meaning of "abuse of process"

2 The process with which these appeals is concerned is that of the Supreme Court of New South Wales. But it appears that the procedures of non-curial bodies may attract the "abuse of process" doctrines. Thus, an unchallenged assumption underlying the majority decision of this Court in *Walton v Gardiner*[3], to which extensive reference was made in submissions in these appeals, was that the entertainment by a tribunal constituted under the *Medical Practitioners Act* 1938 (NSW) of complaints referred to it, might be stayed as constituting an abuse of process. However, in his dissenting judgment, Brennan J carefully distinguished the concept of alien purpose seen in the principles respecting abuse of administrative power, where the focus is upon the purpose of the repository of the power, rather than upon the purpose of the moving party[4].

3 Distinctions also are to be drawn between an order staying pending proceedings as abusive (with which these appeals are concerned) and an action for what have become recognised in Australia as the torts of malicious prosecution and of collateral abuse of process. In their discussion of the subject in *Williams v Spautz*[5], Mason CJ, Dawson, Toohey and McHugh JJ remarked[6]:

> "Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers."

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1 *Newcastle City Council v Batistatos*; *Roads & Traffic Authority of NSW v Batistatos* (2005) 43 MVR 381.

2 (1911) 13 CLR 35 at 55.

3 (1993) 177 CLR 378. See also *Herron v McGregor* (1986) 6 NSWLR 246.

4 (1993) 177 CLR 378 at 410.

5 (1992) 174 CLR 509 at 522-526.

6 (1992) 174 CLR 509 at 523.

From what follows in these reasons, it will be apparent that the central requirement specified in the above passage does not apply outside the area of tort.

4 There is a further point to be made here. Objections by plaintiffs to the exercise of the power to order a stay which rely upon the point that there are available to the defendant remedies in tort have not prevailed. The reason was explained in the joint judgment in *Williams v Spautz* as follows[7]:

> "Neither the action for malicious prosecution nor the action for collateral abuse offers the prospect of early termination of the subject proceedings. An action for malicious prosecution cannot be brought until those proceedings have terminated. Although an action for collateral abuse can be brought while the principal proceedings are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process which the court should not permit to continue."

5 These appeals concern abuse of process as understood in the exercise of the "inherent jurisdiction" of superior courts to stay proceedings. The phrase "inherent jurisdiction" itself is a slippery one. In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*, Gleeson CJ, Gaudron and Gummow JJ remarked[8]:

> "'Jurisdiction' and 'power' are not discrete concepts. The term 'inherent jurisdiction' may be used, for example in relation to the granting of stays for abuse of process, to describe what in truth is the power of a court to make orders of a particular description[9]. In *Harris v Caladine*[10], Toohey J said:
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> > 'The distinction between jurisdiction and power is often blurred, particularly in the context of "inherent jurisdiction". But the distinction may at times be important. Jurisdiction is the

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7 (1992) 174 CLR 509 at 520.

8 (2001) 204 CLR 559 at 590 [64].

9 *Williams v Spautz* (1992) 174 CLR 509 at 518-519.

10 (1991) 172 CLR 84 at 136; see also *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 450-452 [49]-[54]; *DJL v Central Authority* (2000) 201 CLR 226 at 242-243 [30]-[31].

> authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred"[11]'."

Reference in this regard also may be made to the judgment of McHugh J in *Solomons v District Court (NSW)*[12], and to that of Gummow, Hayne and Heydon JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v B*[13].

6 Accordingly, in *Hunter v Chief Constable of the West Midlands Police*[14] Lord Diplock used the term "inherent power" rather than "inherent jurisdiction". In *Walton v Gardiner*[15], the majority, Mason CJ, Deane and Dawson JJ, accepted as correct the passage in *Hunter*[16] in which Lord Diplock spoke of "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". His Lordship went on to describe as "very varied" the circumstances where "abuse of process" can arise[17]. It will be necessary to return to that consideration later in these reasons.

7 In *Hunter*[18], Lord Diplock disavowed the use of the word "discretion" in describing the exercise of the power to prevent abuse of process. Thereafter, in

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11 *Parsons v Martin* (1984) 5 FCR 235 at 241; see also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630-631.

12 (2002) 211 CLR 119 at 140-141 [43].

13 (2004) 219 CLR 365 at 395 [69].

14 [1982] AC 529 at 536.

15 (1993) 177 CLR 378 at 393.

16 [1982] AC 529 at 536.

17 [1982] AC 529 at 536.

18 [1982] AC 529 at 536.

R v Carroll[19], Gaudron and Gummow JJ observed that the use of the term "discretion" in this context indicates no more than that, although there are some clear categories, "the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse". They added[20]:

> "It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not. However, as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration."

8 A further distinction must now be drawn. It is accepted that the inherent power identified by Lord Diplock applies to both civil and criminal proceedings. However, the power does so with somewhat different emphases attending its exercise. In *Williams v Spautz*, Mason CJ, Dawson, Toohey and McHugh JJ identified two fundamental policy considerations affecting abuse of process in criminal proceedings. Their Honours said[21]:

> "The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."

These considerations are not present with the same force in civil litigation where the moving party is not the State enforcing the criminal law. Earlier, in *Jago v District Court (NSW)*, Mason CJ had observed[22]:

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19 (2002) 213 CLR 635 at 657 [73].

20 (2002) 213 CLR 635 at 657 [73].

21 (1992) 174 CLR 509 at 520.

22 (1989) 168 CLR 23 at 26.

> "[T]he criteria for determining what amounts to injustice in a civil case will necessarily differ from those appropriate to answering the question in a criminal context."

Abuse of court process

9 What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues. One example is the line of authority dealing with the stay of proceedings instituted in a second forum where there are pending proceedings in another forum and the continuance of the second proceedings would be an abuse of the process of the first forum[23]. Again, in *Cardile v LED Builders Pty Ltd*[24], Gaudron, McHugh, Gummow and Callinan JJ referred to the passage in the joint judgment in *CSR Ltd v Cigna Insurance Australia Ltd*[25] where it was said of the grant of an anti-suit injunction that the counterpart of the power of a court to prevent the abuse of its processes was the power of the court to protect the integrity of those processes once set in motion. Their Honours in *Cardile* were dealing with the doctrinal foundation of asset preservation orders, and continued[26]:

> "The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor[27]. The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation."

10 A convenient starting point for consideration of the development that has occurred is the statement made by Lord Blackburn in 1885, in a case frequently

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23 *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141; *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners* (1908) 6 CLR 194; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

24 (1999) 198 CLR 380 at 393 [25].

25 (1997) 189 CLR 345 at 391.

26 (1999) 198 CLR 380 at 393 [25]

27 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 638.

cited in Australian courts[28]. The causes of action at stake in *Metropolitan Bank Ltd v Pooley*[29] were in tort. Lord Blackburn said[30]:

> "[F]rom early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action."

11 The references by Lord Blackburn to "power" rather than to "jurisdiction" and to the summary procedure whereby the court informed its conscience upon affidavits are significant.

12 Several other points are to be made respecting that statement in *Metropolitan Bank*. The first is that Lord Blackburn treated vexatious process as synonymous with, or at least an instance of, abuse of process. Secondly, the issues to be considered go beyond a question as to whether the claim or defence in question is bad in law; the demurrer was developed to deal with that situation. Thirdly, and as later emphasised in this Court in authorities to which reference has already been made in these reasons, Lord Blackburn indicated that the power existed to enable the court to protect itself from abuse of its process thereby safeguarding the administration of justice. That purpose may transcend the interest of any particular party to the litigation.

13 It should be added that, in this Court, it has yet to be determined whether the inherent power identified by Lord Blackburn is, like the power to punish

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28 For example, *Tringali v Stewardson Stubbs & Collett Pty Ltd* [1966] 1 NSWR 354 at 361; (1966) 66 SR (NSW) 335 at 345; *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 at 228; *Herron v McGregor* (1986) 6 NSWLR 246 at 250; *Mickelberg v The Queen* (1989) 167 CLR 259 at 312; *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74.

29 (1885) 10 App Cas 210.

30 (1885) 10 App Cas 210 at 220-221.

contempt[31], an attribute of the judicial power of the Commonwealth provided in Ch III of the Constitution. However, in this Court much attention has been given to the nature and extent of the inherent power to deal with abuse of process.

14 In *Ridgeway v The Queen*, Gaudron J explained[32]:

> "The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose[33], as well as proceedings that are 'frivolous, vexatious or oppressive'[34]. This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard[35]. That is necessarily so. Abuse of process cannot be restricted to 'defined and closed categories'[36] because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case[37]. That is not to say that the concept of 'abuse of process' is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose[38] and it is clear that

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31 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 394-397 [15]-[25], 429 [113].

32 (1995) 184 CLR 19 at 74-75. See also the remarks of Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 768 [74]-[75]; 214 ALR 92 at 109-110.

33 *Williams v Spautz* (1992) 174 CLR 509.

34 See, eg, *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210.

35 See, eg, *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 242-243, 246-247, and the cases there cited.

36 *Hamilton v Oades* (1989) 166 CLR 486 at 502, citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 and *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 340, 344. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-26, 47-48, 74; *Walton v Gardiner* (1993) 177 CLR 378 at 393-395; *Rogers v The Queen* (1994) 181 CLR 251 at 255, 285-286.

37 See *Dietrich v The Queen* (1992) 177 CLR 292 at 328-329, 364.

> it extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging'[39] or 'productive of serious and unjustified trouble and harassment'[40]."

15 Earlier, in *Rogers v The Queen*, McHugh J observed[41]:

> "Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute."

His Honour added[42]:

> "Many, perhaps the majority of, cases of abuse of procedure arise from the institution of proceedings. But any procedural step in the course of proceedings that have been properly instituted is capable of being an abuse of the court's process."

To that it should be added that the power to deal with procedural abuse extends to the exclusion of particular issues which are frivolous and vexatious[43]. Further, the failure to take, as well as the taking of, procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of the process of the court.

16 The width of these propositions, drawn from judgments in this Court, the appellant seeks to restrict. The appellant relies in particular upon a House of

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38 As to what constitutes improper purpose, see *Williams v Spautz* (1992) 174 CLR 509 at 526-530, 532-537, 553-556; see also at 543-551.

39 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247.

40 *Hamilton v Oades* (1989) 166 CLR 486 at 502.

41 (1994) 181 CLR 251 at 286.

42 (1994) 181 CLR 251 at 286.

43 *Mickelberg v The Queen* (1989) 167 CLR 259 at 312.

Lords decision which predated *Hunter*[44], namely *Birkett v James*[45]. It will be necessary to return to *Birkett v James* later in these reasons.

Delay and the "inherent jurisdiction"

17 The appellant in this Court wishes to be freed of the permanent stay upon his actions which was imposed by the Court of Appeal. The causes of action he asserts are given by the common law and are subject to any applicable statutory limitation but not to equitable defences of laches, acquiescence and delay. Those defences, in relation to a suit to establish the existence of a trust of land, were considered by this Court in *Orr v Ford*[46]. It was accepted by the majority that prejudice occasioned by the loss of evidence as a result of delay by the plaintiff might be raised as part of a defence of laches[47].

18 The absence in the Anglo-Australian common law of the importation of such equitable doctrines as laches, acquiescence and delay as defences to legal claims to legal remedies has emphasised the significance of the development of the inherent power with respect to abuse of process to supplement the "long-stop" barriers imposed by limitation statutes. In various jurisdictions in the United States, matters developed rather differently. First, various judicially developed "tolling doctrines" may be relied upon by plaintiffs to *lengthen* statutory limitation periods[48]. Secondly, the doctrine of laches has been used to *shorten* statutory periods; and, in that respect, laches has been treated as a defence available equally in actions at law[49].

Inherent power and Rules of Court

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44 [1982] AC 529.

45 [1978] AC 297.

46 (1989) 167 CLR 316.

47 (1989) 167 CLR 316 at 330.

48 See the discussion by Ormiston JA in *Kuek v Victoria Legal Aid* [1999] 2 VR 331 at 339-340.

49 *Teamsters & Employers Welfare Trust of Illinois v Gorman Bros Ready Mix* 283 F 3d 877 at 881 (2002), where the leading judgment of the Court of Appeals for the Seventh Circuit was delivered by Judge Posner.

19 Rules of Court in their various forms may be influenced by, and to differing degrees restate, the characteristics of the inherent power to stay for abuse of process. That relationship between the Rules of the Supreme Court of New South Wales and its inherent power is significant for understanding the issues of the present appeals. Before turning to the facts and the history of the litigation in the Supreme Court, something more should be said of the development of the inherent power alongside the formulations found in Judicature system Rules of Court, such as those in New South Wales introduced by the Fourth Schedule to the *Supreme Court Act* 1970 (NSW) ("the 1970 Act").

20 In England, the demurrer was abolished in 1883[50] and replaced by provisions in RSC, O XXV rr 3-4 which were described as forms of proceedings "in lieu of demurrer". Among other things, RSC, O XXV r 4 then empowered the court to order a pleading to be struck out on the ground that it disclosed "no reasonable cause of action or answer". In that case, and also in the case of the action or defence being shown by the pleadings "to be frivolous or vexatious", the court might order the action to be stayed or dismissed or judgment to be entered accordingly, as might be just. The first limb of the new rule might be seen as providing a procedure in place of the demurrer (overlapping r 3 which created the procedure by which a preliminary point of law can be taken on the pleadings and dealt with separately). However, the second limb, with its reference to frivolous or vexatious actions or defences, went further and into the field of abuse of process. Yet it was decided that the procedure under r 4 did not permit the court to inform itself by affidavits, so that if the pleading did not disclose that the action was bad on its face and extrinsic evidence was required to show that the action was bad, the rule did not apply[51].

21 Hence the point made by Professor Jolowicz[52] that it was not surprising that the English courts held soon after 1883 that the inherent jurisdiction was unaffected by the introduction of r 4. Hence also the emphasis by Dixon J in *Dey v Victorian Railways Commissioners*[53] upon the inherent authority of the

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50 Rules of the Supreme Court 1883, O XXV r 1. But, in this Court, see High Court Rules 2004, r 27.07.

51 *Attorney-General of the Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274 at 278; *Goodson v Grierson* [1908] 1 KB 761 at 764; Winfield, *The Present Law of Abuse of Legal Procedure*, (1921) at 240.

52 "Abuse of the Process of the Court: Handle With Care", (1990) 43 *Current Legal Problems* 77 at 83.

53 (1949) 78 CLR 62 at 91.

Supreme Court of Victoria to stop the abuse of its process when employed for groundless claims. His Honour indicated that the question on the summons to dismiss the plaintiff's action did not arise on the statement of claim and involved no matter of pleading. The local equivalent of RSC, O XXV r 4 therefore did not apply. Rather, the application, which was supported by affidavit evidence, invoked the inherent powers of the Supreme Court of Victoria.

22 However, things were to change. The revised Rules of the Supreme Court introduced in England in 1962[54] permitted evidence on strike-out applications and the phrase "an abuse of the process of the court" appeared in terms[55]. The result in England was described by Professor Jolowicz[56] as incorporating in the 1962 Rules the inherent jurisdiction and supplying two sources, express and inherent, from which the court drew power to bring the proceedings to an end in summary fashion.

23 In New South Wales, as introduced in the Fourth Schedule to the 1970 Act, Pt 13 r 5 of the Supreme Court Rules ("the Rules") provided:

> "(1) Where in any proceedings it appears to the Court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings –
>
> (a) no reasonable cause of action is disclosed;
>
> (b) the proceedings are frivolous or vexatious; or
>
> (c) the proceedings are an abuse of the process of the Court,
>
> the Court may order that the proceedings be stayed or dismissed generally or in relation to any claim for relief in the proceedings.
>
> (2) The Court may receive evidence on the hearing of an application for an order under subrule (1)."

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54 Rules of the Supreme Court (Revision) 1962.

55 RSC, O 18 r 19(1)(d).

56 "Abuse of the Process of the Court: Handle With Care", (1990) 43 *Current Legal Problems* 77 at 84-85.

Part 13 r 5 remained unchanged and was in force at the time of the events giving rise to these appeals[57].

24 If the provenance of Pt 13 r 5 is kept in mind, it is apparent that it serves several purposes, not all of a piece. Rule 5(1)(a) may be traced to the provision made in England in 1883 after the departure of the demurrer. Paragraph (b) of r 5(1) may be seen as a species of the genus of abuse of process identified specifically for the first time in par (c).

25 A further and significant consideration is that, at the critical time for this litigation, there existed in the Supreme Court both the inherent jurisdiction or power to which reference has been made and the power under Pt 13 r 5 of the Rules to order a stay or dismissal of proceedings as an abuse of the process of the court, in each situation evidence being admissible on an application.

26 It is with the several fields of operation of Pt 13 r 5 itself and with the duality of available avenues with respect to the agitation of allegations of an abuse of process leading to stay or dismissal, and the attendant possibility of confusion at several levels, that attention should be given to what now follows in these reasons. The conduct of the applications giving rise to these appeals displayed an imperfect appreciation of these distinctions and coincident remedial avenues outlined above. This, in turn, was significant for the approach taken by the Court of Appeal in its reasons now under appeal.

The litigation

27 Interlocutory applications were brought by the present respondents, the Roads and Traffic Authority of New South Wales ("the RTA") and the Newcastle City Council ("the Council") (collectively "the defendants") seeking the summary dismissal or permanent stay of an action for damages which had been commenced in the Supreme Court against each of them for the appellant ("the plaintiff") by his tutor on 21 December 1994. The plaintiff requisitioned a jury trial. The action was brought upon a cause of action which accrued over 40 years ago on 21 August 1965 after a motor vehicle accident in which the plaintiff was severely injured allegedly due to the negligence of the defendants.

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57 No issue arises respecting changes to procedure in 2005 by the Uniform Civil Procedure Rules. However, Pt 13 r 13.4 of the new Rules does not appear to be materially different from its predecessor.

28 It was the plaintiff's pleaded case that, notwithstanding the lapse of 29 years since the accident, he was not barred from bringing his action by the *Limitation Act* 1969 (NSW) ("the Limitation Act"). This was because he was and has always been a "person under a disability" within the meaning of s 11(3) of that statute. The consequence was that s 52 had suspended the running of any limitation period under the Act subject to the ultimate bar of 30 years fixed by s 51(1).

29 The proceedings were at all times conducted in the Supreme Court on the basis that the Limitation Act was the relevant statute. At the time when the cause of action accrued the *Limitation Act* 1623 (Imp) remained in force[58] in New South Wales under the *Australian Courts Act* 1828 (Imp)[59]. Section 5 of the Limitation Act applied to the repeal of the 1623 Act the preservation of the accrued rights provision made in s 8 of the *Interpretation Act* 1897 (NSW)[60].

30 After the conclusion of oral argument in this Court written submissions were filed by the parties respecting the appropriate limitation period. The RTA and the Council now submit that the relationship between the 1623 statute and the Limitation Act was such that, so long as the plaintiff remains disabled, he may bring his claim at any time. It is unnecessary to pursue these matters to any conclusion. Whatever the limitation period, or lack of it, the plaintiff sued within time, and, as further explained in these reasons, an action commenced in time may attract the exercise of a power to stay it for abuse of process.

31 The applications by the RTA and the Council were for orders that the plaintiff's action be summarily dismissed or permanently stayed pursuant to the Rules as an abuse of process, or alternatively in what was identified as the inherent jurisdiction of the Supreme Court. Reduced to its essence, the presently relevant basis for these applications was that by reason of the effluxion of time since 1965, for the defendants a fair trial was not possible. That submission

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58 The presently relevant provisions of the *Limitation Act* 1623 (Imp), 21 Jac I c 16, were repealed by s 4 and Sched 1 of the Limitation Act, which commenced on 1 January 1971.

59 9 Geo IV c 83, s 24. See *Waung v Subbotovsky* (1969) 121 CLR 337.

60 Now repealed by the *Interpretation Act* 1987 (NSW), s 82 and Sched 2, s 30 of which is to the same effect.

failed before the primary judge (Hoeben J)[61], but was successful in the Court of Appeal (Mason P, Giles and Bryson JJA). Hence the appeal by the plaintiff to this Court.

The plaintiff's cause of action

32 The plaintiff was born on 11 April 1932 in Sydney and, following the death of his mother and the inability of his father and other relatives to care for him, spent much of his early childhood in the St Anthony's Home at Croydon. On 1 March 1938, the plaintiff was "scheduled" under the *Lunacy Act* 1898 (NSW) and committed to the Newcastle Mental Asylum. He was released on leave of absence on 30 July 1954, and ultimately discharged on 10 January 1956. From around the date of his release on leave of absence up to the date of the accident, the plaintiff was employed with the Department of Public Works in Newcastle as a cleaner.

33 On the evening of 20-21 August 1965, while returning from a party the plaintiff was involved in an accident in Fullerton Street, Stockton. The plaintiff pleaded that the accident occurred when he "came upon an unmarked and unposted bend in the road in the vicinity of Meredith Street and its northern approaches", causing the motor vehicle he was driving to run off the road into a depressed ditch and overturn. He sustained spinal injuries, and was rendered quadriplegic.

34 The plaintiff's case as pleaded was that either the Commissioner for Main Roads (to whom the RTA is the statutory successor[62]) or the Council had the care, control and management of Fullerton Street and that either the RTA or the Council constructed, designed and maintained the bend in Fullerton Street which allegedly caused the accident. The particulars of negligence were broad-ranging, alleging negligence in design, construction or maintenance of the road, together with failure to provide adequate warning of the bend and permitting the road to be used whilst in an unsafe condition.

The lapse of time

35 Following the accident the plaintiff remained a patient at various hospitals and rehabilitation hospitals. In 1979 or shortly thereafter, the plaintiff was

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61 *Andrew Batistatos by his tutor Nita Lavinia Batis v Roads & Traffic Authority* [2004] NSWSC 796.

62 *Transport Administration Act* 1988 (NSW), Sched 7, Pt 2, Div 5.

located by his brother, whom he had not seen since the date he was committed to the Newcastle Mental Asylum, and his sister, who had been placed in the care of a different orphanage. They made arrangements for him to come to Sydney in 1982 and ultimately, in 1983, the plaintiff came to live with his sister. She continues to provide his basic care. The plaintiff's present solicitor was instructed in or about December 1993, and commenced investigating the circumstances of the accident over the ensuing 12 months before filing the Statement of Claim on 21 December 1994.

36 Neither the RTA nor the Council sought to attribute blame for the lapse of time (to use a neutral expression instead of the legally connotative word "delay") between the accident and the filing of the Statement of Claim to the plaintiff or any person who cared for him. In so far as the defendants' applications for summary stay or dismissal of the proceedings relied upon the lapse of time, the gravamen of their submission (in a position to which both adhered in this Court) was that the *objective* consequence of the lapse of time was that a fair trial was no longer possible, and so constituted an abuse of process. The determination of the interlocutory applications proceeded on this basis.

37 It is useful to note the effects of the lapse of time relied upon by the defendants in support of the contention that a fair trial was no longer possible. In their written submissions before this Court, these related generally to the deterioration of the evidence and encompassed six broad grounds: (1) the inability to obtain any police records of investigations relating to the accident; (2) the inability to locate hospital or medical records concerning the plaintiff's treatment before 1980; (3) neither the Council nor the RTA had most of the documents relevant to the design and construction of Fullerton Street for the period from 1965 to 1980; (4) difficulty in identifying and locating any person who had active involvement in road maintenance work in and before 1965 who could give evidence of considerations affecting design and construction; (5) the inability to locate any record that could assist in proving the insurer on risk at the relevant time; and (6) the physical state of the road where the accident occurred had altered substantially due to a reconstruction of Fullerton Street carried out by the Council in or about 1985 eliminating the bend which the plaintiff had alleged caused the accident (such evidence as remains regarding the reconstruction not bearing on establishing the signage, vegetation, lighting or other relevant circumstances at the time of the accident). The first four grounds were considered in detail by Hoeben J, whereas the latter two (while raised before Hoeben J) assumed greater significance before the Court of Appeal.

38 There was a further lapse of time between the initial close of pleadings in 1996 and the determination of the interlocutory applications in 2000. However,

the defendants did not rely upon delay in conducting proceedings after the issue of the Statement of Claim in December 1994 to support their applications.

The course of proceedings in the Supreme Court

39 In order to understand the way the proceedings developed, it is necessary to set out the defences filed by the RTA and the Council. In its Defence filed 9 May 1996, the Council pleaded contributory negligence and that the plaintiff's cause of action was not maintainable by reason of non-compliance with s 580(6) of the *Local Government Act* 1919 (NSW) ("the LGA"), which was in force at the time of the accident[63]. This provided a distinct statutory bar to the commencement of proceedings against councils. In its Defence filed 9 October 1997, the RTA pleaded contributory negligence and that the plaintiff's cause of action was not maintainable by reason of the general six year limitation provision in s 14(1) of the Limitation Act[64].

40 Following the close of pleadings, the Council and the RTA each moved for an order that the proceedings be dismissed or permanently stayed under Pt 13 r 5 of the Rules, which has been set out earlier in these reasons. Alternatively, the defendants sought orders striking out the plaintiff's pleading pursuant to Pt 15 r 26 of the Rules, which was in similar terms, but confined in its terms to the striking out of pleadings. In what follows, attention is directed to Pt 13 r 5.

41 The motions came before Master Harrison on 2 June 2000[65], but the Master stood over the motions to be heard by a judge in so far as they relied upon the inherent power of the Court[66]. This course was adopted because Pt 60 r 1A of the Rules does not extend to permit the Master to exercise the inherent jurisdiction of the Court. It does not appear from the reasons given by the Master why the motions were thought to rely upon the inherent jurisdiction as distinct from merely the relevant provisions of the Rules.

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63 Section 580(6) was later repealed by the *Notice of Action and Other Privileges Abolition Act* 1977 (NSW).

64 Although the RTA filed an Amended Notice of Grounds of Defence dated 11 April 2001, the additional ground is not relevant to this appeal.

65 *Batistatos v Roads and Traffic Authority of NSW* [2000] NSWSC 506.

66 [2000] NSWSC 506 at [1].

42 Be that as it may, the Master dealt only with the Council's claim relating to the application under Pt 13 r 5 of the Rules that the plaintiff's proceedings be summarily dismissed as against the Council for non-compliance with s 580(6) of the LGA. The Master declined to dismiss the proceedings summarily on this basis[67]. An appeal from the Master's decision on this point was dismissed by Bergin J. The balance of the motions were adjourned by Bergin J to permit the plaintiff's legal representatives to make further specified inquiries directed to locating further evidence.

43 Following another lengthy delay, the motions came before Hoeben J on 25 August 2004. His Honour had before him all the evidence which had been before Bergin J, together with further affidavits resulting from the plaintiff's solicitor's inquiries in the interregnum. The evidentiary material was the subject of a detailed summary by Bryson JA in the Court of Appeal[68], and it is unnecessary for the resolution of this appeal to repeat it.

44 In his reasons, Hoeben J identified, under the heading "Absence of triable issue", the first submission of the defendants. This was that the claim by the plaintiff "was so obviously untenable that it could not succeed"[69]. The submission was framed in terms which appeared to state as a principle remarks made by Barwick CJ in a passage in *General Steel Industries Inc v Commissioner for Railways (NSW)*[70]. Barwick CJ pointed out that, on the one hand, great care was to be exercised to ensure that a plaintiff was not improperly deprived of the opportunity for the trial of the case "under the guise of achieving expeditious finality", and, on the other, the summary intervention of the court was not reserved for cases where "argument is unnecessary to evoke the futility of the plaintiff's claim". His Honour then immediately continued[71]:

> "Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

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67 [2000] NSWSC 506 at [22].

68 (2005) 43 MVR 381 at 385-389.

69 [2004] NSWSC 796 at [14].

70 (1964) 112 CLR 125 at 130.

71 (1964) 112 CLR 125 at 130.

45 The conclusion in *General Steel* was that Barwick CJ was satisfied that the statement of claim did not disclose a reasonable cause of action so that this Court was authorised by O 26 r 18 of the then High Court Rules to strike out that pleading[72]. To reach that conclusion, extensive argument was considered respecting the construction and application of the Crown use provisions of the *Patents Act* 1952 (Cth).

46 The statements in *General Steel* should not be given canonical force. More recently, in *Agar v Hyde*[73], Gaudron, McHugh, Gummow and Hayne JJ observed:

> "It is, of course, well accepted that a court whose jurisdiction is regularly invoked in respect of a local defendant (most often by service of process on that defendant within the geographic limitations of the court's jurisdiction) should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways[74], but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

47 Hoeben J referred to affidavit evidence provided for the plaintiff by three deponents who said they were familiar with Fullerton Street as it was in 1965 and that they would give evidence as to its configuration, the height and location of grass, control measures provided by the Council, maintenance provided by the Council, and lighting provided in the vicinity of the accident site. Hoeben J concluded that the plaintiff had discharged "any evidentiary onus which he bears to indicate that there is evidence available which could, if accepted, establish his case"[75]. The upshot was that his Honour rejected the submission by the defendants that the plaintiff's claim was so obviously untenable that it could not

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72 (1964) 112 CLR 125 at 137.

73 (2000) 201 CLR 552 at 575-576 [57].

74 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 per Barwick CJ.

75 [2004] NSWSC 796 at [21].

possibly succeed or was "so manifestly faulty that it does not admit of argument"[76]. The latter phrase also appeared in the judgment of Barwick CJ in *General Steel*[77].

48 Hoeben J then went on under the heading "Prejudice" to deal with the further submission by the defendants that the effluxion of time was such that a fair trial for the defendants was not possible. His Honour treated this submission as founded upon the ground of abuse of process appearing both in Pt 13 r 5 and as an element in the inherent jurisdiction of the Supreme Court. Hoeben J concluded that the defendants, who bore the onus, had failed to satisfy him that they could not have a fair trial in the circumstances of the case and he dismissed the defendants' motions that the proceedings be permanently stayed or dismissed.

The Court of Appeal

49 The course taken in the submissions to Hoeben J helps explain the path taken in the judgment of Bryson JA in the Court of Appeal. In truth, the absence of a triable issue, as well as the impossibility of the defendants obtaining a fair trial in the circumstances of the case, may be seen as instances of abuse of process and that term is not applicable solely to the latter situation. It will be recalled that, in the passages set out earlier in these reasons from the judgments of Gaudron J in *Ridgeway v The Queen*[78] and McHugh J in *Rogers v The Queen*[79], the jurisdiction was described in terms sufficiently ample to encompass both situations.

50 The leading judgment in the Court of Appeal was delivered by Bryson JA. His Honour treated as the same in substance the complaints made by the defendants that the proceedings were an abuse of process and that they were irretrievably prejudiced by reason of the delay in the bringing of the proceedings; he treated the remaining complaint as distinct and as depending upon Pt 13 r 5, it would seem, as the only possible basis of power. This complaint was that the defendants were highway authorities at the relevant time and that there was no evidence relating to the circumstances and causation of the accident and injury sustained by the plaintiff.

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76 [2004] NSWSC 796 at [26].

77 (1964) 112 CLR 125 at 129.

78 (1995) 184 CLR 19 at 74-75.

79 (1994) 181 CLR 251 at 286.

51 To that complaint, Bryson JA treated as applicable the reasoning in *General Steel*[80]. His Honour said that the "test" was to the effect that the defendants had to demonstrate "that the case is so clearly untenable that it cannot possibly succeed"[81]. His Honour then treated the task of the defendants as being to show by evidence that the plaintiff was not in a position to call any evidence raising any question for determination at trial of the pleaded allegations.

52 Bryson JA did not accept the conclusion of Hoeben J that the affidavit evidence relied upon by the plaintiff indicated clear recollections by the deponents. However, Bryson JA went on to disagree with an assumption by the primary judge that the plaintiff had no recollection of how the accident occurred. There was nothing in the nature of an admission by the plaintiff that he had no recollection of what happened; even though there was no basis upon which it could be found that the plaintiff was able to do so, it might well be that the plaintiff was in a position to give some evidence about the events. The defendants in their strike-out application had not met "the standard of certitude" required for them to succeed, with the result that the conclusion reached by Hoeben J on the summary disposal application "under Pt 13 r 5" was correct[82].

53 His Honour then turned to consider, as a distinct matter, the exercise of the inherent jurisdiction to stay proceedings by reason of the great delay in the commencement of the action. Bryson JA referred to the statement by Dixon J in *Cox v Journeaux [No 2]*[83]:

> "A litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender. It is only when to permit it to proceed would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party that a suit should be stopped."

54 His Honour discountenanced any approach which saw the absence of a statutory time bar as in some sense an authorisation to bring proceedings at the

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80 (1964) 112 CLR 125 at 128-130.

81 (2005) 43 MVR 381 at 385.

82 (2005) 43 MVR 381 at 394.

83 (1935) 52 CLR 713 at 720.

particular time within the statutory period when they were instituted. His Honour, correctly, emphasised that statutory time bars speak to the consequence of the passage of time, regardless of other considerations. He said[84]:

> "Delay is not what the [Limitation Act] authorises, literally or in substance. It operates in quite another way, by preventing proceedings being brought after prescribed times, irrespective of whether or not the proceedings can be fairly adjudicated. Some statutory time limits are quite short, for example time limits of 2 years or 3 are sometimes prescribed, and there must be many cases where a fair hearing could be conducted even if those statutory limits have not been observed. The present case is one at the extremes, as almost 3 decades passed before the proceedings were commenced, and 4 decades will have passed before the proceedings ever go to trial. The [Limitation Act] cannot in my view close the court's eyes to the practical inability of reaching a decision based on any real understanding of the facts, and the practical impossibility of giving the defendants any real opportunity to participate in the hearing, to contest them or, if it should be right to do so, to admit liability on an informed basis."

55 The critical holding by Bryson JA appears in the sentence[85]:

> "No more than a formal enactment of the process of hearing and determining the plaintiff's claim could take place; it cannot be expected that the process would be just."

Bryson JA also stated[86]:

> "To my mind the simple and overwhelmingly clear position is that no useful evidence is available upon which to conduct a trial into the question whether the plaintiff's injuries were caused by negligence of the defendants, and no further search or inquiry is in any way likely to locate any such evidence; so that a trial of the proceedings could not rise above a debate about the effect of scraps of information, and it is impossible to inform the debate with any realistically useful information."

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84 (2005) 43 MVR 381 at 405-406.

85 (2005) 43 MVR 381 at 406.

86 (2005) 43 MVR 381 at 405.

56 In his concurring reasons, Giles JA dealt as follows with the two strands in the defendants' applications for a permanent stay. His Honour dealt with the first strand saying[87]:

> "While the defendants did not establish that the plaintiff's case was untenable, nor did the plaintiff demonstrate its strength; on the limited material disclosed, it is not a strong case."

57 With respect to the other strand, his Honour observed that whether the defendants could have a fair trial necessarily required consideration of the negligence alleged against them. The negligence was alleged in broad terms and the more generously the terms of the pleading of the plaintiff's case, the more difficult it was for the defendants to meet the allegations after so long a time. His Honour continued[88]:

> "The plaintiff's case was not narrowed by proffering a meaningful account from the plaintiff of how he came to run off the road, or an expert report identifying material deficiences in the design, construction, maintenance or state of the roadway. It is particularly against that background that it would be unfair and oppressive on the defendants to require them to attempt to meet such a generous case under the difficulties brought about by the lapse of time."

The third member of the Court of Appeal, Mason P, agreed with both judgments.

The appeals to this Court

58 There is no issue by way of cross-appeal or notice of contention by the defendants in respect of the treatment by the Court of Appeal of the failure of the defendants to establish that the cause of action was "untenable". The focus of the appeal is upon the other strand in the reasoning in the Court of Appeal.

59 Here the ground taken by the plaintiff is one which, if accepted, would have denied, in the circumstances, the existence of the power to order the permanent stay. The plaintiff accepts that his case in the Court of Appeal would have failed if there had been misconduct shown on his part which caused the inability of the defendants to have a fair trial. But, the plaintiff submits, in the

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87 (2005) 43 MVR 381 at 382.

88 (2005) 43 MVR 381 at 381-382.

absence of such a showing of misconduct, there was no power to make the order complained of by the plaintiff.

60 It is in this respect that the plaintiff relies particularly upon *Birkett v James*[89], a decision of the House of Lords which has been accorded significant standing in several Australian intermediate courts of appeal[90].

61 Counsel for the plaintiff developed the submission by placing particular emphasis upon the operation of s 52 of the Limitation Act. This had suspended the running of the limitation period for the duration of the disability suffered by the plaintiff. Reference was made to a number of English authorities[91]. These were said to demonstrate that where there is a statutory limitation period any exercise of power to stay proceedings commenced within that period must be exceptional and could not be supported merely by prejudice which might be expected to flow from the effluxion of time within the limitation period. The plaintiff submitted that some element of "oppressive" conduct on the part of the plaintiff must be discernible before the court would exercise the power to order a permanent stay. The "oppression" lay in conduct which was burdensome, harsh, wrongful.

Conclusions on the appeals

62 There is no substance in the negative implication which the plaintiff seeks to draw from an unexpired statutory limitation period. As Bryson JA pointed out, periods of statutory limitation operate indifferently to the existence of what might be classified as delay on the part of a plaintiff. Section 63 of the Limitation Act provides for the extinction of causes of action "to recover any debt damages or other money". But s 68A requires a party claiming the benefit of extinction to plead that extinguishment. To say that a limitation period has not run is to say that the potential defendant, if now sued, has no accrued defence to the action.

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89 [1978] AC 297.

90 *De Nier v Beicht* [1982] VR 331; *Williams v Zupps Motors Pty Ltd* [1990] 2 Qd R 493.

91 *Tolley v Morris* [1979] 1 WLR 592; [1979] 2 All ER 561; *Hogg v Hamilton and Northumberland Health Authority* [1993] 4 Med LR 369; *Bull v Devon Area Health Authority* [1993] 4 Med LR 117; *Headford v Bristol and District Health Authority* [1995] 6 Med LR 1.

63 In that setting it is unsatisfactory to speak of a common law "right" which may be exercised within the applicable statutory limitation period, and of the enacting legislature as having "manifested its intention that a plaintiff should have a legal right to commence proceeding with his action". The words are those of Lord Diplock in *Birkett v James*[92]. The difficulty is in the expression "a legal right". The plaintiff certainly has a "right" to institute a proceeding. But the defendant also has "rights". One is to plead in defence an available limitation defence. Another distinct "right" is to seek the exercise of the power of the court to stay its processes in certain circumstances. On its part, the court has an obligation owed to both sides to quell their controversy according to law.

64 It is a long, and impermissible, step to deny the existence of what may be the countervailing right of a defendant by imputation to the legislature of an intent, not manifested in the statutory text, to require the court to give absolute priority to the exercise by the plaintiff within the limitation period of the right to initiate proceedings. The truth is that limitation periods operate by reference to temporal limits which are indifferent to the presence or absence of lapses of time which may merit the term "delay".

65 The "right" of the plaintiff with a common law claim to institute an action is not at large. It is subject to the operation of the whole of the applicable procedural and substantive law administered by the court, whose processes are enlivened in the particular circumstances. This includes the principles respecting abuse of process.

66 *Birkett v James* concerned a second action commenced in anticipation that a strike-out motion, for want of prosecution, would dispose of the first action. Lord Diplock said that in such a situation[93]:

> "[E]xceptional cases apart, where all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution".

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92 [1978] AC 297 at 320.

93 [1978] AC 297 at 320-321.

67 What those "exceptional cases" might include was not explored beyond the possible example given by Lord Diplock of *Spring Grove Services Ltd v Deane*[94], but it is apparent from other passages[95] that "contumelious disregard" by a plaintiff in observance of the more important steps in the preparation of the action for trial could enliven the exercise of the inherent power of the court. Such default was not relied on in *Birkett v James*[96] itself. However, it is upon this footing that the present plaintiff points to a requirement of "oppressive conduct", to its conceded absence in this case, and to consequent error in principle by the Court of Appeal.

68 The decisions in England since *Birkett v James* were analysed recently and in detail by the New Zealand Court of Appeal in *Bank of New Zealand v Savril Contractors Ltd*[97]. It is unnecessary to repeat what is there said, beyond making one point. This is that, as exemplified by the decision of the English Court of Appeal in *Securum Finance Ltd v Ashton*[98], the new Civil Procedure Rules have been taken in England as giving a wider scope for the use of principles of abuse of process in dealing with dilatory plaintiffs. It has been suggested that the significance of *Birkett v James* has been "overtaken" by the strictures of the new procedural code[99].

69 The descriptions, rather than definitions, given in this Court and set out earlier in these reasons post-date *Birkett v James* and do not provide any ground for a requirement of oppressive conduct by the plaintiff. Rather, as in the circumstances of the present case, attention must be directed to the burdensome effect upon the defendants of the situation that has arisen by lapse of time. The

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94 (1972) 116 Sol Jo 844. In that case the plaintiff's action had been dismissed for want of prosecution within the limitation period. When the same writ was filed two years later, the Court struck it out as an abuse of process, the plaintiff's solicitor having previously told the defendant the action was abandoned, so resulting in the defendant falling out of touch with a principal witness.

95 [1978] AC 297 at 318.

96 [1978] AC 297 at 318.

97 [2005] 2 NZLR 475.

98 [2001] Ch 291.

99 Andrews, "Slow Progress in Striking Out Dilatory Litigants: 'No Second Bite at the Cherry'", [2001] *Cambridge Law Journal* 56 at 58.

Court of Appeal held that this was so serious that a fair trial was not possible. The result was that to permit the plaintiff's case to proceed would clearly inflict unnecessary injustice upon the defendants.

70 What Deane J said in *Oceanic Sun Line Special Shipping Company Inc v Fay*[100], with respect to the staying of local proceedings, is applicable also to a case such as the present one. His Honour emphasised that there was no "requirement that the continuance of the action would involve moral delinquency on the part of the plaintiff"; what was decisive was the objective effect of the continuation of the action.

71 In assessing that effect, there must be taken into account the consideration expressed by Dixon J in *Cox v Journeaux [No 2]*[101] and set out earlier in these reasons. Bryson JA in terms did so. He went on to remark in that connection that the defendants had not shown that the plaintiff's action was "clearly without foundation". But, he concluded that there was "in practical terms nothing of utility to place in the balance against the defendants' claim for a permanent stay"[102].

72 There was no error of principle in the decision of the Court of Appeal.

Orders

73 The appeals should be dismissed with costs.

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100 (1988) 165 CLR 197 at 247. See also the judgment of Mason CJ, Deane, Dawson and Gaudron JJ in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 555.

101 (1935) 52 CLR 713 at 720.

102 (2005) 43 MVR 381 at 405.

74 KIRBY J. Mr Andrew Batistatos ("the appellant") has suffered serious mental retardation from birth and gross disadvantages in life. He was catastrophically injured in a motor accident which left him paralysed by quadriplegia. After the accident, he lived for 14 years, confined and friendless, in a hospital and later a nursing home, until his siblings (from whom he had been separated as an infant) sought him out.

75 Eventually, his sister arranged for him to retain a legal practitioner. Subsequently, having been appointed the appellant's tutor, she commenced proceedings for negligence on his behalf against two public authorities that, it was claimed, had caused his accident. The proceedings were brought within 30 years, the ultimate ("long stop") time limit fixed by the statute of limitations accepted by all parties below to be applicable to the case[103].

76 These appeals to this Court concern the law of limitations in New South Wales[104]. But chiefly they relate to the power of the Supreme Court of that State to provide a permanent stay of the appellant's proceedings as an abuse of process. The respondents sought such relief on the basis that the appellant's delay in bringing the proceedings would occasion an unfair trial.

77 Reversing orders of the primary judge (Hoeben J)[105], the New South Wales Court of Appeal[106] permanently stayed the appellant's proceedings. Although mentally disabled before injury, profoundly injured by the accident, within the time limit to bring his case and found to have a "not untenable" cause of action, the appellant is thus denied access to the courts to decide his proceedings as they would normally be decided: after a trial on the evidence and based on the relevant law. By special leave, the appellant appeals to this Court to restore the orders of the primary judge so that he can proceed to trial.

78 In *Holt v Wynter*[107], Priestley JA observed that "different judges have somewhat different ideas" upon the matters debated in these appeals. However, the outcome now reached by the majority appears so counter-intuitive as to demand the closest scrutiny of the arguments that succeed.

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103 *Limitation Act* 1969 (NSW), s 51(1).

104 Specifically the *Limitation Act* 1969 (NSW), ss 14, 51 and 52.

105 *Batistatos v Roads & Traffic Authority* [2004] NSWSC 796.

106 *Newcastle City Council v Batistatos* (2005) 43 MVR 381.

107 (2000) 49 NSWLR 128 at 142 [79].

79 The majority conclusion involves error of law. It gives inadequate weight to the right of access to the courts and to the parliamentary law that considered, and provided for, a long stop limitation bar in the case of persons whose delay in commencing proceedings is excused by their mental disability. The judgment of the primary judge should be restored. A trial should be had. No sufficient reason of fact or law supports the contrary, exceptional, conclusion.

The facts

80 *Long delayed proceedings*: The background to this case is found in the reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ ("the joint reasons")[108]. Mr Andrew Batistatos was born in April 1932. He was effectively orphaned soon afterwards. From birth, he suffered from mental disability – so much so that he was scheduled under the *Lunacy Act* 1898 (NSW).

81 Until the age of 22, the appellant spent most of his life confined to a mental asylum. Tests disclosed an IQ of 69 points. This is ranked as mental retardation. He had little formal education. Dr Gordon Kerridge reported that he "suffered from a significant mental disability which had substantially impeded him in the management of his affairs".

82 The appellant's disabilities were compounded when, in the subject motor accident on 21 August 1965, he suffered a fracture of the spine at the C7/T1 level, causing quadriplegia. Dr Keith Mayne concluded that he was "unable to manage his own affairs, and although he can perform simple calculations and understands the nature of money, he is unable to read, to write cheques or to conduct business of any complexity". Self-evidently, such a person, and particularly after such an injury, was seriously impeded in bringing an action to court to protect his legal rights. In practical terms, the appellant was dependent upon others to do that for him.

83 The appellant's injuries occurred when he was driving his vehicle in Fullerton Street, Stockton, near Newcastle. At the relevant time, Fullerton Street followed an "S" curvature. This was shown in an aerial photograph tendered in evidence. It had been taken 36 days after the accident. As ultimately pleaded, the appellant's claim was that his vehicle ran off the road at night into a ditch and overturned. The pleading blamed the accident, and the consequent injuries and losses, on the fact that the appellant's vehicle had come "upon an unmarked and unposted bend in the road in the vicinity of Meredith Street".

84 After the accident, Fullerton Street was reconstructed so as to travel through the former Stockton Soccer Club field. This reduced the curvature of the

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108 Joint reasons at [27]-[31].

previous design[109]. Arguably, this alteration decreased the risk to a motorist such as the appellant. According to the evidence, before the reconstruction, Fullerton Street was known as a "black spot"[110]. The appellant argues that it was so dangerous as to suggest that the respondents, or one of them, were negligent, among other things, in allowing it to be and remain that way.

85 The appellant has spent his life since the accident in a wheelchair. He spent the ensuing 14 years in a hospital and later a nursing home. It was at that point that he met his brother and sister again. The appellant's legal practitioner was instructed in 1993. Within the year following, he brought the present proceedings. As was his right, the plaintiff requested a trial by jury.

86 *Defences and summary relief*: The defendants named by the appellant (now the respondents) were the Roads and Traffic Authority of New South Wales ("the RTA"), as successor to the former Commissioner for Main Roads and the Newcastle City Council ("the Council"). The appellant alleges that the respondents had the care, control and management of Fullerton Street and were responsible for the design, construction and maintenance of the road at the point at which the accident occurred. However, the respondents applied for the summary dismissal, or a permanent stay, of the proceedings. Their applications were made both under the Rules of the Supreme Court, providing for such relief[111], and under the "inherent" jurisdiction of the Supreme Court, operating to similar effect.

87 The basis for the respondents' claims was not the descent of a limitation bar and extinguishment of the appellant's cause of action, as is often the case where a great delay has followed an occurrence, allegedly tortious. Nor was this a case where, to commence and maintain his proceedings, the appellant needed to obtain an extension of time under the limitation statute to bring the action outside the applicable limitation period[112]. Instead, making common cause, the respondents sought summary relief on the basis that the appellant's proceedings were legally and factually untenable or that, because of the objectively lengthy lapse of time, a fair trial of the action was no longer possible thereby rendering the proceedings an abuse of the process of the Supreme Court.

88 In so far as the relief was sought by the respondents on the basis that the action was "clearly without foundation", the primary judge in the Supreme Court

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109 *Batistatos v Roads & Traffic Authority of NSW* [2001] NSWSC 237 at [65]-[66].

110 [2004] NSWSC 796 at [6].

111 Supreme Court Rules (NSW), Pt 13 r 5.

112 Cf *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234.

rejected that claim. He did so based on the Supreme Court Rules[113]. The Court of Appeal accepted that, in this respect, the primary judge's conclusion was correct, in outcome if not in all of the reasoning[114]. In this Court, both of the respondents accepted that the appellant's case had not been shown to be "untenable"[115]. Accordingly, that issue is not before this Court. No cross-appeal, nor any notice of contention, raising that issue, or contesting the proceedings on any other basis, was filed by either of the respondents.

89 Instead, invoking the "inherent" jurisdiction of the Supreme Court, to provide relief against the proceedings, the respondents sought a permanent stay. It was that relief that the primary judge refused and the Court of Appeal granted. The ultimate issue in these appeals is, thus, whether the appellant has demonstrated error in the Court of Appeal's approach to the exercise of its jurisdiction and powers, allowing the reinstatement of the primary judge's orders or other relief.

90 *Evidentiary deficiencies and repair*: As appears in the joint reasons[116], the respondents relied heavily on the suggested imperfections in the evidence available to them, with which to defend themselves against the appellant's claims. Specifically, the respondents relied on the difficulties presented by what they claimed was the unavailability of (1) reports of police investigations of the accident; (2) hospital or medical records relating to treatment of the appellant before 1980; (3) documents relevant to the design, maintenance and construction of Fullerton Street before 1980; (4) identification of witnesses involved in road design, construction and maintenance in the street prior to the accident; (5) proof of the insurer(s) on risk at the applicable time; and (6) evidence as to the physical state of the road when the accident occurred, having regard to the post-accident reconstruction which eliminated the bend and other features on the road of which the appellant complained.

The decisions at first instance

91 *The initial hearings*: Before the respondents' proceedings for summary relief were heard by Hoeben J, there had been two earlier hearings in the Supreme Court. The first, before Master Harrison, was eventually confined to an application for summary relief based on the appellant's failure, before action, to give a notice of intended action, as then provided for in s 580 of the *Local*

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113 [2004] NSWSC 796 at [49].

114 (2005) 43 MVR 381 at 394 [48].

115 Cf joint reasons at [58].

116 Joint reasons at [37].

Government Act 1919 (NSW). The Master declined to dismiss the proceedings summarily on that basis[117]. Her refusal was affirmed by Bergin J, in an appeal from her orders[118]. That issue has not been pressed in this Court. It can be disregarded.

92 In the balance of her reasons, Bergin J turned to an alternative claim for relief advanced by the respondents. This invoked the Supreme Court Rules and the "inherent" powers of the Supreme Court to terminate or stay the appellant's proceedings permanently[119]. Bergin J's consideration of the arguments of the parties on those issues was well advanced when the appellant's legal practitioner made a late application for an adjournment. This application was granted to permit further investigations following a grant of legal aid for the proceedings[120]. With the consent of all parties, the resumed proceedings came before Hoeben J[121].

93 *The intervening decision in Brodie*: Two consequences followed this interruption. The first was a development in the law which, as Hoeben J recognised, made one aspect of the respondents' resistance to the appellant's proceedings more difficult for them. This was the decision of this Court in *Brodie v Singleton Shire Council*[122]. That decision overruled previous understandings of the common law. The former "highway immunity rule"[123] had limited the liability for negligence of highway authorities, such as the respondents, to positive acts of misfeasance. It relieved them of liability for relevant nonfeasance.

94 Accordingly, if the appellant could prove that both or either of the respondents were responsible for the design, construction or maintenance of Fullerton Street (such that, for example, they ought to have eliminated the bend in that street and the "black spot" said to have caused or contributed to the appellant's accident *before* he was injured and not *after*), the appellant would begin building his case. Certainly, *Brodie* would make the appellant's task easier.

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117 [2000] NSWSC 506 at [1].

118 [2001] NSWSC 237 at [39].

119 [2001] NSWSC 237 at [41].

120 [2001] NSWSC 237 at [71].

121 [2004] NSWSC 796 [13].

122 (2001) 206 CLR 512.

123 See *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 375-376.

The ruling (being with respect to common law doctrine) would apply retrospectively to the time when the appellant was injured in August 1965[124].

95 *The reasoning of the primary judge*: Also important for Hoeben J's conclusion was the use that the appellant's solicitor had made of the adjournment. During that interval, he had gathered evidence from three witnesses, namely Messrs Lanham, Wynne and Alston[125]. Affidavits from these witnesses were received by Hoeben J. Each of them deposed that he was "familiar with Fullerton Road, as it was in 1965, and would be able to give evidence as to its configuration, the location and height of grass, control measures provided by the Council, maintenance provided by the Council, and lighting provided in the vicinity of the accident site"[126].

96 As recorded by Hoeben J[127], Mr Alston "actually saw the [appellant's] vehicle in position off the road not long after the accident". "[A]lthough the [appellant's] vehicle had been removed by the time [Mr Wynne] went to the accident site, he observed marks on the road and off the road at the accident site"[128]. The witnesses could give evidence about these facts.

97 By reference to this evidence, to the aerial photograph of the road taken within days of the accident, to survey plans of the road dating from 1984/1985 and to internal Council documents concerning complaints about the road and photographs of parts of the road to which those complaints related[129], Hoeben J concluded that relevant evidence would be available at a trial of the appellant's claim. It would describe the condition of the road at the time of his accident and relate that condition to subsequent objective evidence about the road after its trajectory was changed.

98 In his reasons, Hoeben J contrasted the success of those representing the appellant in locating the three persons mentioned and the alleged inability of the respondents to find any evidence at all. He pointed out that Mr Lanham had, for many years, been an alderman of the respondent Council. The three newly found witnesses had "detailed recollection of the road and of events which had

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124 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

125 [2004] NSWSC 796 at [19].

126 [2004] NSWSC 796 at [19].

127 [2004] NSWSC 796 at [20].

128 [2004] NSWSC 796 at [20].

129 [2004] NSWSC 796 at [23]-[25].

happened in relation to the road at the relevant time"[130]. As Hoeben J explained[131]:

> "There was no suggestion that these witnesses were partisan or that their evidence would necessarily favour the [appellant]. These witnesses now having been identified could be interviewed by the [respondents] and through them it may well be possible to locate other persons with knowledge of the road and of the accident."

99 *The conclusions of the primary judge*: There is no doubt that the interval between the appellant's accident and the commencement of his proceedings was significant. It imposed burdens and disadvantages on both sides. So much was not denied by the appellant. However, he disputed that the delay was such as to prevent a fair trial being had or even attempted. He also asked why his legal representative had been able to turn up relevant evidence but the respondents, by inference, with much larger resources, had failed to pursue lines of enquiry that were obvious, might have been fruitful and could still be explored[132].

100 By reference to such evidentiary material, Hoeben J concluded[133]:

> "I am not satisfied that the [respondents] have thus far taken steps reasonably open to them to identify and locate other persons, particularly from their own organisations, who may have similar information.
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> ...
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> Of particular importance is the aerial photograph taken thirty six days after the accident which shows the road and surrounding features and houses with considerable clarity. There is no evidence before me that there was any significant change to the road between 1965 and the early 1980s when the survey plans were prepared and when the photograph attached to Mr Garner's report were taken."

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130 [2004] NSWSC 796 at [40].

131 [2004] NSWSC 796 at [40].

132 [2004] NSWSC 796 at [36]-[37] referring to the earlier reasons of Bergin J at [2001] NSWSC 237 at [38], [39], [40], [45].

133 [2004] NSWSC 796 at [45]-[46].

The reasons of the Court of Appeal

101 *Finding the action not untenable*: The respondents appealed to the Court of Appeal. In that Court, Mason P agreed in the reasons of Bryson JA and also with additional remarks of Giles JA[134]. In those remarks, Giles JA, who likewise agreed with Bryson JA, noted the broad terms in which the appellant's case had been pleaded and particularised and the failure of the appellant himself to give evidence in the applications for summary relief. Nevertheless, as Giles JA recognised, the appellant's case was basically about the "design, construction, maintenance or state of the roadway"[135]. He observed, correctly, that any trial would depend significantly upon expert testimony[136].

102 Inferentially, expert evidence about the standards of road design, construction and maintenance at the time of the appellant's injury in August 1965, would be available. It would be derived from contemporary texts and from the evidence of engineers having the necessary recollection, knowledge or training. Armed with the contemporaneous aerial photograph and with detailed lay evidence of the kind gathered by the appellant's legal representative, the prospects of a fair trial, involving contesting experts, seemed within reach. The essential reason that led Giles JA to his conclusion, adverse to the appellant, was[137]:

> "While the [respondents] did not establish that the [appellant's] case was untenable, nor did the [appellant] demonstrate its strength; on the limited material disclosed, it is not a strong case. I agree that the balance plainly comes down in favour of a stay of the proceedings."

103 Except by cross-reference to the reasons of Bryson JA, neither Mason P nor Giles JA gave explicit weight to the appellant's ordinary entitlement to approach the court for a determination, in a full trial, of a serious action at law. This was so despite the significance of such a trial for the appellant and his carers and his desire to present his case for decision on the basis of full evidence and argument.

104 Nor did any member of the Court of Appeal give explicit weight to the significance of the fact that the appellant, in his disabled condition, was bringing his claim within the time fixed by Parliament before his cause of action was

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134 (2005) 43 MVR 381 at 381 [1].

135 (2005) 43 MVR 381 at 382 [3].

136 (2005) 43 MVR 381 at 381-382 [3].

137 (2005) 43 MVR 381 at 382 [4].

extinguished by the long stop bar provided by law. Nor did any of their Honours refer, or give weight to, the entitlement of the respondents or either of them, at or after the close of the appellant's case at trial, to submit that the appellant's proceedings should be dismissed at that stage, on the basis that there was no case to answer[138].

105 *Application of inherent jurisdiction*: After concluding that Hoeben J had not erred in refusing summary disposal of the proceedings under Pt 13, r 5 of the Supreme Court Rules[139] Bryson JA, for the Court of Appeal, turned to the "inherent" jurisdiction of the Supreme Court. He declared that such jurisdiction had been "reconferred by s 23 of the *Supreme Court Act* 1970 (NSW), to stay proceedings ... upon the ground that the continuance of the proceedings is harsh, oppressive and an abuse of process … [including by reason of] great delay in the commencement or in the conduct of the proceedings"[140].

106 After reference to the evidence and to judicial authority in this Court[141], in the Court of Appeal itself[142] and in England[143], Bryson JA explained why he considered that Hoeben J had erred. Although acknowledging that, historically, "there has been a strong general reluctance to dismiss proceedings … where the statutory time limits have not expired"[144] Bryson JA went on[145]:

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138 Supreme Court Rules (NSW), Pt 34 r 8. See also Pt 34 r 7; cf Uniform Civil Procedure Rules (NSW), Pt 29 rr 9-10.

139 (2005) 43 MVR 381 at 394 [48].

140 (2005) 43 MVR 381 at 394 [49].

141 *Cox v Jorneaux [No 2]* (1935) 52 CLR 713 at 720; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-26, 45-47, 57-61, 73-76; *Walton v Gardiner* (1993) 177 CLR 378 at 392-395; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552-554: see (2005) 43 MVR 381 at 396-399 [53]-[56], 399 [59], 404 [73].

142 *Herron v McGregor* (1986) 6 NSWLR 246 at 251, 253-255; *Holt* (2000) 49 NSWLR 128 at 142-143 [79]-[84].

143 *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 214; *Birkett v James* [1978] AC 297.

144 (2005) 43 MVR 381 at 399 [56].

145 (2005) 43 MVR 381 at 399 [57].

> "However I am unable to see any reason in principle why the power should not be exercised in a proper case. The existence of apparent authorisation in a statute of limitation is not in principle a reason why great delay may not be an abuse of process, or a reason why the power of the court may not be exercised."

107 *Relevance of the limitation statute*: This reasoning indicates (and nothing contradicts it) that Bryson JA gave no, or no particular, weight to the provisions of the limitation statute applicable to proceedings brought by persons with disabilities, such as the appellant. This approach was confirmed, later in Bryson JA's reasons, when he said[146]:

> "Delay is not what the *Limitation Act* 1969 authorises, literally or in substance. It operates in quite another way, by preventing proceedings being brought after prescribed times, irrespective of whether or not the proceedings can be fairly adjudicated. … The present case is one at the extremes, as almost 3 decades passed before the proceedings were commenced, and 4 decades will have passed before the proceedings ever go to trial. … No more than a formal enactment of the process of hearing and determining the [appellant's] claim could take place; it cannot be expected that the process would be just."

108 Despite the substantive evidence to which Hoeben J had referred in his reasons (and the defaults and omissions of both of the respondents that he, and earlier Bergin J, had enumerated) Bryson JA went on[147]:

> "To my mind the simple and overwhelmingly clear position is that no useful evidence is available upon which to conduct a trial into the question whether the [appellant's] injuries were caused by negligence of the [respondents], and no further search or inquiry is in any way likely to locate any such evidence; so that a trial of the proceedings could not rise above a debate about the effect of scraps of information, and it is impossible to inform the debate with any realistically useful information. The balancing exercise in *Walton v Gardiner*[148] can hardly be carried out, as there is in practical terms nothing of utility to place in the balance against the [respondents'] claim for a permanent stay."

109 This was a somewhat hyperbolic description of the evidentiary state of the case, as described by the two primary judges. It is difficult to reconcile it with

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146 (2005) 43 MVR 381 at 405-406 [80].

147 (2005) 43 MVR 381 at 405 [79].

148 (1993) 177 CLR 378 at 395-396.

the earlier passage in Bryson JA's reasons, in the course of explaining why his Honour rejected the respondents' arguments to the effect that the case was "untenable" and liable to termination on that ground[149]. By first concluding that the respondents had failed to show that the appellant's case was "untenable" (in the sense of lacking an arguable basis), Bryson JA undermined, in my respectful opinion, the subsequent expressed conclusion that all that the appellant had, on which to base his case at trial, were "scraps of information" on which it would be unfair to put the RTA and the Council to trial, so that the Court of Appeal was authorised, exceptionally, to order a permanent stay for abuse of process.

The issues

110 The following issues arise:

(1) *The applicable limitation law issue*: The appellant's cause of action arose in 1965. At that time, the limitation statute applicable in New South Wales was the *Limitation Act* 1623 (Imp) (21 Jac I c 16) ("the 1623 Act"). The provisions of the 1623 Act, concerning persons with a mental disability[150], were particularly protective of the disabled person. Does the limitation regime provided in the 1623 Act still apply to the appellant's proceedings? Or are they governed by the supervening provisions concerning persons with such a disability, as set out in the *Limitation Act* 1969 (NSW) ("the 1969 Act")? Having regard to the applicable limitation statute, was the appellant still within time to bring his proceedings against the respondents, when he began them on 21 December 1994?

(2) *The court rules and "inherent" jurisdiction issue*: Having regard to the fact that the Supreme Court of New South Wales is "re-established" by s 23 of the *Supreme Court Act* 1970 (NSW), is it correct to refer to the unexpressed powers of the Supreme Court to terminate proceedings brought within the applicable limitations period, as "inherent" powers? Or are any such "powers", existing beyond those expressly stated in the Supreme Court Rules, or implied by the right and duty of a superior court, such as the Supreme Court, to protect and uphold the integrity of its process? Having regard to the position of the Supreme Court within the integrated Australian Judicature for which the Constitution provides[151], are there any constitutional implications that inform the content of the "inherent" or "implied" powers of the Supreme Court in this respect? In

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149 (2005) 43 MVR 381 at 385 [13].

150 Section 7.

151 Constitution, Ch III, see esp ss 73 and 77(iii).

the case of a State Supreme Court, is it correct to refer to its residual, non-statutory powers as "inherent"? Is this classification of supplementary jurisdiction and powers correct, given that "inherent" powers are traceable historically to the courts created out of Royal Prerogative, which no Australian court now is? Is this classification relevant to the content of the powers?

(3) *The necessity of oppression issue*: To the extent that the Supreme Court continues to enjoy "inherent" (or "implied") powers to provide a permanent stay of proceedings, are such powers available beyond those stated in legislation, where the party seeking their exercise can demonstrate that the continuation of the proceedings would result in a trial that would be unfair to it? Or, in order to secure such a stay, is it necessary for the applicant for such relief to demonstrate that its opponent has acted with deliberate or contumelious disregard to the rights of others by delaying the proceedings or has, in some other way, been guilty of oppressive conduct that would render it just, in the circumstances, to terminate or order a permanent stay of the proceedings?

(4) *The relief and right of action issue*: In considering the provision of relief, whether described as "inherent" or "implied", is it relevant to give weight to the right, ordinarily belonging to a person asserting a cause of action at law, to have access to the courts for the trial of that person's action? Did the Court of Appeal err in failing to give any, or any proper, attention to this right in the present proceedings?

(5) *The relevance of the limitation law issue*: Having regard to the applicable limitation statute, was it relevant, in exercising the "inherent" or "implied" powers of the Supreme Court, to have regard to the appellant's profound mental and physical disabilities and the provision for a long stop bar against the bringing of such proceedings and to any extinguishment of the right of action by the applicable limitations statute?

(6) *The relief issue*: Having regard to the resolution of the foregoing issues, what relief, if any, should be afforded to the appellant? If error is shown, should the orders of Hoeben J be restored? Should the Court of Appeal's orders be affirmed on the same or different grounds? Or should the proceedings be returned to the Court of Appeal to exercise its jurisdiction and powers afresh, according to correct principles?

The applicable limitation statute

111 *Limitation statutes and disability*: As noted in the joint reasons[152], these proceedings were conducted below on the basis that the limitation statute applicable to them was the 1969 Act[153]. At the date of the appellant's accident, the 1623 Act applied. Under s 3 of that Act, a six year limitation period was provided for "all actions … upon the case". Relevantly, an exception applied in the case of "any person or persons that is or shall … be at the time of such cause of action given or accrued, fallen or came … non compos mentis". In these cases, "such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being … of sane memory … as other persons having no such impediment should have done"[154].

112 It was accepted that, at the date of his accident and at all material times afterwards, the appellant was "non compos mentis" for the purposes of the 1623 Act. It followed that, so long as the 1623 Act continued to apply to the appellant's case, there was no limitation period within which the appellant was required to commence his proceedings, unless he ceased to be non compos mentis[155].

113 By the operation of the 1969 Act, the 1623 Act was repealed in so far as it applied to New South Wales. By s 5 of the 1969 Act, rights accrued, pursuant to the operation of the 1623 Act, were preserved. The appellant did not argue that, following the passage of the 1969 Act, he was entitled to the preservation of the indefinite right to bring proceedings as provided by that Act. He accepted that, after 1 January 1971, the 1969 Act applied to his cause of action. He accepted that the 1969 Act had provided the relevant limitation provisions since that time.

114 *The 1969 Act long stop provision*: At trial, all parties accepted or assumed that, within the 1969 Act, the appellant had a reasonably arguable case that he was a person under a disability. This meant that the ordinary limitation period then applicable to his proceedings, of six years running from the date on which the cause of action first accrued[156], was suspended for the duration of his

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152 Joint reasons at [28]-[29].

153 See, esp, *Newcastle City Council* (2005) 43 MVR 381 at 383 [9].

154 Section 7.

155 *Prowse v McIntyre* (1961) 111 CLR 264.

156 The 1969 Act, s 14(1)(b).

disability[157]. A potential further extension of the limitation period of three years applied after the person "ceases to be under a disability"[158]. On the uncontested evidence, the appellant had a relevant mental disability and had not ceased to be under it.

115 The provisions, extending the time within which a person under a disability might bring an action, founded on a tort, appear in Div 2 of Pt 3 of the 1969 Act. The first section in that Part (titled "Postponement of the bar") is a general provision appearing in Div 1. The section reads, relevantly:

> "51 Ultimate bar
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> (1) Notwithstanding the provisions of this Part, an action on a cause of action for which a limitation period is fixed by or under Part 2 is not maintainable if brought after the expiration of a limitation period of thirty years running from the date from which the limitation period for that cause of action fixed by or under Part 2 runs."

116 There is now an exemption from this ultimate bar in the case of discretionary extensions for latent injuries[159]. That potential extension has no present application. Quadriplegia, at least, is far from a latent condition. The appellant did not argue otherwise. The reference in s 51(1) to Pt 2 of the 1969 Act includes a reference to s 14 of that Act. This establishes the general limitation period with respect to a cause of action founded on tort (originally of six years, now three[160]).

117 *The 1969 Act applies*: Until the proceedings in this Court, it was acknowledged by all parties that the 1969 Act, not the 1623 Act, applied to the appellant's cause of action[161]. In its primary terms, the 1969 Act preserved, until 1971, protection against extinguishment by the preceding Imperial statute in its application to New South Wales. After 1971, the running of the limitation period, fixed by the 1969 Act, was suspended for the duration of the appellant's continuing disability. However, such suspension was itself subject to the

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157 The 1969 Act, s 52(1)(d).

158 The 1969 Act, s 52(1)(e)(i).

159 Section 51(2), inserted by the *Limitation (Amendment) Act* 1990 (NSW), s 3, Sched 1, cl 5.

160 The 1969 Act, s 50C.

161 Cf *Blunden v The Commonwealth* (2003) 218 CLR 330 at 347 [46], 360 [94].

ultimate bar fixed by s 51 of the 1969 Act. That section of the 1969 Act provided that the appellant's action was not maintainable if it was brought after 30 years running, in the appellant's case, from 21 August 1965, the date of his accident.

118 In supplementary written submissions, received after the hearing of these appeals, the respondents attempted to resile from this understanding of the applicable limitation law. They now assert that the indefinite limitation period provided by the 1623 Act, applicable to a person non compos mentis, who had not recovered, continued to apply to the appellant because of his ongoing mental state. The new argument is substantially one of law. Presumably, it was provoked by the significance given before this Court to "long stop" provisions of the 1969 Act. I see no procedural impediment in this Court's considering it[162]. However, the argument should not be accepted. First thoughts are often best.

119 By virtue of the 1969 Act and its transitional provisions, the appellant, after 1971, became subject to the ultimate bar of 30 years there provided. That provision was an important feature of the proposals of the New South Wales Law Reform Commission, upon whose recommendations the 1969 Act was based[163]. It was a feature of the law given much emphasis in the Minister's Second Reading Speech supporting the Bill that became the 1969 Act[164]. The interpretation to the contrary would undermine the achievement of one of the most important reformatory purposes of that Act. Of it, the Law Reform Commission had said[165]:

> "We think, however, that quite apart from questions of title to land, a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the disabilities and other matters dealt with in … the Bill do exist. These disabilities and other grounds of postponement may well be outside the knowledge of the defendant and we think it right that, after a period of thirty years has elapsed, there should be no further postponement of the statutory bar on any ground."

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162 Cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

163 New South Wales Law Reform Commission, *Limitation of Actions*, Report No 3, (1967).

164 *New South Wales Legislative Assembly, Parliamentary Debates* (Hansard), 26 March 1969 at 5152.

165 New South Wales Law Reform Commission, *Limitation of Actions*, Report No 3, (1967) at [241].

120 The language of the 1969 Act gives effect to this purpose. I do not understand the joint reasons in this Court to conclude otherwise. The submission that the 1623 Act still provides the limitation law applicable to the appellant's proceedings should be rejected.

The Supreme Court Rules and "inherent" or implied powers

121 *Inherent jurisdiction and powers*: All of the judges who have considered this case, including in the joint reasons in this Court, have assumed the correctness of the invocation of a so-called "inherent" jurisdiction and powers of the Supreme Court[166]. I acknowledge that it has been common, including in this Court, to speak of such "inherent jurisdiction" or "inherent powers"[167].

122 In *A J Bekhor & Co Ltd v Bilton*[168], it was recognised that such descriptions amounted to "an uncertain expression loosely used and signifying a discretionary power which may be developed to meet circumstances not known to 19th-century Judges". In Australia, the concept of "inherent jurisdiction" or "inherent powers" has been borrowed from the reasoning of English judges, traceable to earlier times in English courts originally created out of the royal prerogative. The use of such expressions in Australia has not been subjected to an analysis appropriate to a country whose courts are not established out of the prerogative but provided for, or envisaged in, the federal and State constitutions and established by or under legislation enacted by Australian parliaments.

123 There is a common tendency for lawyers to prefer judicial elaborations of the law over analysis of applicable legislation. This is a tendency which this Court, in recent years, with a single voice, has endeavoured to correct[169]. This tendency is relevant to so-called "inherent jurisdiction", relied upon as the source of the orders to provide a permanent stay against the continuation of the appellant's proceedings.

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166 See joint reasons at [5]-[6].

167 See eg *Walton* (1993) 177 CLR 378 at 393; cf Mason, "The Inherent Jurisdiction of the Court", (1983) 57 *Australian Law Journal* 449; Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", (1997) 113 *Law Quarterly Review* 120.

168 [1981] 1 Lloyd's Rep 491 at 507.

169 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Allan v TransUrban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Weiss v The Queen* (2005) 80 ALJR 444 at 447-448 [9], 452 [31]; 223 ALR 662 at 664, 671.

124 *Inherent and implied jurisdiction*: One aspect of the neglect of the constitutional setting for the jurisdiction and powers of Australian courts[170] is the failure to subject notions of "inherent jurisdiction" and "inherent power" to an appropriate Australian constitutional scrutiny. The parties did not undertake such a scrutiny in these proceedings. Because it was neither attempted, nor made subject to any notices necessary for a decision based on such an argument[171], it is inappropriate to take the matter further in these appeals. However, the point should not be wholly ignored. If it is "inherent" jurisdiction or power that puts the appellant out of court, it is important to have some idea of the source and ambit of such a concept.

125 All Australian courts are created by, or under, legislation. Whatever the position in the United Kingdom, the additional jurisdiction and powers of Australian courts may not, therefore, truly be described as "inherent". It may be more accurate to describe any supplementary jurisdiction or powers of such courts, including superior courts, as "implied", that is implied in the constitutional or legislative source. According to this approach, a reference to "inherent jurisdiction" or "inherent powers" is likely to mislead. It may give rise to exaggerated opinions as to the ambit of the propounded jurisdiction and powers.

126 Support for this opinion, in the context of the Federal Court of Australia, was expressed by Bowen CJ in his reasons in *Jackson v Sterling Industries Ltd*. His Honour said[172]:

> "In relation to a statutory court such as the Federal Court it is wise to avoid the use of the words 'inherent jurisdiction'. Nevertheless a statutory court which is expressly given certain jurisdiction and powers must exercise that jurisdiction and those powers. In doing so it must be taken to be given by implication whatever jurisdiction or powers may be necessary for the exercise of those expressly conferred. The implied power for example to prevent abuse of its process, is similar to, if not identical with, inherent power."

127 When that case reached this Court, these words were endorsed by Deane J[173]. Even in the absence of an express statutory grant of jurisdiction and

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170 Constitution, s 73. See also s 74.

171 *Judiciary Act* 1903 (Cth), s 78B.

172 (1986) 12 FCR 267 at 272.

173 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624.

power to a court such as the Federal Court, Deane J was of the opinion that, simply because it was a court, it "would have possessed power to make such orders in relation to matters properly before it, as an incident of the general grant to it as a superior court of law and equity of the jurisdiction to deal with such matters"[174]. In short, the additional unexpressed powers are not *inherent*. They are *implied* in the relevant legislation.

128 Similar opinions have been expressed in later decisions of this Court[175]. Usually, however, the distinction between "inherent" and "implied" powers has been noted but left unresolved[176].

129 *Importance of the distinction*: The distinction is not necessarily a trifling one. The notion of "inherent powers", in the case of courts of constitutional or statutory origin, involves a judicial assertion of authority to enlarge the ambit of the jurisdiction and powers of the court without expressly anchoring such enlargement in the text of that law.

130 Given that the courts often impose coercive burdens on liberties and rights, it is arguably safer to derive the source for additional unexpressed jurisdiction and powers in the necessary *implications* from the written law rather than in a vague notion of *inherent* powers, found attractive to judges in particular cases. Because so-called "inherent jurisdiction" and "inherent powers" may sometimes be used to abrogate fundamental common law rights[177], or to suggest departure from express statutory provisions[178], it seems important to establish the true source of the propounded jurisdiction or power and to trace it back to the legislative source. In courts recognised by the Constitution and created by statute, the source of any such jurisdiction or power is, ultimately, the Constitution and the statute itself. In so far as the word "inherent" connotes a source existing in the royal prerogative or elsewhere, it appears to be inapplicable to the Australian constitutional setting.

131 State Supreme Courts in Australia are sometimes treated as courts of unlimited jurisdiction. However, as this Court pointed out in *Stack v Coast*

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174 (1987) 162 CLR 612 at 623.

175 See, eg, *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422 [108].

176 See eg *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391; cf *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 16-17.

177 *Reid v Howard* (1995) 184 CLR 1 at 16.

178 *Doyle v The Commonwealth* (1985) 156 CLR 510 at 518.

Securities (No 9) Pty Ltd[179], in the Australian constitutional context, no court really enjoys unlimited jurisdiction or powers. The jurisdiction and powers of every Australian court are limited by that court's constitutional and statutory competence.

132 In the case of the Supreme Court of New South Wales, its jurisdiction and powers were originally granted by the Third Charter of Justice for New South Wales, issued in 1823. However, that instrument was, in turn, supported by an Act of the Imperial Parliament[180]. Now, by s 22 of the *Supreme Court Act* 1970 (NSW), it is provided that the court "as formerly established as the superior court of record in New South Wales is hereby continued". The source of its continuance now appears to be that State law. Constitutionally speaking, the source appears to be neither an Imperial Act nor a royal charter. It is s 23 of the *Supreme Court Act* that provides that the court "shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

133 In *Tait v The Queen*[181], decided before the enactment of the *Supreme Court Act*, this Court found it unnecessary to determine whether the statutory grant of jurisdiction and power to a State Supreme Court was wider than that previously existing under the Charter of Justice. That may or may not be. But now the source lies in a law enacted by a State Parliament, itself a legislative body expressly provided for in the federal Constitution[182]. The source of that enactment can be traced, ultimately, to the will of the electors entitled to vote in New South Wales. It does not appear to lie in Imperial law, the royal prerogative or any other source.

134 Any judicial expressions of "inherent" or "implied" powers of such a court must therefore be consistent with the new *Supreme Court Act*. It follows that, arguably, the source of the jurisdiction, and the "necessary" powers, of the Supreme Court of New South Wales is, after 1970, s 23 of the *Supreme Court Act*, other Acts and implications found there and not "inherent" jurisdiction and powers.

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179 (1983) 154 CLR 261 at 275.

180 It was pursuant to the *New South Wales Act* 1823 (Imp) (4 Geo IV c 96) that Letters Patent dated 13 October 1823 were issued, to take effect from their promulgation in Sydney. This took place on 17 May 1824. Those Letters Patent are referred to as "The Charter of Justice". By that Charter, the Supreme Court of New South Wales was made a court of record (s 1) with a Chief Justice (s 2) who should keep the Seal of the Court (s 3).

181 (1962) 108 CLR 620.

182 Sections 9, 10, 15, 25, 29-31, 51(xxxvii) and (xxxviii), 107-108, 111 and 123.

135 *The difference need not be resolved*: Concerns such as the foregoing are not determinative of the outcome of these appeals. I accept that the wide grant of jurisdiction provided to the Supreme Court by s 23 of the *Supreme Court Act* is adequate, of itself, to confer on that Court, jurisdiction and power (whether technically "inherent" or "implied") to terminate proceedings and to provide a permanent stay of proceedings[183].

136 I also accept that the provisions of the Supreme Court Rules do not state exhaustively the circumstances in which a judge of the Supreme Court might strike out proceedings, or permanently stay them, as an abuse of process. Whether the additional unarticulated jurisdiction and power is properly described as "implied" from the statutory grant of jurisdiction rather than "inherent" is not therefore an issue that must be decided in these appeals[184].

Deliberate misconduct is not essential to relief

137 *The appellant's argument*: The appellant submitted that a claim, brought as the appellant's has been, within the time allowed under the applicable limitation statute, could not (whatever the circumstances) be struck out or permanently stayed as an abuse of process without proof of some oppressive or contumelious conduct on the part of the party bringing the action[185].

138 On this submission I agree in the conclusions stated in the joint reasons[186]. It is not necessary for a party seeking relief against what it claims is an abuse of process, to show misconduct of some kind on the part of the plaintiff. To the extent that this requirement is suggested by any *dicta* of the House of Lords in *Birkett v James*[187], those *dicta* do not represent Australian law.

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183 Cf *Burton v Shire of Bairnsdale* (1908) 7 CLR 76; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.

184 Cf *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 at 584-585 (1952) per Black J.

185 He relied on *Herron v McGregor* (1986) 6 NSWLR 246 at 253, 256 per McHugh JA. At 256 McHugh JA stated "[w]hile long delay in bringing proceedings by itself is not enough to render a complaint an abuse of process, the circumstances of this case make the delay in bringing proceedings so oppressive as to amount to an abuse of process."

186 Joint reasons at [69]-[70].

187 [1978] AC 297.

139 In *Jackamarra v Krakouer*[188] I acknowledged that delay (as in the commencement or continuation of litigation), and the fact that such delay was "intentional or contumelious", were relevant considerations in judging whether the proceedings should be terminated[189]. In the context of identifying considerations that need to be taken into account in making such decisions, I referred to *Birkett v James*. Amongst other considerations that I mentioned in *Jackamarra* were whether any of the delay was caused by the litigant or its lawyers and "considerations personal to the party which might have affected its ability to safeguard its own interests"[190].

140 Each of the stated considerations is relevant to these appeals. It was agreed that neither the appellant nor his legal representative could be blamed for the delay once the present proceedings were commenced. The matters personal to the appellant, specifically his mental and physical disabilities, are considerations relevant to the final judgment that has to be made.

141 *Misconduct not essential for a stay*: The suggestion that the respondents had to prove misconduct of some kind on the appellant's part before they could secure relief against proceedings classified as an abuse of process should be rejected[191]. The considerations to be given weight are much more numerous. The preclusory theory of the power, propounded for the appellant, cannot be reconciled with the purposes of the power. The power to terminate or stay proceedings as an abuse of process does not exist simply to punish a party or its legal representatives who deliberately delay proceedings to the disadvantage of other parties. In the exceptional cases to which it applies, the power to stay exists to prevent the conduct, or further conduct, of proceedings that would be fundamentally unfair to another party, because, for example, of serious delay in the commencement, or continuation, of the proceedings.

142 In some cases an order made under this power, or under analogous powers, will indeed be made to protect the parties proceeded against from the serious injustice involved in subjecting them to litigation in circumstances that render the proceedings grossly unfair. However, part at least of the reasons for the termination of such proceedings, or the provision of a permanent stay, on the ground of an abuse of process, is the self-regard of the court itself. At the one time, the court is protecting parties and defending the "temples of justice". This

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188 (1998) 195 CLR 516 at 542-543 [66.7]. See also at 521 [7].

189 In that case by failing to enter an appeal for hearing despite an extension of the period of time within which to do so.

190 (1998) 195 CLR 516 at 543 [66.7].

191 *Contra* reasons of Callinan J at [232].

is inherent in the performance by the court of its jurisdiction and the exercise of its powers[192]. Thus, preclusion by misconduct is a consideration. But it is not the only consideration. Nor is it essential. Of its nature, the power exists for application in a wider range of circumstances.

143 Furthermore, of its nature, the power may be invoked although a party is still within the applicable limitation period for maintaining its claim[193]. This must be so because, if an ultimate limitation bar has descended, no question would normally arise as to the power of the court to dismiss, or permanently stay, proceedings as an abuse of process. In such a case, the parties sued would usually be entitled to relief on limitation grounds (subject to any power to extend the limitation period in the circumstances of the case). By accepting that the court's power to dismiss proceedings, or to stay them permanently, in circumstances of misconduct, the appellant effectively accepted that the limitation statute did not afford an irreducible right to bring proceedings within the relevant limitation period.

144 Once that concession was made (correctly in my view) the issue for decision shifts. It involves not the *existence* of a power to provide relief from proceedings that constitute an abuse of process. It concerns, instead, the *content* of that power and the relevance to it of a provision in limitation law and whether, in the present case, such provision was given proper weight.

Mistaking the content of the power to terminate proceedings

145 *An issue in these appeals*: I now reach the issues that are decisive for the outcome of these appeals. In its supplementary written submissions the RTA asserted that the remaining issue in the appeals was whether the Supreme Court enjoyed a "discretionary power to grant a permanent stay of proceedings where the action is not time-barred". It contended that the appellant did not advance a proposition that the exercise of discretion by the Court of Appeal had miscarried. The Council adopted, and supplemented, the RTA's arguments.

146 These submissions do not represent a correct statement either of the ground of appeal before this Court or of the position that the appellant adopted in his arguments.

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192 See *Nudd v The Queen* (2006) 80 ALJR 614 at 632-633 [84]; 225 ALR 161 at 184; *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 557; *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1988) 85 ALR 640 at 651.

193 *Contra* reasons of Callinan J at [220].

147 In his notices of appeal to this Court, the appellant contended that the Court of Appeal erred in law in "defining the circumstances in which a citizen can be deprived of his fundamental right to bring a case before a Court in a civil proceeding" where he has brought his case within a relevant period of limitation and bears no fault for any delay. This ground of appeal raises the relevance, if any, of the existence and content of the period of limitation (and the absence of any fault for such delay) where the proceedings have been brought *within* a relevant limitation period.

148 *Issues should not be narrowed*: During oral argument, the appellant made it clear to this Court that this was one of the ways in which he advanced his argument[194]. No occasion arises for this Court to narrow the issues, properly raised in support of the appellant's appeals, falling as these issues do within the amended grounds of appeal filed on his behalf.

Error in the Court of Appeal's reasons

149 *Instability of appellate reasoning*: The Court of Appeal was exercising its powers in proceedings that had earlier been heard by Master Harrison, Bergin J and, ultimately, Hoeben J. The Court of Appeal considered (as has been explained)[195] that no error appeared in Hoeben J's conclusion, based on the respondents' invocation of the jurisdiction and powers of the Supreme Court to stay the proceedings under Pt 13 r 5 of the Supreme Court Rules[196]. Its intervention was thus confined to the suggested error of Hoeben J in the exercise of the "inherent jurisdiction" of the Supreme Court (or implied powers as I should prefer to describe them).

150 It follows that the question for this Court, as a court of error, is whether the Court of Appeal erred in considering that it was authorised to disturb the evaluative (sometimes called "discretionary") decision, reached by Hoeben J. As such, this Court is not simply involved in a consideration, as on a rehearing, of how it would exercise the applicable powers for itself, absent demonstration of error on the part of the Court of Appeal[197].

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194 [2006] HCATrans 004 at 1114-1125.

195 See above these reasons at [105].

196 [2004] NSWSC 796 at [49].

197 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879 [65.1]; 179 ALR 321 at 336; *Manley v Alexander* (2005) 80 ALJR 413 at 416 [14]; 223 ALR 228 at 231; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 464 [12]; 224 ALR 1 at 6.

151 There is an obvious instability in the Court of Appeal's reasoning in so far as all of the judges there endorsed the conclusion that Hoeben J had been correct to refuse summary dismissal under Pt 13 r 5 on the basis that the case was not "so clearly untenable that it cannot possibly succeed"[198]. Those reasons later conclude that the trial had to be stopped because all that the appellant was relying upon at trial was "scraps of information" in order to establish the liability of the respondents[199].

152 If it were true, as Bryson JA concluded, that it was "impossible to inform the debate [between the parties] with any realistically useful information"[200], it is impossible to sustain the conclusion that a "viable" or "not untenable" case had been demonstrated by the appellant which denied the respondents summary relief on that footing.

153 This inconsistency is of particular concern when the very basis of Hoeben J's conclusion at first instance, was a rejection of the respondents' submissions that the appellant's case (including, by then, the affidavits of Messrs Lanham, Wynne and Alston), prevented the summary termination or stay of the proceedings as an abuse of process. Principally, it was those affidavits that convinced Hoeben J and the Court of Appeal that the respondents did "not meet the standard of certitude required for the exercise of this power" under Pt 13 r 5 to stay the proceedings[201].

154 Either the affidavits of Messrs Lanham, Wynne and Alston are mere "scraps of information" that render it "impossible to inform the debate with any realistically useful information" constituting "in practical terms nothing of utility to place in the balance against the [respondents'] claim for a permanent stay"[202] or the affidavits and the other material tendered by the appellant constitute a not untenable case, so that the matter should proceed to trial. It is impossible to have it both ways.

155 *Need to correct erroneous reasoning*: It is possible to imagine a proceeding in which, although a plaintiff established, by evidence, a not untenable case, the countervailing injustice to the defendant might be such as to render the trial so seriously unfair that it should be stayed permanently as an

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198 (2005) 43 MVR 381 at 385 [13].

199 (2005) 43 MVR 381 at 405 [79].

200 (2005) 43 MVR 381 at 405 [79].

201 (2005) 43 MVR 381 at 394 [48].

202 (2005) 43 MVR 381 at 405 [79].

abuse of process. However, this is not the way the Court of Appeal explained its orders.

156 Such a serious inconsistency in the reasoning supporting the orders of the Court of Appeal, cannot be allowed to stand. Especially so when its consequence is to put a person, such as the appellant, out of court, although he is within time to bring his proceedings under the applicable limitation law. This Court must correct the consequential orders of the Court of Appeal unless some other lawful foundation can be found to support them. Alternatively, this Court must return the proceedings to the Court of Appeal to exercise its powers afresh without this inconsistency.

The relevance of the right of access to the courts

157 *Fundamental right of access*: The reference, in the appellant's notices of appeal, to the deprivation of a citizen's "fundamental right to bring a case before a Court in a civil proceeding" is not well expressed. In Australia, access to courts (and tribunals) for the defence of legal rights, is not normally limited to "citizens"[203].

158 Nevertheless, I take the language of this ground of appeal to refer to the importance for any person with a requisite interest to have access to an applicable court. Such a person may complain, in a case such as this, that the summary termination of the right to have a court decide the case, on the basis of the entirety of the evidence and argument, denies that person a fundamental right.

159 The common law has long been defensive of the right that all persons enjoy to have access to the courts and not to be denied such access save in the most exceptional of circumstances[204]. So much is inherent in the rule of law which is a foundation of Australia's legal system, implied in the Constitution. Thus, in *Dey v Victorian Railways Commissioners*[205], Dixon J said:

> "A case must be very clear indeed to justify the summary intervention of the court … [O]nce it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it,

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203 There are some exceptions deriving from the content of substantive law. See, eg, *Migration Act* 1958 (Cth), s 48A.

204 *Williams v Spautz* (1992) 174 CLR 509 at 519; *Old UGC Inc v Industrial Relations Commission of New South Wales* [2006] HCA 24 at [52], [65]-[66].

205 (1949) 78 CLR 62 at 91. See also *Webster v Lampard* (1993) 177 CLR 598 at 602.

then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

160 In *General Steel Industries Inc v Commissioner for Railways (NSW)*[206], Barwick CJ, in a similar vein, affirmed that "great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal". His Honour said this whilst acknowledging that there are cases where a defendant "should be saved from the vexation of the continuance of useless and futile proceedings".

161 These authorities have been applied repeatedly in this, and other, Australian courts. They are not stated in the modern language of universal human rights. However, they are directed to the same ends. The principles of the international law of human rights may now inform the content and application of Australian law[207]. The provision in Art 14 of the International Covenant on Civil and Political Rights ("ICCPR"), to which Australia is a party, providing a guarantee of the right to a fair trial, is the provision of that treaty most commonly invoked before the United Nations Human Rights Committee[208]. That article provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

162 To the extent that a party is deprived of the opportunity, at such a hearing, to present all available and relevant evidence and argument, in a substantial case that has been held not to be untenable, a question is presented as to whether the requirements of Art 14 of the ICCPR has been complied with. Simply because a case appears to be difficult to prove or has evidentiary weaknesses disclosed in a preliminary examination where summary relief is claimed, does not mean that a trial, in the normal way, would necessarily be unfair. The contrary is the case.

163 *Fair trial is fair to both sides*: In *Holt*[209], Priestley JA, in dissenting reasons, although in words that I regard as uncontroversial, said:

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206 (1964) 112 CLR 125 at 130.

207 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

208 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed (2005) at 461.

209 (2000) 49 NSWLR 128 at 142 [79] (emphasis in original).

> "One thing seems to be clear; that is that the term ["fair trial"] is a relative one and must, in any particular case, mean a fair trial between the parties in the case in the circumstances of that particular case. Further, for a trial to be fair it need not be perfect or ideal. That degree of fairness is unattainable. Trials are constantly held in which for a variety of reasons not all relevant evidence is before the court. Time and chance will have their effect on evidence in any case, but it is not usually suggested that that effect *necessarily* prevents a fair trial."

164 As Hoeben J pointed out in his reasons at first instance in this case, the seriously delayed trials of claims arising out of the *Melbourne/Voyager* collision[210], anticipated by a contemporaneous decision of this Court[211], did not prevent fair trials from taking place. In one such case, the trial took place 40 years after the collision[212]. In this case, the appellant's legal representative had discovered, and tendered, three independent witnesses, familiar with the road whose design, markings and surroundings lay at the heart of the appellant's claim, together with photographs, plans and other materials. In such circumstances, to stop the trial without a hearing on the merits is truly exceptional. It constitutes a rare and serious step. Especially is this so because of the dimensions of the claim; the importance of the proceedings for the appellant and his carers; the confirmed conclusion that, on the evidence, the appellant had a "not untenable" case; and the serious disabilities, mental and physical, that have, at all material times afflicted the appellant, explaining the delay in the earlier prosecution of his legal entitlements.

165 It is true, as the joint reasons state[213], that the Court of Appeal referred to the admonitions of caution in *Cox*[214]. In that decision, Dixon J placed emphasis on the fact that[215]:

> "A litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender. It is only when to permit it to

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210 [2004] NSWSC 796 at [44].

211 *Parker v The Commonwealth* (1965) 112 CLR 295. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394.

212 *Wright v The Commonwealth* [2005] VSC 200.

213 Joint reasons at [7].

214 (1935) 52 CLR 713.

215 (1935) 52 CLR 713 at 720 (emphasis added); (2005) 43 MVR 381 at 404 [73].

> proceed would amount to an abuse of jurisdiction, or would *clearly* inflict unnecessary injustice upon the opposite party that a suit should be stopped."

The Court of Appeal also referred to similar remarks of Dixon J in *Dey* and of Barwick CJ in *General Steel*[216].

166 *Fair trial takes account of disability*: What is missing from the consideration of this general principle is an express recognition by the Court of Appeal of the special circumstance occasioned by the severe disabilities, mental and physical, under which the appellant laboured.

167 From the earliest times of the Australian legal system, reflected in the provisions of the 1623 Act, mental disabilities have been treated as falling in a special case requiring adjustments to the law's ordinary approach to delays that take the proceedings outside the ordinary limitation period. Such disabilities have attracted special treatment from Parliament. This has been so although a measure of unfairness is inherent in the extended limitation period. Large numbers in the Australian community, as in societies everywhere, suffer from mental and physical disabilities which help to explain a delay in bringing their proceedings promptly. There is no reflection in the Court of Appeal's reasons of that consideration or of its significance for the appellant's delay, the needs that his mental impairment occasioned, the disadvantages he faced in invoking the courts and the consequence that these features of his case should be weighed before a decision was taken to terminate the proceedings on the basis of abbreviated evidence and without a trial of the merits.

168 Whilst each of the judicial officers at first instance who considered the respondents' applications for a permanent stay[217] referred to these considerations, there is no like attention to them by any of the learned judges of the Court of Appeal. Necessarily, a "fair trial" involves fairness to both sides. The respondents are well resourced public authorities who, Bergin J and Hoeben J concluded, had not tried hard enough to gather evidence relevant to their defence to the case that the appellant had pleaded. Only the appellant's camp had done so.

169 The judges at first instance made several suggestions that had not apparently occurred to those representing the respondents. These involved lines

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216 (2005) 43 MVR 381 at 394 [47].

217 [2000] NSWSC 506 at [3] per Master Harrison; [2001] NSWSC 237 at [17], [25], [43]-[48] and [72] per Bergin J; [2004] NSWSC 796 at [16]-[26], [43]-[48] per Hoeben J.

of enquiry which the respondents had not pursued. The respondents' contention that Hoeben J had disregarded the complaint about identifying the respondents' insurers at risk at the relevant times, is also unconvincing. Even hard-copy indexes to the published decisions reveal that, in the 1960s, both of the respondents were frequent litigants in New South Wales courts. Such cases suggest that there would be court files, which would not have been destroyed but archived. By inference, such records would provide a fruitful source for tracking down the respondents' and opponents' solicitors at that time who could help identify the respondents' insurers. In any event, the inability of a party, otherwise liable in law, to establish its insurance because it has destroyed its own files at a time when it was still exposed to risk is, although a relevant consideration, not determinative of the rights of another party who, to the requisite standard, can prove his case at law.

170 *Fair trial upholds real access*: The Court of Appeal's conclusion that a "fair trial" could not be had in the circumstances is flawed by the failure of that Court to give due attention to justice to the appellant, especially in the circumstances of his serious disabilities. This is yet another instance where an Australian court has shown itself inattentive to the requirements of justice for a mentally disabled person[218]. In this case, that person is an individual entitled to a guaranteed human right of real access to the courts for the trial of a contested claim. He is a citizen and he is a person entitled to have fairness, in a case of profound importance for his well-being, put into the balance when the final decision is taken on whether his case constitutes an abuse of process. These omissions on the part of the Court of Appeal alone warrant the setting aside of that Court's orders.

The enactment of an ultimate time bar is relevant

171 *Relevance of the ultimate time bar*: There is a further and connected reason for concluding that the Court of Appeal misunderstood, and therefore misapplied, the exceptional power of the Supreme Court to terminate the appellant's case before trial as an abuse of process.

172 The Court of Appeal decided not only that the existence of the ultimate statutory limitation bar was not determinative of the rights of the parties (a correct decision) but also that it was immaterial because addressed to a different purpose[219] (an incorrect decision).

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218 Cf *Purvis v New South Wales* (2003) 217 CLR 92 at 104 [20]. See also Goggin and Newell, *Disability in Australia: Exploring a Social Apartheid* (2005), 17-22, 36-37.

219 (2005) 43 MVR 381 at 405-406 [80].

173 The "inherent" powers of the Supreme Court revolve in the orbit of statutes[220]. The bulk of the law of a contemporary society is now made up of parliamentary law. A power sourced to the decisions of judges cannot be inconsistent with, or indifferent to, relevant statutory provisions. Even where legislation does not expressly govern the case, it may afford the context in which the common law, or any particular statutory provision, will be found.

174 Although, therefore, I accept that proceedings brought within an applicable limitation period may, as a matter of jurisdiction and power, be stayed as an abuse of process I do not accept that an exceptional limitation period fixed by Parliament is irrelevant to the exercise of the power to terminate or stay proceedings permanently on the basis that a fair trial could not be had. In a case such as the present, where the relevant State Parliament has addressed its attention to two provisions that are specifically relevant to a case of this kind, it is material to take the enacted law into account in defining the ambit of the common law power to terminate or to stay[221].

175 The two relevant statutory provisions, appearing in the 1969 Act, are (1) the special provision suspending the operation of the ordinary limitation period where a person is "under a disability", for the "duration of the disability"[222]; and (2) the particular provision, notwithstanding such suspension, imposing an "ultimate bar", arising after "the expiration of a limitation period of thirty years"[223].

176 No conclusion about the content of the "inherent" or "implied" power of the Supreme Court to terminate or stay proceedings permanently for abuse of process could be adopted which ignored, or rejected, these provisions. They fix the outer limits of what Parliament has provided. In deciding whether a particular trial would be irremediably "unfair", it is material and necessary to take into account that Parliament has decided that up to 30 years may elapse but, in the ordinary case of a person under a disability during that time, the claim is not statute-barred but may be brought, tried and determined.

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220 Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2004) 35 *Ottawa Law Review* 163.

221 Cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 12-13 [33], 27 [83], 45-47 [128]-[130]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 [23], 89-90 [105]; *Harriton v Stephens* [2006] HCA 15 at [139]-[144].

222 Section 52(1)(c) and (d).

223 Section 51(1).

177 Inevitably, a claim brought, by a person under a disability, beyond the ordinary limitation period and up to 30 years later will impose disadvantages on the party sued. Inescapably, it will involve unfairness to some degree. Yet, in balancing fairness to the plaintiff and to the defendant, Parliament has concluded that, within the time fixed by the ultimate bar, the action is not statute-barred. The concern for the entitlements of persons under a mental disability is as old as the 1623 Act, and perhaps older[224]. That concern has been reflected in the law during the entire history of Australia. What is new is the introduction of an "ultimate bar" of 30 years by which Parliament has addressed the period beyond which a defendant, even in cases of a plaintiff with a disability, should not be further troubled[225].

178 To say that these provisions leave open the exceptional power to terminate or stay proceedings permanently for an abuse of process is one thing. But to treat the outer boundaries within which the proceedings may be brought as immaterial, is quite another. The Court of Appeal erred in so regarding the provisions of ss 51 and 52 of the 1969 Act. The approach adopted by the Court of Appeal reflects an attitude to the fairness of trials on causes of action, sued for by a person with a serious disability, that is inconsistent with that adopted by Parliament. At the least, the parliamentary prescription was one that should have been taken into account in deciding the provision of relief where all of the judges at first instance on legal and discretionary grounds had refused that relief.

179 *English cases on the limitations context*: There are many passages in English cases that support this approach to the relevance of the outer boundaries fixed by Parliament in the *Limitation Act* 1975 (UK)[226]. It is, after all, an approach similar to the way in which, earlier, equity developed its response to delay in proceedings by analogy with statutes of limitations[227]. Apart from general observations, there are several judicial remarks specifically addressed to the position, as here, of a person under a disability bringing a belated claim, but within an exceptional limitation period.

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224 *Herron* (1986) 6 NSWLR 246 at 253.

225 There are long stop provisions in the limitations statutes of other Australian States: see, eg, *Limitation of Actions Act* 1958 (Vic), s 5(4).

226 See, eg, *Birkett* [1978] AC 297 at 320; *Tolley v Morris* [1979] 1 WLR 592 at 599-600; [1979] 2 All ER 561 at 568 per Lord Diplock.

227 *Blunden* (2003) 218 CLR 330 at 358 [85] citing Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th ed (2002) at 1015-1016 [34-075].

180 In *Hogg v Hamilton and Northumberland Health Authority*[228], Purchas LJ, in the English Court of Appeal, cited with approval a passage from the reasons of the trial judge in that case, Brooke J. After acknowledging that a delayed claim made it difficult for a medical practitioner to defend himself, Brooke J pointed to the fact that the legislative provision, allowing a person under a disability to bring a claim "at any time, however unfair it may be to the people against whom the claim is made", was inherent in the parliamentary prescription[229]. Mann LJ remarked that it would be rare, where proceedings were instituted within an extended or unexpired limitation period, that they could be found to be abusive "even though there has been demonstrable prejudice to the defendant in consequence of delay"[230].

181 In another English case, *Bull v Devon Area Health Authority*[231], involving a claim brought on behalf of an infant damaged at birth by negligence allegedly occurring some 17 years before the trial, Mustill LJ addressed the "double disability" of infancy and mental disability suffered by the plaintiff. He said[232]:

> "Parliament must … have decided that the public interests in requiring factual disputes to be litigated promptly is outweighed, in cases such as this, by the public interest in giving the disadvantaged a long time within which to sue. By making this choice the legislature has imposed heavy burdens on the parties and also on the trial judge. Heavy as they are, the law requires them to be assumed."

182 In *Headford v Bristol and District Health Authority*[233], another case was presented in which damage to an infant plaintiff had been followed by a delay of 28 years before the initiation of proceedings for negligence. The trial judge dismissed the action as an abuse of process. The English Court of Appeal acknowledged the existence of a power, exceptionally, to terminate proceedings that constitute an abuse of process. However, it concluded that the applicable provisions of the *Limitation Act* 1980 (UK)[234] indicated that Parliament had

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228 [1992] PIQR 387.

229 [1992] PIQR 387 at 400.

230 [1992] PIQR 387 at 406.

231 [1993] 4 Med LR 117.

232 [1993] 4 Med LR 117 at 139.

233 [1995] 6 Med LR 1.

234 Section 28(1).

"expressly contemplated … that"[235] proceedings might be brought very many years after the limitation bar applicable to the ordinary case. When evaluating the relevance of delay, for the exceptional, residual common law power to terminate proceedings as an abuse of process, a material consideration was the express provision by Parliament of an exceptional limitation period in the case of infants and persons with disabilities.

183 *Giving weight to the legislative context*: I agree in this consistent approach in the line of English cases, decided by senior judges and supported by persuasive reasons. The importance of the suspension of the ordinary limitation period for disability and the imposition of an ultimate limitation bar in the limitation statute applicable to the appellant's claim is this. It indicates a parliamentary judgment that, at least in the ordinary case, brought within the period fixed by any ultimate bar, the great delay involved (whilst necessarily prejudicial to the defendants) is not to be taken without more, as resulting in an unfair trial. This is because, both in the 1623 Act, and in the 1969 Act, legislatures have recognised that certain persons are under a disability or other disadvantage through no fault of their own and it is proper in their cases to adopt a more tolerant rule.

184 *Erroneous disregard of the context*: Whilst cases will arise where the defendant may be relieved of that burden, those cases will be rare and exceptional. The passage, under the 1969 Act, of up to 30 years from the accrual of the cause of action cannot amount, of itself, to a ground of impermissible unfairness. Particular, additional, features of the litigation may demonstrate that a trial would be incurably unfair and so should be terminated or permanently stayed. But such exceptional features take their content from the fact that, by statute, delays of up to 30 years have been judged by the New South Wales Parliament as tolerable, in the ordinary case.

Conclusion: the Court of Appeal erred

185 Because, in exercising its exceptional power to stay the appellant's proceedings permanently, the Court of Appeal erred in the respects identified in expressing the power and in applying it to the circumstances, the Court of Appeal erred. Its orders cannot stand. Upon this premise, this Court must either exercise the power for itself or remit the matter so that the power might be lawfully re-exercised below.

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235 [1995] 6 Med LR 1 at 4.

Formulation of relief and orders

186 *Re-exercise of the power to stay*: Having regard to the great delay in these proceedings, this Court should exercise the power that miscarried in the Court of Appeal[236]. The relevant evidence is available for this purpose. Clearly, this is a case where a trial should be had as quickly as possible.

187 Taking into account the conclusion of the Court of Appeal (with which I agree) that Hoeben J did not err in rejecting the application for summary relief under the Supreme Court Rules and in finding that the appellant's proceedings were "not untenable", the alternative invocation in this case of the "inherent" (or "implied") jurisdiction or power of the Supreme Court should be rejected.

188 The appellant's proceedings, brought within the time available to a disabled person, should be tried in the ordinary way. Delay disadvantages the appellant as well as the respondents. Despite the newly discovered witnesses, their evidence, the aerial photograph and other evidence, the appellant may ultimately fail to establish his claims of negligence and nuisance. The onus of proving his case rests on him. Yet he is entitled to have those claims tried. They should not be disposed of on the basis of the abbreviated evidence and submissions in a summary proceeding such as this.

189 *Reinstating the primary judge's orders*: The fairness of the trial, which the courts are obliged to protect, includes fairness to a profoundly disabled and catastrophically injured person such as the appellant. Like Hoeben J, I am unconvinced by the respondents' argument that a fair trial of the proceedings is impossible. In judging the unfairness to the respondents, I take into account, as a material consideration, that Parliament has judged, in the ordinary case of a person with such disabilities, that a claim brought within the ultimate bar of 30 years is not, for that reason only (or for reasons inherent in such a delay), to be treated as unfair.

190 I accept the analysis of the available evidence contained in the reasons of Hoeben J. On that evidence, it was open to his Honour to reject the respondents' claims that the proceedings should be dismissed or permanently stayed. On the same evidence, and in the case of this appellant, I would reach precisely the same conclusion. I will not be a party to orders of this Court that impose on the appellant a third, exceptional, burden – the burden of injustice.

191 *Orders in the appeals*: The appeals should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should

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236 Reasons of Callinan J at [236]; *BHP Billiton v Schultz* (2004) 221 CLR 400 at 468 [175], 494 [262].

be set aside. In place of those orders, the appeals to the Court of Appeal should be dismissed with costs.

192 CALLINAN J. This appellant has had a most unfortunate life. The first of his many misfortunes was to be born mentally retarded. The second was to lose his mother when he was one year of age. The third was his separation from his siblings and his admission to a mental institution when he was 6 years old. Another, in 1965, was to be rendered quadriplegic in a motor accident when the vehicle that he was driving failed to take a bend in the road and overturned. The last was to have an action which he brought in the Supreme Court of New South Wales to recover damages in respect of his quadriplegia, brought within the limitation period, stayed by the Court of Appeal of New South Wales, on the basis that effluxion of time alone produced the consequence that the action could not be fairly tried. It is with that decision that this Court is concerned, and in respect of which it is required to decide whether the Supreme Court had power to stay the action permanently, and, if it did, whether the power was properly exercised.

Facts

193 It is unlikely that any of the courts which have so far been concerned with these proceedings has had placed before it all such relevant facts as might be available to a court actually conducting a trial for which the parties could be expected to have made full preparation. Some of the more important of the facts that were actually placed before the courts at first instance, are, surprisingly rather more detailed than might perhaps have been expected after the passage of so much time.

194 The appellant was born in 1932. His parents were Greek migrants. His mother died in giving birth to a sibling in 1933. His father was unable to care for the children of whom there were three. English was not spoken at home. In 1938 the appellant was admitted to the Newcastle Mental Asylum where he remained for the next 18 years. There is reason to believe that he was dyslexic, and that it and the serious disadvantages that he suffered as a child, may have made him appear to be more mentally retarded than he was, although a test in December 1948 showed that his intelligence quotient was 69 only. His schooling was rudimentary: he can write in a fashion, but he has never learned to read. Even so, by age 22 he was able to work as a labourer in the Public Works Department, and in the first two years of his employment saved $10,000.

195 Fullerton Street connects Newcastle and Williamtown. In 1965 it was partly sealed. It is possible that in that year it was under the control of the predecessor to the respondent Authority, the Commissioner for Main Roads, although the respondent Council also may have had some responsibility for it. Before 1965 there had been accidents causing fatalities on the road. In the early 1960s there were only three streetlights in the area where the appellant's vehicle left the roadway. They were not of such a kind as to provide much illumination. Mr Lanham, who is still alive, knew the area quite well and was an Alderman on the respondent Council from 1980. He pressed for improvements to the road

and, in particular, for it to be straightened. His efforts resulted in a realignment which occurred in about 1985. Before the realignment, no signs had been erected on the road warning of the existence, the beginning, or the end of the deviation. There are aerial photographs in existence which show portions of the road as it was a few months after the appellant was injured on it. There is no reason to suppose that those photographs do not reasonably accurately represent the appearance of the road at the time of the accident.

196 Official records still in the possession of the respondent Council describe the deviation in the road as a "dog leg". The same records, made in 1981, speak of the presence of saltbush at the dog leg, and the impairment of sight lines because of it and the curve. Trees also obstructed vision. By 1981 the primary responsibility at least for the road lay with the respondent Council. Official records also contain some sketches of the roadway indicating the nature of the path of the curve. The cost of the work when it was done is the subject of Council estimates.

197 Mr Wynne, now a man of 68 years of age was living in Stockton, near where the accident occurred in the years leading up to 1965. His recollection of the topography is clear. He recalls that the appearances leading up to the relevant curve were deceptive because telegraph poles near to the road "continued on in a straight line whereas the road itself took a deviation to the left then went straight for a period and deviated again to the right. One then made a left hand turn to continue straight on down Fullerton Street ...". Mr Wynne also says that the remains of the bitumen road in its unaligned state can still be seen.

198 Mr Wynne knew the appellant before he was injured and visited him in hospital after the accident. He actually went to the scene of the accident a few days after it and observed marks on the roadway which, it seems likely, were made by the appellant's vehicle.

199 Mr Alston is another person who was familiar with the locality at the time of the accident and knew the appellant. He describes the configuration of the roadway as a "zig zag". He too has observed remnants of the unaligned tar surface and gutter in the vicinity. He says that the street lighting in 1965 was very poor. He believes that he did see the appellant's vehicle beside the roadway shortly after the accident. There is no police report of any investigation into the accident. Neither of the respondents has available to it very much information about the state of the roadway at the time.

200 The respondent Authority, in an affidavit, makes these assertions:

> "The [Authority] has been irretrievably prejudiced by the [appellant's] delay in bringing these proceedings. Because of the [appellant's] delay the [Authority] has no means of ascertaining or investigating the:

– road conditions (including the manner of the roadway's construction, camber, alignment, levels, roadmarking, signage, illumination and speed zoning) of Fullerton Street as at the date of the [appellant's] alleged accident;

– circumstances in which the alleged accident occurred;

– [appellant's] physical and mental condition at the time of, and in the years following, the alleged accident.

The [Authority] has by reason of the [appellant's] delay been denied the opportunity to conduct an effective defence to the claim."

201 It is unnecessary for me to go into the detail of those assertions but sufficient to point out that there is quite good evidence available, including hospital records and medical reports, of the appellant's physical and mental condition before, and in the years after he became quadriplegic. Furthermore, I am unable to accept that there would not be available objective evidence of relevant engineering standards and practices applicable to roads such as the one in question at the time of the accident.

202 There has not been placed before the Court any sworn direct account of the accident by the appellant. Particulars provided by him refer to the consumption by him of a moderate amount of alcohol at a party shortly before the accident.

203 It does seem that the roadway may have been resurfaced not long before the accident occurred: a photograph taken 36 days after the accident is available and would suggest this to be so.

204 The appellant commenced his action on 21 December 1994, more than 29 years and a little less than 30 years after the accident.

The nature of the claim

205 The appellant alleged that the first and second respondents had the care, control and management of Fullerton Street and that the bend where the accident occurred was designed, constructed or maintained by one or other of the respondents. The substance of the appellant's claim against the respondents is negligence, in that as he was driving his car along Fullerton Street, Stockton he "came upon an unmarked and unposted bend in the road in the vicinity of Meredith Street" and ran off the road and into a depressed ditch and overturned. The following relevant particulars of negligence were provided.

"6. On or about the 21st August 1965 the [appellant] was driving a motor vehicle along Fullerton Street, Stockton when the motor vehicle ran off the road and into a depressed ditch and overturned,

when the [appellant's] vehicle came upon an unmarked and unposted bend in the road in the vicinity of Meredith Street and its northern approaches.

7. The [appellant] was thereby injured.

8. The said bend in the road was constructed and/or maintained and/or designed by the said Commissioner for Main Roads and/or the [Council].

9. The [appellant's] injuries were occasioned by the negligence of the said Commissioner for Main Roads and the [Council] and each of them.

PARTICULARS OF NEGLIGENCE

(a) Constructing and/or maintaining a bend in the said road which was at a higher level of elevation to the surrounding terrain.

(b) Failing to warn of the existence of the said bend at its northern approaches or at all.

(c) Failing to place posts with reflectors in and at the approaches to the said bend.

(d) Constructing and/or maintaining the said bend where the adjacent grass camouflaged its existence.

(e) Failing to remove the said grass in the course of such construction and/or maintenance.

(f) Failing properly to illuminate the said bend.

(g) Failing to warn that the roadway was or had become unsafe to traverse at normal cruising speed.

(h) Failing to post any or any sufficient warning of the necessity to traverse the roadway at less than normal cruising speed.

(i) Failing to construct or design the roadway with adequate or proper camber, or to cause the said roadway to be so constructed or designed.

(j) Constructing and/or maintaining the roadway in such a condition that it was unsafe to traverse at normal cruising speed and/or causing permitting or allowing the roadway to be so constructed and/or maintained.

(k) Failing to warn of the inadequate or defective camber of the roadway or to rectify the same.

(l) Causing permitting or allowing the said roadway to come into or remain in public operation with the deficiencies hereinbefore particularised.

10. Further and in the alternative the [appellant] claims that the said Commissioner for Main Roads and/or the [Council] wrongfully caused and/or permitted the said roadway to be dangerous in the respects referred to in the preceding paragraph and as hereinbefore particularised and thereby committed a nuisance on the roadway."

206 Particulars were requested and the following were given:

"(i) [Appellant] travelling along Fullerton Street at approximately 30 mph (45 mph speed limit) between 12 midnight and 1 am on way to catch Stockton ferry to return to the home of a couple in Newcastle where he was then living.

(ii) Had consumed a few beers during course of evening.

(iii) Driving a Ford van, similar to a PMG van which he had purchased second-hand from a caryard at Mayfield.

(iv) Stockton Police had attended the accident scene and the hospital.

(v) It was raining at the time of the accident and traffic conditions were light.

(vi) Fullerton Street was a bitumen road with a single carriageway in either direction.

(vii) The [appellant] was travelling in the south bound side of the road and did not realise that there was a bend in the road 'due to the absence of proper marking, signage, lighting and reflectors until it was too late to take effective evasive action'."

207 The following particulars were also given:

"The accident occurred just north of the junction of Fullerton Street and Meredith Street. An S-bend existed at that point which the evidence on behalf of the [appellant] will suggest was known in the Stockton area as a black spot. The road has since been straightened and the hazard which gave rise to the [appellant's] catastrophic accident has thus been eliminated. If you could furnish us with a map of the Fullerton Street

> Meredith Street area in the condition which it then existed we shall mark the accident site upon it for you."

Previous proceedings

208 It is unnecessary for me to repeat any of the detail of the proceedings preceding the appeal to this Court as these are fully described in the joint reasons and the reasons of Kirby J. Similarly, it is unnecessary to define the principal issues with which this Court is concerned because these too are amply formulated in a way with which I would respectfully agree subject only to what I say below.

Abuse of process

209 The joint reasons point out that an abuse of process may take more than one form, and that a distinction needs to be drawn between malicious prosecution, collateral abuse of process, and other abuses of process. As is also pointed out in the joint reasons, at the very least, different emphases attend the exercise of an inherent power to stay civil and criminal proceedings. Although the focus of this appeal is upon abuses of the former kinds rather than abuses of criminal processes, something further should be said about the differences between them.

210 The first is that considerable care should be exercised in seeking to apply to civil proceedings what was said by the majority of this Court in *Williams v Spautz*[237]. It should be firmly kept in mind that that case was about the laying of informations concerning a number of offences, including criminal conspiracy to defame and injure, without justification and by illegal means. In other words, the case was concerned with abuse of criminal process, and not all therefore of what was said by the majority can be readily or indiscriminately applied to abuses of civil process. Because the relevant proceedings constituting the abuse there were criminal proceedings no argument was directed to, and the Court did not have to consider, the obligations of legal advisers to prosecute very difficult, and initially at least, unpromising actions, or to mount defences which at first sight might appear to have little prospect of success, matters as to which Lord Esher MR said[238]:

> "[I]f [a] solicitor could not come to the certain and absolute opinion that the case was hopeless, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most

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237 (1992) 174 CLR 509.

238 *In re Cooke* (1889) 5 TLR 407 at 408.

> strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions."

211 Two judges in *Williams v Spautz*, although in dissent, but whose observations are not relevantly affected by that fact, were very much alive to the distinction between civil and criminal abuse. Deane J said this of the former[239]:

> "Most civil proceedings are instituted in the hope that the defendant will settle before the action ever comes to trial or formal orders are made. Frequently, they are instituted for the predominant subjective purpose of obtaining an object which it would be beyond the power of the particular court to award in the particular proceedings. For example, the predominant subjective purpose of a plaintiff in a common law action for damages for wrongful dismissal may well be to obtain a settlement involving reinstatement in his or her former position under a contract for personal services of a type which a court would not enforce by specific performance or injunction. A plaintiff's predominant subjective purpose in suing at common law for damages for trespass to land may be to obtain a settlement in the form of undertakings about future conduct. A plaintiff's predominant subjective purpose in bringing proceedings for an injunction restraining infringement of copyright or breach of patent may be to obtain a settlement incorporating a licence agreement providing for the payment of future royalties. In all those cases, the institution and maintenance of proceedings and the use of them to pursue a form of redress which the particular court could not have granted if the proceedings had run their course are legitimate unless the proceedings themselves are not founded on a genuine grievance but are used as a "stalking-horse" for extortion[240] or merely as an instrument for vexation and oppression."

Gaudron J, the other judge who dissented, said this[241]:

> "But leaving that aside and without going to other cases in the area in which there has been held to be an abuse[242], on my reading of the relevant cases there is no basis for characterizing a purpose as improper unless it involves a demand made without right or claim of right, or unless it entails

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239 (1992) 174 CLR 509 at 543.

240 See *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91.

241 (1992) 174 CLR 509 at 555-556.

242 See, for example, *In re a Debtor* [1928] Ch 199; *In re a Judgment Summons; Ex parte Henleys Ltd* [1953] Ch 195.

some consequence which is unrelated to or is not proportionate with the right, interest or wrong asserted in the proceedings or by the process which is said to have been abused. And, in my view, one or other of those features must be present or the purpose must itself be wrongful if a purpose is to be held an improper purpose justifying a stay."

212 In recent times, pressures, unreasonable ones in my view, have been placed upon advocates, effectively to decide in advance of a hearing, whether there is a good cause of action, or a defence. Indeed in New South Wales, s 345 of the *Legal Profession Act* 2004 (NSW) relevantly provides:

"**Law practice not to act unless there are reasonable prospects of success**

(1) A law practice[243] must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate[244] responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success."

The section then goes on to define the critical expressions found in sub-sec (1):

"(2) A fact is provable only if the associate reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.

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243 "Law practice" is defined in s 4(1) of the Legal Profession Act as:

"(a) an Australian legal practitioner who is a sole practitioner, or

(b) a law firm, or

(c) a multi-disciplinary partnership, or

(d) an incorporated legal practice, or

(e) a complying community legal centre."

244 Under s 7(2)(a) of the Act, a "legal practitioner associate" is an "associate" of a law practice who is an Australian legal practitioner. "Associate" is given an extensive definition in s 7(1) and includes, *inter alia*, a sole practitioner, a partner in a "law practice" and an employee of a "law practice".

(3) This Division applies despite any obligation that a law practice or a legal practitioner associate of the practice may have to act in accordance with the instructions or wishes of the client.

(4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim."

213 Section 347 is also relevant. It provides:

"**Restrictions on commencing proceedings without reasonable prospects of success**

(1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.

(2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

(3) Court documentation on a claim or defence of a claim for damages is not to be accepted for lodgment unless accompanied by the certification required by this section. Rules of court may make provision for or with respect to the form of that certification."

214 The breadth of these requirements is excessive, especially s 345(4) which requires, among other things, the taking of an effectively final view of the current law. Advocates are advocates, and judges are judges. The respective roles and obligations are not to be confused, particularly in an adversarial system. The New South Wales provisions go much further than the opinion of Lord Esher MR that I have quoted as to the nature of the obligation at common law.

215 In Queensland the *Uniform Civil Procedure Rules* now allow judges, indeed encourage them to be much more robust in striking out worthless actions

and defences[245]. Even this has its dangers but it does offer a somewhat better way to proceed in relation to causes that are not legally sustainable, or are genuinely abusive. It is a way that maintains the distinction between advocate and judge.

216 The truth is that in recent times, the courts, especially this Court have not always altered the law only incrementally. On the strict application of the New South Wales rule, were it in force and applicable in the relevant jurisdiction at the time, it is hardly likely that the causes of action or defences raised in *Lange v Australian Broadcasting Corporation*[246], *Burnie Port Authority v General Jones Pty Ltd*[247], and *Brodie v Singleton Shire Council*[248] about which more will be said later, would ever have been pleaded or raised, and the cases decided as they were. It is certainly hard to imagine how, in the setting of 1982 when *Mabo v Queensland*[249] was commenced, the result for which the plaintiffs contended could have constituted a certifiable cause of action under the New South Wales rule. Until *Brodie v Singleton Shire Council*, it is equally unimaginable that an

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245 "**171 Striking out pleadings**

(1) This rule applies if a pleading or part of a pleading –

(a) discloses no reasonable cause of action or defence; or

(b) has a tendency to prejudice or delay the fair trial of the proceeding; or

(c) is unnecessary or scandalous; or

(d) is frivolous or vexatious; or

(e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

246 (1997) 189 CLR 520.

247 (1994) 179 CLR 520.

248 (2001) 206 CLR 512.

249 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

advocate could have certified, as required by s 347(2), that there were reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim in non-feasance by a highway authority had reasonable prospects of success. How could any advocate have certified, before the High Court said so in *David Securities Pty Ltd v Commonwealth Bank of Australia*[250] in 1992, that, contrary to hundreds of years of settled law, a mistake of law could give rise to a good cause of action in the same way as a mistake of fact? I took the view in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[251] that the time was ripe for the consideration at least of the recognition by the law of a cause of action for invasion of privacy. In view of the fact that my opinion was only a dissenting one[252], it is difficult to see how an advocate in New South Wales could seek to bring this matter before the courts now even though the law is moving in that direction in the United Kingdom[253]. There has however been a civil case in Queensland where damages were awarded for invasion of privacy[254].

217 The truth is that the common law has often owed its development to, and has benefited from, the adventurousness and ingenuity of counsel.

Statutes of limitation

218 Statutes of limitation give effect to societal and commercial ends of high importance. It is true of course that it is highly desirable that persons who have been wronged not be deprived of a remedy. It is also important however, that there come a time, fixed with certainty, after which the threat of litigation be removed, and the person against whom it is threatened be permitted to carry on life or business without that threat or fear. In general, people who have been wronged should be obliged, not only in the interests of those whom they would

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250 (1992) 175 CLR 353.

251 (2001) 208 CLR 199.

252 But see (2001) 208 CLR 199 at 225-226 [40]-[42] per Gleeson CJ.

253 The results may have been influenced by the European Convention on Human Rights, incorporated into the domestic law of the United Kingdom by the *Human Rights Act* 1998 (UK). See, for example, *Douglas v Hello! Ltd* [2001] QB 967; *Douglas v Hello! Ltd (No 2)* [2003] 1 All ER 1087; *Douglas v Hello! Ltd (No 3)* [2006] QB 125; *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch).

254 *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706. Other civil claims for invasion of privacy have been dismissed, see: *Kalaba v Commonwealth* [2004] FCA 763 and *Giller v Procopets* [2004] VSC 113.

sue and, in most cases, themselves personally, but also of society itself, to bring and prosecute their actions with a reasonable degree of diligence. The consequences of delay are not only of impairment of the integrity of the trial itself, but also of obstruction to the orderly working of the courts. Not all people can however sue promptly. A number of these considerations are self-evidently competing ones. The statutes of limitations resolve these tensions in various ways: by specifying fixed periods for causes of action, by making special provision for persons under a disability, and, in modern times, by giving courts powers under fairly strict conditions to enlarge periods of limitation.

219 Even in the absence of relevant statutes of limitation, the law, equity in particular, has recognised that there comes a time when, in relation to some civil wrongs or derelictions of duty, the wrongdoer should no longer be vexed with the possibility or actuality of legal proceedings. I am referring to the elaborate rules of laches and acquiescence devised by equity to deny in some circumstances, equitable relief. But as the joint judgment in this case recognises, it has never been part of the law of Australia that the equitable defences to which I have referred are available[255] in common law cases.

220 When therefore a legislature has enacted an express and clear period of limitation, it is not for the courts to subvert it, or to seek to qualify it, by the introduction of words embodying the concept that the specified period might be shortened or lengthened, in the discretion of the court according to whether the court thinks that a period is too long or too short. As I said in *Agar v Hyde*[256]:

> "Limitations statutes are enacted to put an end to uncertainty. They confer rights upon defendants and encourage the expeditious commencement of proceedings. Exceptions to enable time to be enlarged should not, in my opinion, be construed with any predisposition either way, that is, between strictness or liberality."

221 Statutes of limitations seek to draw lines. Far too often, but sometimes with justification, courts are accused of blurring lines. In my view the line drawn at 30 years by the legislature here should be accepted and applied without qualification.

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255 Joint reasons at [18] where the position in the United States of America is contrasted citing the discussion of "tolling doctrines" in *Kuek v Victoria Legal Aid* [1999] 2 VR 331 at 339-340 per Ormiston JA and of the equitable defences of laches and acquiescence in *Teamsters & Employers Welfare Trust of Illinois v Gorman Bros Ready Mix* 283 F 3d 877 at 881 (2002) per Judge Posner speaking for the Court.

256 (2000) 201 CLR 552 at 601-602 [131].

222 Nothing that I have said is affected by the New South Wales Supreme Court rule[257] quoted in the joint reasons which provides, among other things, that the Court may, in relation to any claim for relief in proceedings, stay it either generally, or in a particular respect, as an abuse of the process of the Court. Having regard to the fact that the legislature has enacted limitations periods, and that other parts of the same rule refer to an absence of a reasonable cause of action, and the frivolousness or vexatiousness of the proceedings, and not effluxion of time within the limitation period, as criteria for the grant of a stay, I am unable to regard the rule as intended to apply to the sort of abuse of process which is said to arise here, that is as a result of the effluxion of time *before* the expiration of the limitations period. Nor could I regard an inherent jurisdiction or power of the Court to prevent abuses of its process, as extending to what is contended to be abuse here.

Jurisdiction or power to stay

223 Some observations should be made about the function of appellate courts in reviewing decisions at first instance either to grant or not to grant a stay. As the joint reasons point out[258], in *R v Carroll*[259] (although a criminal case) Gaudron and Gummow JJ, said that the use of the words "discretion" in this field of discourse indicates no more than that, although there may be some clear categories, "the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse". What may however be said with some confidence of discretionary exercises in this area, may be said in my opinion with equal force of discretionary exercises in other areas and generally. Appellate courts exercising their appellate powers under unqualified enactments as to those powers have tended to defer rather too much to the views and the discretionary judgment of the judge at first instance, in a somewhat similar way to the way that they have paid deference to the factual findings of trial judges at first instance[260]. Just as s 75A of the *Supreme Court Act* 1970 (NSW), the appeal provision, makes no distinction between appeals on factual and legal grounds, it says nothing about, and in no way suggests that appeals against discretionary decisions require different treatment from other appeals. It is easy to see why the decision of, for example, a trial judge who has heard all of the evidence in a

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257 Pt 13 r 5 Supreme Court Rules.

258 Joint reasons at [7].

259 (2002) 213 CLR 635 at 657 [73].

260 *Fox v Percy* (2003) 214 CLR 118 at 126-128 [25], [27]-[29] per Gleeson CJ, Gummow and Kirby JJ, 163-166 [142], [145]-[146], [148] per Callinan J.

criminal trial, should not have his or her discretionary sentence lightly overturned. To preside over a criminal trial undoubtedly gives to the trial judge insights as to the nature and gravity of the crime, and the criminality of the conduct of the convicted person, that an appellate court would rarely have. It is often overlooked that the remarks which are most often cited in Australia in appellate courts by those seeking to uphold a discretionary judgment were made in a criminal case and in relation to a sentence[261]. Too frequently there has been too ready a disposition on the part of appellate courts to adopt their Honours' statements in that case as if they were a canon applicable to all judgments, involving the exercise of discretion, particularly judgments in which the facts have been found, and in respect of which the discretion is to be exercised upon the basis of them, and not otherwise. In principle there is no reason why the views of a majority of appellate judges as to the exercise of the discretion in those, and perhaps other cases when judges are performing their unqualified appellate function, should not prevail over the discretionary view of a single judge. Judges need to be careful about erecting qualifications and barriers to their powers, whether out of expediency, judicial defensiveness, fear of the collapse of floodgates limiting the flow of appeals, or otherwise, if the relevant authorising statute makes no provision for them. By now, the courts of equity, which exercise many discretions, should long have shed any antipathy that they might have initially had to appeals against exercises of discretion stemming from the extraordinary nature of the unusual jurisdiction of the Court of Chancery founded on the prerogative, and exercisable by the King himself on advice from the Chancellor or others[262]. It is unnecessary to add to what I said in *Fox v Percy* about other appeals and with which an analogy can be drawn, including factual appeals in common law cases and to which I would adhere[263].

224 It follows from what I have said that I do not doubt that there was a jurisdiction or power available to the Court of Appeal in this case to take a different view from the Master and Judges at first instance who declined to grant the stay sought. And equally of course this Court also has the power to take a different view on any discretionary issue from the Court of Appeal.

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261 *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

262 Meagher, Heydon and Leeming, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, 4th ed (2002) at 4 [1-020]; Spence, *Equitable Jurisdiction of the Court of Chancery*, (1846) vol 1 at 393-396.

263 *Fox v Percy* (2003) 214 CLR 118 at 163-164 [142], [145].

Disposition of the appeal

225 It is not suggested in this case that the unfortunate appellant has in any way been blameworthy, or that the delays which have occurred since the institution of his action should be laid at his door. The respondents' case is first, simply that objectively a fair trial is not possible: that as the years have passed their means of defending the action have, and again without any fault on their part, been lost. It is for these reasons, and one other to which I will refer, that they say that the continuation of the case would represent an abuse of process. The other reason that they advance is, effectively, that the appellant's prospects of succeeding are ultimately hopeless anyway, and satisfy the stiff test stated by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[264], and almost invariably applied in this country.

226 It is with the latter that I will deal first. There is no doubt that there are many hurdles for this appellant to surmount in order to succeed in a trial. It is unnecessary to deal with the legal difficulties that may confront him with respect to the selection of the correct statute of limitations applicable to his case as the proceedings in the Supreme Court were all conducted on the basis that the *Limitation Act* 1969 (NSW) was the relevant statute, and because both respondents accepted for the purpose of these appeals that the appellant had a reasonably arguable case, that the long stop provision of 30 years under s 51(1) of the *Limitation Act* was the applicable provision[265].

227 The facts in this case are admittedly sparse. Any trial that may take place would be an imperfect one factually. But this must be so in many cases brought long after the event by persons under a disability. There are some records that are just as likely to have been destroyed after seven years as after 29 years. So too, there may be cases in which relatively recent recall, of say five years, may be no better than recall after many years, of events which, by their singularity, or their consequences, have unambiguously etched themselves on the minds of those who have witnessed them, or know of them. But whether this is so or not has certainly not been the concern of the legislature. Section 51(1) of the *Limitation Act* does not offer any distinction between cases in which witnesses are available and have good recall, and those in which there are no, or few witnesses, or ones whose memory is of little value.

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264 (1964) 112 CLR 125 at 129-130.

265 See joint reasons at [29]. Subsequently the respondents filed written submissions resiling from this proposition. Without finally concluding against them on this issue, I am inclined to prefer the view of Kirby J that 30 years is the relevant period. I do not consider that this Court should decide differently before the case has been tried.

228 In an adversarial system under the most ideal of circumstances so far as time limits are concerned, a court is often obliged to make decisions on incomplete facts. Parties are not bound to bring to the attention of the court facts which are detrimental to their cases. Sometimes, by reason of the absence, or sudden death of a witness or a witness' departure, or for any number of other reasons, key facts cannot be established. The courts have to do the best that they can on the material before them and, in doing so, may make allowances for the circumstances in which each of the parties finds himself or herself. As Gleeson CJ, Gummow and Callinan JJ said in *Vetter v Lake Macquarie City Council*[266], a case in which there was a paucity of relevant material:

> "As long ago as 1774 Lord Mansfield said[267] that all evidence is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted."

229 Perhaps one might have expected the appellant to have sworn an affidavit in the courts below stating in detail his recollection of the relevant events, and his recollection of the layout of the road upon which he came to grief. That he has not done so does not however give rise to any necessary inference against him that even he cannot speak to the matters central to the case which he has to prove. It should not be assumed that all of the relevant facts are in. The applications made here are applications only. They are not trials. Applicants take their chances when they make them. It is undesirable and inappropriate in my view that they be elevated to something in the nature of a full scale pre-trial trial. That this is so is reason for the adoption of the hard test that *General Steel* prescribes.

230 From what is known of the case now, I am bound to say that it is, at this stage apparently, a slight one and that the appellant's prospects of proving negligence do not appear promising. But I have not had the benefit of hearing any of the evidence, and of conducting a trial, at which time, as I have said, circumstances may change. I do think however, as did Master Harrison[268], that the respondents have been unable to make out the case for a stay upon the basis of the principles stated in *General Steel* which I am content to apply here.

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266 (2001) 202 CLR 439 at 454 [36].

267 *Blatch v Archer* (1774) 10 Cowp 63 at 65 [98 ER 969 at 970]. See also *Weissensteiner v The Queen* (1993) 178 CLR 217 at 226-227, per Mason CJ, Deane and Dawson JJ.

268 *Batistatos v Roads and Traffic Authority of New South Wales* [2000] NSWSC 506 at [22].

231 There remains what was the respondents' principal argument, that objectively there is an abuse of process simply because of the effluxion of time within the limitations period. I would reject that argument. To accept it would be to subvert or qualify the explicit statutory language and to disturb the compromise which the *Limitation Act*, relevantly here s 51(1), reflects.

232 I would accept the appellant's submission that in the absence of any relevant misconduct on his part there is no power to make the order for a stay that the Court of Appeal did. I would respectfully agree with Lord Diplock in *Birkett v James* that the appellant had a right to bring his action at the time that he brought it[269]. I agree with the decision and the reasoning of the House of Lords in that case in which it was held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default has been intentional or contumelious or if there has been inordinate and inexcusable delay in the prosecution of proceedings instituted within time giving rise to a substantial risk that a fair trial would not be possible or of serious prejudice to the defendant, propositions which have been accepted and applied by various intermediate courts of appeal and judges at first instance in this country since *Birkett v James*[270].

233 I cannot accept that the fact that the holding of a fair trial because of effluxion of time within the limitation period has become very difficult, perhaps even impossible, can justify a stay. There must be many cases in which objectively a fair trial is impossible. A court may not know that this is so in a particular instance but will often be aware that what is taking place in a trial falls far short of the ideal. That cannot justify the stopping of the case by the court.

234 There is, in this case, a particular aspect of unfairness which the common law tolerates as a matter of course. It arises out of the legal fiction that the current law is treated as if it has always been the law. Hence the decision of this Court in *Brodie v Singleton Shire Council* which (temporarily only in New South Wales) swept away the distinction between nonfeasance and misfeasance on the part of highway authorities may have improved, to the significant disadvantage

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269 [1978] AC 297 at 320.

270 See *Muto v Faul* [1980] VR 26; *De Nier v Beicht* [1982] VR 331; *Exell v Exell* [1982] VR 842; *Bruce Pie & Sons Pty Ltd v Mainwaring* [1987] 1 Qd R 304; *Williams v Zupps Motors Pty Ltd* [1990] 2 Qd R 493; *Flynn v Kailis Groote Eylandt Fisheries Pty Ltd* (1992) 108 FLR 354; *Mickelberg* (1996) 90 A Crim R 126; *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242; *Bishopsgate Insurance Australia (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863; *Velcrete Pty Ltd v Melsom* [2000] WASCA 109; *Hancock Family Memorial Foundation Ltd v Fieldhouse* (2005) 30 WAR 398.

of the respondents, the appellant's prospects of success on any trial. This may seem particularly unfair now that the New South Wales parliament has substantially reintroduced the old distinction between nonfeasance and misfeasance on the part of highway authorities, but not retrospectively so as to apply to this case[271]. Why, it may be asked, should such objective unfairness arising out of the actions of the court, be treated differently from unfairness resulting from the passage of time within the limitations period?

235 No doubt some European lawyers and others would take the view that the adversarial system is not productive of fair trials generally, a view that I do not share but that I understand, just as I am by no means certain that an inquisitorial process will always produce a fair result. But this is beside the point. The legislature has spoken in unequivocal terms and it is the duty of the court to give effect to its words by allowing the appellant's action to proceed at this point.

The High Court's discretion

236 What I have said is sufficient to require that the appeal be allowed. I would add however that if, as is held in the joint reasons[272], what was said by Lord Diplock in *Birkett v James* were to be rejected, I would be disposed to allow the appeal by revisiting the exercise of the discretion of the Court of Appeal, and by exercising the discretionary powers of this Court for myself. I have said earlier in these reasons that appellate courts defer too often to the factual findings and exercises of discretion of lower courts. With the greatest of respect, I would disagree with the sequence of reasoning which appears at the end of the joint reasons[273], that because "[t]here was no error of principle in the

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271 *Civil Liability Act* 2002 (NSW), s 45.

272 Joint reasons at [63].

273 Joint reasons at [63]-[72].

decision of the Court of Appeal", the appeals should be dismissed. There would then remain the question whether this Court should exercise its discretion in the same way the Court of Appeal exercised *its* discretion[274]. As I have said, I am of a different opinion.

Conclusion

237 I would allow the appeals and join in the orders proposed by Kirby J.

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274 See, generally, the comments of Lord Halsbury LC in *Riekmann v Thierry* (1896) 14 RPC 105 at 116, on the broad nature of the appellate jurisdiction. That case concerned revisiting a trial judge's finding of fact, but the principle seems just as relevant here.

238 HEYDON J. For the reasons given by Callinan J[275], there is sufficient strength in the plaintiff's claims against the defendants to prevent the prosecution of those claims, even at this late stage, from being characterised as an abuse of process. On that basis I would allow the appeal and join in the orders proposed by Kirby J. In those circumstances it is unnecessary to decide whether or not a plaintiff has a right to sue within the longest available limitation period which is untrammelled by anything except blameworthy conduct on the part of that plaintiff, or to decide on the other matters of law debated in the majority reasons for judgment and those of Kirby J and Callinan J.

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275 At [193]-[203].